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A C O M P L E A T
Body of Conveyancing,
I N
T H E O R Y
A N D
P R A C T I C E.

I n T W O P A R T S.

PART I. Contains the *Theory*; wherein the various Ways and Methods of Acquiring, Forfeiting, Conveying, Limiting and Settling all Kinds of Estates, as well Real as Personal; and also the Nature, different Forms, Parts, Operations and Effects of all Kinds of Deeds and Common Assurances, Fines and Recoveries, are fully treated of,

PART II. (In Two Volumes) Contains the *Practice*: Or, PRECEDENTS of Feoffments, Grants, Bargains and Sale, Leases, Releases, Declarations and Limitations of Uses and Trusts, Marriage Settlements, and Private Acts of Parliament, (made for Settling the most considerable Estates in *Great Britain* and *Ireland*;) Mortgages, Leases, Assignments, Deeds of Charter-party and Copartnership, Bills, Bonds, Releases, Letters of Attorney, &c. Deeds for securing Annuities, &c. and of *Bank*, *East-India*, *South-Sea* Stocks, and other Public Funds; and in General all Deeds and Instruments any Ways requisite in Mercantile, Maritime and Plantation Affairs. With *Observations* and *Opinions* of the most EMINENT CONVEYANCERS. Selected from many Thousand Manuscript Precedents.

COLLECTED BY
EDWARD WOOD, Gent. deceased.

The Whole digested in a Method intirely new, avoiding all Repetitions, and containing a greater Variety of Useful PRECEDENTS than all other Books upon the same Subject now extant.

By **JOHN SALTHOUSE, Gent.**

PART I.

In the S A V O Y :

Printed by HENRY LINTOT, Law-Printer to the King's Most Excellent Majesty, for J. Worrall at the Dove in Bell-Yard, near Lincoln's Inn. 1749.

2



THE P R E F A C E.

AFTER having so fully in the Title-page indicated to the Purchaser what he is to expect in these Volumes, there is little Need, it is hoped, to bespeak his Favour, by Way of Preface; for if the very many imperfect Pieces of Conveyancing that have been, and daily are, published, most of which too are merely trifling, find a ready Sale, surely a Work, like this, comprehending the whole Art, both in Theory and Practice, must meet with a proportionable Reception, and suitable Encouragement.

The Necessity there is for all Those who make Conveyancing their Business, to be thoroughly grounded in its Fundamentals; well read in the various Kinds and Tenures of Estates, and the Opinions, Resolutions, and Determinations of our Courts, in Cases relating thereto; intimately acquainted with the several Ways of Practice; nicely skilled in the peculiar Stile and Manner of Drawing; and sufficiently stored with the best Precedents and Forms; is too evident to require inculcating here. From whence else, but a Want thereof in too many of the Practisers, could spring those, almost numberless Suits, that have from Time to Time filled our Courts of Judicature; to the great Trouble and Detriment of many Purchasers, and the no small Disgrace of a well-governed State? Since, if any Human Affairs can be transacted free from Errors, Uncertainties, and Deceit, undoubtedly that of Conveyancing may, and ought to be.

Such being the End in View, the Editor was unwilling to neglect the Opportunity, which he flattered himself he had, of facilitating to Gentlemen the Progress to and Attainment thereof: For having by him a very large Collection, made by the late industrious

dustrious and well-known Mr. Wood, during his many Years Practice, of Draughts in all the Branches of Conveyancing, settled by the most able Hands, besides several other curious, uncommon, and choice ones, which some worthy Gentlemen of the Law, the Editor's particular Friends, have favoured him with, there was Nothing more wanting to compleat the Practic Part of this Work, but to select out of them such as were proper to be retained, and methodizing and disposing the whole in their natural Order; which hath accordingly been done: And moreover, as well for avoiding Repetitions, and unnecessarily swelling this Work into too great a Bulk, as also for the greater Ease in turning to, upon any particular Occasion, the Deeds, &c. have been, as it were, dissected; and their several component Parts distributed under proper Heads. As for the Theoretic Part of the Work, it was compiled by the late Mr. Salhouse from all the Books of the best Authority and Repute in the Law; and no Care or Pains were spared by him to make the same clear, easy, and useful; and may be safely relied on; all the Particulars having been extracted in the very Words of the respective Authors, or as near thereto as conveniently could be.

THE

THE CONTENTS.

PART I. The Theory of Conveyancing.

CHAP. I.

Of Conveyancing in general. Page I

Sect. I. <i>Conveyancing what.</i>	1
Sect. II. <i>What Estates or Things may be conveyed, &c.</i>	1
— As to Estates of Inheritance.	1
— As to Estates less than Inheritance.	2
Sect. III. <i>By whom and to whom Estates may be conveyed.</i>	2
Sect. IV. <i>The different Ways and Means whereby Properties in Estates may be acquired or conveyed in general.</i>	3
— By Act of Law.	3
— By Means of the Party.	3
— By a mix'd Act.	3

CHAP. II.

Of the different Ways of acquiring or conveying Real Estates in particular, and of claiming Titles thereto.

Sect. I. *Of the Acquisition of Real Estates by Entry, and therein of Occupancy.* Page 4

(A) Of Entry in general.	4
(B) Entry congeable.	5
— <i>in what Cases congeable.</i>	5
— <i>What shall be an Entry to reduce an Estate.</i>	6
— <i>Where an Entry into Part shall be an Entry for the Whole.</i>	7
— <i>Where an Entry by one shall serve for another.</i>	8
— <i>Where the Entry of one to the Use of another settles the Possession in him without Agreement.</i>	8
— <i>What is a good Agreement to settle an Estate where the Entry is to the Use of another.</i>	10
— <i>Of what Things Advantage may be taken without an Entry.</i>	10
— <i>In what Cases an Estate shall be in a Person without Entry or Claim.</i>	10
— <i>By whom and on whom an Entry may be for a Forfeiture.</i>	11
— <i>At what Time an Entry may be for a Forfeiture.</i>	11
— <i>Entry for Breach of a Condition.</i>	11
1. <i>In what Cases it may be.</i>	11
2. <i>Who may enter.</i>	11
3. <i>At what Time.</i>	12
— <i>Where a Demand must be made before Re-entry.</i>	12
— <i>Things to be observed in demanding Rent.</i>	13
— <i>How he who enters for a Condition broken shall be said to be in.</i>	14
b	1. Of

1. Of the same Estate. Page 14	(H) In what Cases a Man shall be said to be in by Descent or by Purchase. Page 37
In respect of Impossibility. 14	(I) Of Descents which take away Entries. 39
In respect of Necessity. 14	— In what Cases. 40
2. In respect of collateral Qualities. 15	Where the Descent is immediate. 40
— What Things shall be avoided by Entry for a Condition broken. 15	Where the Entry is given by Record. 40
— How to enter into and take Possession of Lands, &c. 16	— Of what Things a Descent shall take away an Entry. 41
(C) Forcible Entry and Detainer. 16	— Of what Estates. 41
(D) Of Occupancy. 17	— Who shall be bound thereby. 41
— Occupancy what. 17	— In respect of his Right or Estate. 42
— Occupant who. 17	— In respect of several claiming by the same Title. 42
— Upon what Occupancy is founded. 17	(K) Where an Entry taken away by Descent shall be revived. 43
— What it is to supply. 17	(L) How a Descent to take away an Entry may be prevented by continual Claim. 43
— The Subject and Object of the Occupant. 18	— Continual Claim what. 43
— Of what Estate there may be an Occupant. 18	— Where to be made. 43
— Against whom there shall not be an Occupant. 19	— How. 44
— Who shall be an Occupant. 19	— When. 44
— What Actions will lie against an Occupant. 20	— Who may make it. 44
— What he should plead. 20	— In what Cases the Claim made by one shall serve for another. 44
— Relief in Equity in Cases of Occupancy. 20	(M) What Things shall descend to the Heir or Executor. 45
— How to prevent Occupancy. 21	(N) What Person may or may not be Heir to another, and to whom. 45
— How far this Title Occupancy is altered by Statutes. 21	— In general. 45
	— By Matter subsequent. 46
	— Where the Mulier shall be barred. 47
	(O) How far the Heir is chargeable for the Act of the Ancestor. 48
Sect. II. Of acquiring Real Estates by Descent. 21	
(A) Of Descents in general. 21	
— Descent, its Derivation and Signification. 21	
— Heir who. 21	
— Kinds of Descents or Successions. 22	
(B) Descents by the Common Law. 22	
— General Rules concerning Descents of Lands in Fee-simple, with Examples, Reasons, Exceptions, Observations, &c. 22	
— Particular Rules of Transversal ascending Successions. 26	
(C) Descents by Custom. 29	
(D) Descents by Statute. 31	
(E) Descents by the Jus Coronæ. 34	
(F) By what Seisin Descents to the Half Blood shall be defeated. 35	
(G) What shall be an Impediment of a Descent. 36	
	Sect. III. Of acquiring Real Estates by Purchase. 49
	(A) Purchase what. 49
	— Derivation. 49
	— Definition. 49
	— Description. 49
	(B) Who are capable or incapable of purchasing or conveying Lands, &c. and what are good Names of Purchase. 49
	— Persons Natural. 49
	— Persons Incorporate. 49, 50
	— King. 49, 51
	— Queen Consort. 50
	— Aliens. 49
	— Felons

— Felons.	Page 50
— Infants.	50, 52
— Ideots and Lunaticks.	50, 52
— Hermaphrodite.	50
— Feme Covert.	50
— Parishioners.	51
— Inhabitants.	51
— Probi Homines of D.	51
— Churchwardens.	51
— Lord and Commoners.	51
— Name and Surname.	51
— Titles.	51
— Name changed.	51
— Known Name or Description of the Person.	51
— Persons deformed, and other reasonable Creatures.	52
— Who is capable of an Office.	52
— Persons capable of certain Things to special Purposes.	53
— Who cannot purchase nor retain any Thing.	53
— How far Papists are disabled from purchasing or conveying Estates.	53
— Indemnity of Protestant Purchasers of Papists Estates.	60
— Persons naturalized or denized.	60
— Artificers going beyond Sea.	60

(C) Who are deemed Purchasers, or not. 61

(D) In what Cases a Purchaser is favoured, or not. 62

— As to Incumbrances. 62

— By Allowance. 62

— After Length of Time. 62

(E) In what Cases Purchases are affected. 69

— By Incumbrances. 69

— By Misapplication of Money. 73

— By presumptive Notice, and where there is a Settlement. 74

(F) Of Disputes between Purchasers. 75

Sect. IV. Of claiming Titles to Estates by Prescription. 76

Prescription what. 76

In what Names made, and who may be by Prescription. 77

Of what Things. 77

How laid. 78

When a Title by Prescription may be lost. 78

The Difference between Prescription, Custom and Usage. 78

The Incidents inseparable to Prescription and Custom. Page 78

Sect. V. Of acquiring Real Estates by Escheat. 79

The Derivation and Signification of the Word Escheat. 79

Property of Lands by Escheat. 79

Causes of Escheat. 79

— Bastardy. 79

— Attainder of Treason, Felony, &c. 79

Things to be observed in Escheats. 80

The Tenure. 80

— The Manner of such Attainder. 80

What Attainders shall give the Escheat to the Lord. 82

In what Cases an Escheat shall be to the Grantor or not. 83

Who shall take Advantage of an Escheat. 84

By what Act an Escheat shall be presented. 84

At what Time Forfeitures commence. 84

Of seising Felons Goods and Chattels. 84

Of a Purchase by a Person attainted. 84

Restitution in Blood. 85

Sect. VI. Of acquiring Real Estates by Means of Forfeitures and Losses in Civil Cases. 85

(A) Of Forfeitures and Losses of Real Estates in general. 85

(B) Of Forfeitures by the Alienation of a particular Tenant, by claiming a greater Estate than one ought; or by affirming a Reversion or Remainder to be in a Stranger. 85

First, The Nature of Things forfeited, whether in pais or by Matter of Record. 85

1. In pais. 85

2. By Matter of Record. 86

— By Alienation. 86

1. Devesting. 86

2. Not devesting. 86

— By Claim. 86

1. Express. 86

2. Implied. 86

— By affirming the Reversion or Remainder to be in a Stranger. 86

1. Actively. 86

2. Passively. 86

— What is a Forfeiture by Matter of Record. 86

— Of a Lease. 87

Secondly,

(F) In Chancemedley and <i>Se defendendo</i> .	Page 123
(G) Upon Outlawry in Treason, Felony, &c.	123
(H) In Petty Larceny.	124
(I) Upon Flight.	124
(K) Upon Appeal of Death.	124
(L) Drawing a Weapon upon a Judge, or for striking in <i>Westminster-Hall</i> , &c. sitting the Courts.	124
(M) In <i>Præmunire</i> .	124
(N) For challenging to Fight for Money won at Play, &c.	125
(O) By Papists.	125
(P) By Artificers exercising or teaching their Trades in foreign Parts.	125

**The different Ways of ac-
quiring or conveying Per-
sonal Estates in particular.**

(A) The Acquisition of Property by Act in Law.	125
1. By Succession.	125
2. By Devolution.	125
3. By Prerogative.	125
4. By Custom.	126
5. By Judgment.	126
6. By Sale in Market-overt.	126

(B) The Acquisition of Property by Act of the Party.	126
1. <i>By Grant.</i>	126
2. <i>By Contract.</i>	126
3. <i>By Assignment.</i>	126

(C) The Acquisition of Property by a mix'd Act, partly by Act of Law, and partly by Act of the Party. 126

SECT. II. *Of acquiring or conveying Personal Estates by Gift.* 126

— Gift what.	126
— How made.	126

Se&. III.

Sect. III. Of acquiring or conveying Personal Estates by Sale. Page 129

- Sale what. 129
- Who may sell. 129
- What is a good Sale, or not. 129
- How a Sale in a Market-overt of Goods stolen, &c. shall bar the Owner, or not. 130
- The Days and Places of Markets-overt. 131
- Statutes relating to Sales in Fairs and Markets. 131
- As to Horses. 131
- Goods pawned. 134

Sect. IV. Of acquiring or conveying Personal Estates by Marriage. 135

Sect. V. Of acquiring, &c. Personal Estates by Executorship. 136

- (A) Who are Executors, and how they are appointed. 136
- (B) By whom Executors may be appointed or not. 136
- (C) How many may be appointed. 136
- (D) For what Time Executors may be appointed. 137
- (E) Who are capable or not of being Executors. 137
- (F) Of accepting or refusing an Executorship. 137
- (G) The Executors Interest in the Goods of the Testator. 139
 - What Things shall go to the Executor or Administrator. 139
 - Where upon the Death of one of the Executors the Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other. 141
 - What Things the Executor or Administrator shall have as Assignee. 142
 - When the Surplus of the Personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin to the Testator. 142
 - What the Heir shall have and not the Executor. 145
 - Of Paraphernalia. 146
- (H) An Executor's Power. 146
- (I) Of Assets. 147
- (K) The Office and Duty of an Executor. 149
 - As to the Burial. 149
 - Probate. 149

- Inventory. Page 150
- Debts. 150
- Legacies. 151
- Accounting to the Ordinary. 152
- Power of Overseers of a Will. 152
- Of Waste by Executors. 152
- Executor de son tort, who. 152
- his Power. 153
- Who shall be chargeable as Executors. 154

Sect. VI. Of acquiring Personal Estates, &c. by Administration and Distribution. 155

- (A) Administration what, and who is an Administrator. 155
- (B) By whom Administration may be granted. 155
- (C) To whom Administration may be granted. 157
 - Letters ad Colligend'. 157
 - Administration de bonis non, &c. 157
 - Cum Testamento annexo. 157
 - Durante minore ætate. 157
 - Durante absentia extra Regnum. 158
 - Pendente lite. 158
 - Where it does not cease. 158
- (D) The Interest of an Administrator in the Goods, &c. of the Intestate. 158
- (E) The Power of an Administrator. 158
- (F) The Office and Duty of an Administrator; and therein how, to whom, and of what Distribution is to be made. 159
 - Burial, Inventory, Debts, Account, &c. 159
 - Bond to make Inventory, Administrator account and distribute. 159
 - How Distribution is to be made. 159
 - Hotchpot. 160

Sect. VII. Of acquiring, &c. by Legacy. 163

- (A) Legacy what, and Legatee who. 163
- (B) To whom Legacies are to be paid, or not. 163
- (C) Who

(C) Who are incapable of taking by Legacy, or of being Legatees. Page	164
(D) The Difference between the Property and Use being bequeathed. 164	
(E) Where Legacies are recoverable; and of an Executor's Assent to Legacies. 165	
(F) At what Time Legacies are to be paid. 165	
(G) In what Order Legacies are to be paid. 166	
(H) Of abating Legacies. 166	
(I) Of refunding Legacies. 166	
(K) What a Widow may discount out of Legacies to Children for their Maintenance. 167	
(L) Where the Legatees shall have Interest and Maintenance. 167	
(M) Ademption of a Legacy. 168	
(N) Where a Legacy is lost or not by Death of the Legatee. 168	
 Sect. VIII. Of acquiring Goods, &c. by Judgment and Execution. 171	
 Sect. IX. Of acquiring Things personal by Custom. 171	
 Sect. X. Of acquiring personal Estates by Means of Forfeitures and Losses in Civil Cases. 172	
(A) By Sale in a Market-overt and Bankruptcy. 172	
(B) By the King's Prerogative, or by his Grant, or by Prescription. 172	
First, Of Treasure-Trove. 172	
Secondly, Of Waifs. 172	
Thirdly, Of Strays. 173	
Fourthly, Of Wreck. 174	
 Sect. XI. Of acquiring the Property in personal Estates by Means of Forfeitures and Losses in Criminal Cases. 175	

C H A P. IV.

Of Deeds in general, and the Things incident thereto. 176

Sect. I. What a Deed or Charter is, and the Things incident thereto. 176	
--	--

Sect. II. In what Hand and Language a Deed must be written. Page	176
--	-----

Sect. III. On what a Deed must be written. 177	
--	--

Sect. IV. Who is able to contract, or to give, grant, &c. 177	
---	--

Sect. V. Of the Name and Description of the Person contracting, as the Grantor, Donor, &c. 218	
--	--

Sect. VI. To whom Grants, Contracts, &c. may be made. 222	
---	--

Sect. VII. What is a sufficient Name of a Donee, Grantee, or other Person to whom a Contract may be made. 228	
---	--

Sect. VIII. Of the Things to be contracted for, granted or conveyed. 231	
--	--

(A) The Division of Things. 231	
(B) What Things may be contracted for or conveyed, and by what Means or Instrument. 232	

Sect. IX. What Words the Law requires in a Deed or Instrument of Conveyance. 242	
--	--

Sect. X. Of sealing Deeds. 248	
--------------------------------	--

Sect. XI. Of delivering Deeds. 249	
------------------------------------	--

First, With Respect to the Person who makes it. 249	
Secondly, With Respect to the Person to whom it is made. 250	
Thirdly, With Respect to the Time. 251	
Fourthly, With Respect to the Place. 251	
Fifthly, With Respect to the Manner and Order of the Delivery. 251	

C H A P. V.

Of the formal or constituent Parts of Deeds, and the Ceremonies used on the Execution thereof. 254

Sect. I.

Sect. I. Of the Parts of Deeds in general. Page 254

Sect. II. Of the Premises. 254

- (A) Premises what. 254
- (B) The Office of the Premises. 254
- (C) The Contents of the Premises. 255
- (D) The Date. 255
- (E) The Parties Names and Addition or Description. 255
- (F) The Recital. 256
- (G) The Consideration. 257
- (H) The Receipt. 257
- (I) The Gift, Grant, &c. 257
- (K) The Things granted or conveyed. 258
- (L) The Exception. 260
 - Of what it may be. 260
 - Of what it must be. 260
 - How it must be made. 261
 - In what Part of the Deed. 263
 - By what Words. 263

Sect. III. Of the Habendum. 263

- (A) Habendum what. 263
- (B) The Office of the Habendum. 264
- (C) What the Habendum should contain, where placed in the Deed, and by what Words expressed. 264
- (D) How the Habendum shall be construed; and how different Estates are limited according to the Words of the Habendum. 265
- (E) Where the Habendum is repugnant and void; and where not, but shall control, divide or expound the Premises. 273

Sect. IV. Of the Tenendum. 275

- (A) Tenendum what. 275
- (B) The Office of the Tenendum. 275
- (C) Where the Tenendum is placed, and by what Words it is expressed. 276

Sect. V. Of the Reddendum and Clauses of Distress, *Nomine pœnæ*, and Re-entry. 276

- (A) Reddendum what, and how it differs from an Exception. 276
- (B) Where the Reddendum is necessary or not. 276
- (C) Of what the Reddendum must be. 276
- (D) Out of what a Reddendum must be. 277

(E) To whom a Reddendum may be made. Page 277

(F) How and by what Deed a Reddendum must be made. 278

(G) Where the Reddendum is placed in a Deed, and by what Words it is expressed. 278

(H) How the Reservation shall be construed. 279

(I) Clause of Distress and *Nomine pœnæ*. 279

(K) Clause of Entry and on Non-payment. 280

Sect. VI. Of the Condition. 280

(A) Condition what, and how it differs from a Limitation. 280

(B) Kinds of Conditions. 280

(C) The Nature of a Condition expressed, and of a Limitation. 281

(D) What shall be said a Condition in Law, and when an Estate shall be subject to such a Condition. 282

(E) Upon what Act a Condition may be created. 283

(F) Where the Cause or Consideration of the Grant will make a Condition. 283

(G) What may be made upon Condition, and to what Things Conditions may be annexed, or not. 283

(H) How and by what Deed a Condition may be created and annexed. 284

(I) To what Things a Condition shall extend. 286

(K) Incidents that a Condition to create an Estate ought to have. 286

(L) To what Persons a Condition may be reserved. 287

(M) When a Person to whom a Condition is not certainly designed, the Law shall say who it shall be. 287

(N) Of the Manner, Frame and Order of making a Condition. 287

(O) At what Time a Condition may be created. 288

(P) Where placed in a Deed, and by what Words expressed and created. 289

(Q) What shall be said a Condition precedent and subsequent. 294

(R) Of Conditions Copulative and Disjunctive. 299

(S) Of Conditions to enlarge Estates. 296

(T) Of Conditions to abridge Estates. 297

(U) Of the Matter and Substance of a Condition. 297

(V) Of Conditions relating to Assignees by Nomination. 300

(W) What

(W) What Persons shall be bound by a Condition.	Page 301
(X) Of a Condition to perform Covenants.	302
(Y) Of a Condition to save harmless, &c.	303
(Z) What Persons may perform a Condition.	303
(AA) Of Conditions where something is to be done before the Performance or Breach of them.	304
— Demand.	304
— Notice.	306
(BB) Who are disabled to perform Conditions.	311
(CC) To whom a Condition may be performed.	312
(DD) At what Time a Condition shall be performed where Time is limited.	313
(EE) At what Time a Condition is to be performed where no Time is limited.	316
(FF) Of performing Conditions where a Place is limited.	320
(GG) At what Place a Condition must be performed where no Place is limited.	321
(HH) How a Condition shall be performed.	322
(II) What shall be said a Performance of a Condition, and what a Forfeiture.	331
(KK) By whom collateral Things conducive to the Performance of Things limited shall be done.	333
(LL) In what Cases a collateral Thing is in Satisfaction of a Condition.	333
(MM) What will excuse the Performance of a Condition.	335
— Acts of God.	335
— Acts of the Parties.	337
— Acts of a Stranger.	340
— Acts of the Law.	341
(NN) What Things will dispense with a Condition.	342
(OO) Who may dispense with a Condition.	342
(PP) In what Cases the Dispensation or Extinguishment of Part of a Condition shall be of the Whole.	342
(QQ) What will destroy a Condition, and what not.	343
— Acts by the Reservor.	343
— Acts in Law.	344
(RR) What shall be said a Condition impossible and void, and what not.	344
(SS) The Effect of a Condition impossible at the making thereof.	344
(TT) The Effect of a Condition which becomes impossible after the making thereof.	345

(UU) What Condition shall be said to be repugnant.	Page 345
(VV) What Condition shall be said against Law, and what shall be void, and <i>e contra</i> .	347
(WW) The Effect of a Condition against Law.	349
(XX) What Act shall be a Breach of a Condition.	349
(YY) How a Condition shall be expounded.	352
— In Respect of Persons.	352
— In Respect of Time.	353
(ZZ) Where a Court of Equity will relieve against the Breach of a Condition.	357

Sect. VII. Of the Warranty. 361

(A) Warranty what, and Warrantor and Warrantee who.	361
(B) Kinds of Warranties.	361
— General.	361
— Particular.	361
— In Deed.	361
— In Law.	361
— Lineal.	361
— Collateral.	361
— By Disseisin or Wrong.	361
(C) What Words and Clauses in a Deed will make a Warranty.	361
(D) What shall be said a good Warranty in Deed, or not, and how it shall bar and bind.	362
(E) What shall be a good Warranty in Law, and how it shall bar and bind.	365
(F) What shall be said a lineal Warranty, and how such Warranty will bar.	365
(G) What shall be said a collateral Warranty, and how such Warranty shall bar.	367
(H) What shall be said a Warranty that begins by Disseisin, Abatement or Intrusion, and what is the Effect thereof.	368
(I) To what Things a Warranty may be annexed and extended, and to what not, and how.	369
(K) The Fruit and Effect of a Warranty in Deed, and what Use may be made of it.	370
(L) Who may take Advantage of a Warranty, and how and against whom it may be taken.	372
(M) When a Warranty shall be said to be defeated, determined or avoided, and how, or not.	374
(N) How a Warranty shall be expounded.	376

Sect. VIII.

Sect. VIII. *Of the Covenants*: Page 377

- (A) Covenant what, Covenantor and Covenantee who. 377
- (B) How a Covenant differs from a De-feasance, Condition, Warranty, an Exception, &c. 378
- (C) What shall be said an Agreement, and what Agreement amounts to a Covenant. 380
- (D) The Kinds of Covenants relative to their Nature. 381
 - *In Deed or in Law*. 381
 - *Real or Personal*. 382
 - *Inherent or Collateral, and to stand seised to Uses*. 382
 - *Copulative or Disjunctive*. 382
 - *Executed, executory or present*. 384
 - *Affirmative or Negative*. 384
 - *Joint or several*. 385
 - *Mutual and reciprocal*. 387
 - *Distinct and several*. 391
 - *General or particular; and where the particular or express Covenant qualifies the general, or not*. 393
 - *Obligatory or Declaratory*. 394
- (E) What Words will create or amount to an express Covenant, or not. 394
- (F) What Words amount to a Covenant and not to a Condition, or to a Con-dition and not to a Covenant. 396
- (G) What Words of Covenant or A-greement amount to a Grant, Lease, &c. and what to a Covenant only. 400
- (H) How a Covenant in Law may be created, and the Operation and Con-sequents upon it. 401
- (I) By whom Covenants may be made. 403
- (K) With whom Covenants may be made. 403
- (L) The Use and Operation of a Cove-nant. 404
- (M) What shall be said a good Cove-nant in Deed upon which an Action of Covenant may be had, and what not. 404
 - *In Respect to the Manner of making it*. 404
 - *In Respect to the Matter or Substance of it*. 405
- (N) What shall be said a good Cove-nant in Law upon which an Action of Covenant may be had, and what not. 407
- (O) Who shall or may have Advantage of a Covenant in Deed or Law, and

- bring a Writ of Covenant upon the Breach of it, or not. Page 407
- (P) Who shall be bound or charged by a Covenant, and against whom a Writ of Covenant lies, and where, or not. 411
- (Q) What shall be accounted real Co-venants that run with the Land, or shall affect the Assets only. 416
- (R) Where Covenants are placed in a Deed, and in what Form written. 417
- (S) What Covenants are void at Law. 417
 - *For being against Law*. 417
 - *For being impossible to be per-formed*. 419
- (T) What shall excuse the Performance of a Covenant, or not. 420
 - *The Act of God*. 420
 - *The Act of the Parties*. 420
 - *Act of a Stranger*. 421
 - *Act of Law*. 421
- (U) What is a good Performance of a Covenant, or not. 422
 - *With Respect to the Substance of the Covenant*. 422
 - *With Respect to the Time and Place of performing a Covenant*. 423
 - *With Respect to Notice, as where it is necessary, or not, for the Performance of a Covenant*. 424
 - *With Respect to Cases where a Demand, Request or Tender, is necessary, or not, for the Perfor-mance of a Covenant*. 425
- (V) When a Covenant is broken, or not. 426
- (W) What will extinguish, suspend or discharge a Covenant. 429
- (X) Covenants, how taken and ex-pounded. 431
- (Y) Where a Covenantor shall be re-lieved in Equity. 435

Next, *Of the particular Kinds of Co-venants relative to their Uses*, which are either,

First, *To all Kinds of Estates*. Or,
 Secondly, *To Estates for Lives or Years, and not to Estates in Fee-simple*. Or,
 Thirdly, *Which may or may not be in Deeds of Conveyances of Lands, or may be in Articles of Covenants only*.

d

(Z) OF

(Z) Of Covenants commonly annexed to all Kinds of Estates. Page 436

First, That the Covenantor is lawfully seised (or possessed) of the Premises. 436

Secondly, That the Premises are of such a Tearly Value. 437

Thirdly, That the Grantor, &c. has a Right to sell, &c. 437

Fourthly, For peaceable Enjoyment. 438

Fifthly, Free from Incumbrances. 448

Sixthly, To make further Assurance. 450

Seventhly, To stand seised to Uses. 452

(AA) Of Covenants commonly annexed to Estates for Life or Years, and not to Estates in Fee-simple. 453

First, Concerning the Payment of Rent, and other Payments issuing out of Land. 453

Secondly, Concerning Reparations. 460

Vide Concerning Building (BB) post.

Thirdly, That the Lessee will not assign, &c. the Premises leased. 466

Fourthly, That the Lessee will drain the Water which is upon the Land. 466

Fifthly, That the Lessee will do all reasonable Charges for the Lessor. 466

Sixthly, That the Lessee shall have House-boot, &c. 467

Seventhly, That the Lessor may view the Premises. 467

Eighthly, That the Lessee will render up the Possession at the End of the Term. 467

(BB) Of Covenants which may or may not be in Deeds of Conveyances of Land, or may be in Articles of Covenant only. 467

First, To pay Money. 467

Secondly, To make Assurances of Land, &c. 469

See before concerning Covenants for further Assurance.

Thirdly, To save harmless and indemnified. 477

Fourthly, Concerning Marriages and Portions. 479

Fifthly, Concerning building Houses, &c. 481

See before concerning Repairs.

Sixthly, To permit Things to be done. 481

Seventhly, To account. Page 483

Eighthly, Concerning Apprentices and Servants. 484

Ninthly, To do Things. 486

Tenthly, Of Covenants determining with the Estate, and of suing on Covenants after the Estate determines. 486

Sect. IX. Of a Warrant (or Letter) of Attorney to make Livery of Seisin. 489

Sect. X. Of the Conclusion of a Deed, or the In cujus rei Testimonium. 490

Sect. XI. Which of these formal or constituent Parts of Deeds are essential, or not. 491

Sect. XII. Of the Ceremonies used on the Execution of Deeds. 491

(A) Reading Deeds to illiterate Men. 491

(B) Of signing Deeds. 492

(C) Of sealing Deeds. 492

(D) Of delivering Deeds. 493

(E) Of Witnesses to the Execution of Deeds. 493

(F) Of indorsing the Receipt for the Consideration-Money. 493

(G) Other Ceremonies necessary to perfect a Deed. 494

First, The Agreement of him to whom a Deed is made. 494

Secondly, Livery of Seisin. 494

See before, §. 9. and Tit. Feoffment, post.

Thirdly, Attornment. 494

See hereafter Tit. Grants.

Fourthly, Actual Entry. 495

See Chap. II.

Fifthly, Election. 495

See Tit. Grant.

Sixthly, Inrolling Deeds. 495

See Tit. Bargain and Sale, post.

Seventhly, Registering Deeds and Wills, &c. 495

In the West-Riding of Yorkshire. 495, 507

— East-Riding. 500

In the County of Middlesex. 507

In the North-Riding of Yorkshire. 511

C H A P. VI.

Of the different Kinds of Deeds, Wills and Testaments. Page 520

Sect. I. *Of the Difference between Deeds, Wills and Testaments.* 520

Sect. II. *Of the various Kinds of Deeds in general.* 520

- (A) With Relation to the exterior Form. 520
- (B) With Relation to their Use and Effect. 524

Sect. III. *Of Feoffments.* 526

- (A) Feoffment what, and Feoffor and Feoffee who. 526
- (B) Of the Antiquity of Feoffments. 527
- (C) Of the Kinds of Feoffments. 528
- (D) Feoffment, how made and executed. 529
- (E) What amounts to a Feoffment. 530
- (F) The Difference between a Feoffment to Uses, and a Covenant to stand seised to Uses. 531
- (G) In what Cases Uses are vested or changed by a Feoffment. 531
- (H) Of Feoffments upon Condition, and to the Uses of another, and to a Will. 532
- (I) Of the Nature, Operation and Force of a Feoffment. 533
- (K) Who may make a Feoffment, and to whom it may be made. 533
- (L) How the Feoffor may be named. 537
- (M) How the Feoffee may be named. 537
- (N) What Consideration is necessary to a Feoffment. 537
- (O) Of what a Feoffment may be made. 537
- (P) By what Name a Thing may be enfeoffed. 538
- (Q) What is a good Feoffment in Respect of the Presence or Possession of other Persons on the Land. 539
- (R) What Feoffments are void. 540
- (S) Livery of Seisin what. 541
- (T) The Antiquity and Origin of Livery of Seisin. 541

- (U) The Kinds of Livery of Seisin. Page 541
- (V) The Nature and Operation of Livery of Seisin. 542
- (W) The Effect and Operation of Livery of Seisin to pass a future Interest. 542
- (X) The Effect of Livery of Seisin with Respect to the Presence or Possession of others. 545
- (Y) Livery of Seisin, in what Cases it is requisite, or not. 548
- (Z) By whom Livery of Seisin may be made. 550
- (AA) To whom. 551
- (BB) When. 553
- (CC) At what Place. 554
- (DD) Of what Things. 555
- (EE) How to be made. 555
- (FF) Livery in *Deed*, how and to whom to be made, and when it is good. 559
- (GG) Livery in *Law* or within the View, how and to whom to be made, and when it is good. 560
- (HH) What shall be said an Execution of the Livery. 563
- (II) In what Cases several Parcels will pass by one Livery, or where several Parties may take by a Livery to one. 563
- (KK) Of making Livery of Seisin by Letter of Attorney (in general). 564
- (LL) By whom and to whom Livery may be made by Letter of Attorney. 564
- (MM) Who may make Livery of Seisin by Attorney. 565
- (NN) Who may be an Attorney to make Livery of Seisin. 565
- (OO) Livery by Attorney to be by *Deed*. 566
- (PP) When Livery by Attorney must be made. 566
- (QQ) In what Place. 567
- (RR) How. 567
- (SS) Livery to one in the Absence of the other Feoffee, or to more Persons than is requisite. 568
- (TT) Delivery of Seisin of Part in the Name of the Whole, or of more than the Authority extends to. 569
- (UU) Where Livery is void on Account of the Letter of Attorney being bad. 569
- (VV) What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin. 570
- (WW) How Livery of Seisin shall enure, and be taken and construed. 570
- (XX) What must be done after Livery of Seisin. 573
- (YY) Where

(YY) Where Livery is presumed at Law or supplied in Equity. Page 573

SECT. IV. Of Fines. 575

- (A) A Fine what. 575
 (B) Of the Origin and Antiquity of Fines. 576
 (C) The Nature, Use and Effect of a Fine. 577
 (D) Of the several Kinds of Fines. 578
 Single. 578
 Double. 578
 Without Proclamations. 579
 With Proclamations. 579
 Executed. 579
 Executory. 579
 Other Divisions. 579
 1. *Of a Fine Sur Cognissance de droit come ceo, &c.* 580
 2. *Sur Concessit.* 582
 3. *Sur Concessit tantum.* 583
 4. *Sur Concessit & Reddidit.* 583
 5. *Sur Cognissance de droit tantum.* 583
 6. *Sur Cognissance de droit tantum, ove Grant ou Concessit.* 584
 7. *Sur Done, Grant & Render.* 584
 (E) Of the Parts of a Fine. 587
 1. *The Original Writ.* 587
 2. *The Composition or King's Licence.* 587
 3. *The Concord.* 587
 4. *The Note.* 587
 5. *The Foot.* 588
 6. *The Proclamations.* 588
 (F) Who may be Cognisors. 588
 (G) Who may be Cognisees. 590
 (H) By what Names Cognisors and Cognisees may give and take in a Fine. 590
 (I) Of what Fines may be levied with Respect to the Estate of the Parties. 591
 (K) Of what Fines may be levied with Respect to Things. 593
 (L) Of what not. 593
 (M) By what Names Things must be expressed in Fines. 593
 (N) The Order of placing them in Fines. 595
 (O) Of naming the Places where the Things lie. 595
 (P) Of the *Præcipe* and Concord. 596
 — *Præcipe what.* 596
 — *Concord what.* 596
 — *Of what a Concord may be.* 596
 — *Of reciting Things in the Concord.* 597

- *Exception in a Concord.* Page 598
 — *Dividing Things.* 598
 — *How the Right is to be limited.* 598
 — *Release and Warranty.* 599
 — *Several Purchases.* 599
 — *Lands in several Counties.* 599
 — *Of what Term a Fine shall be.* 599
 — *Exposition of Concords.* 599

- (Q) In what Courts Fines may be levied. 599
 (R) Before what Persons acknowledged and recorded. 600, 601
 (S) How to sue out and levy Fines in general. 601
 (T) How to acknowledge a Fine at the Bar. 602
 (U) Before the Lord Chief Justice of C. B. 602
 (V) Before a Judge of Assise. 602
 (W) Before Commissioners. 603
 1. *In what Cases a Dedimus Potestatem may issue.* 603
 2. *How to sue out a Dedimus Potestatem, and when it is necessary to sue out a Writ of Covenant at the same Time.* 604
 3. *How the Commissioners are to take the Acknowledgment of a Fine and Return, or certify the same into the Common Pleas.* 604
 3. *How a Fine must be transmitted and allowed.* 605
 (X) How to pass a Fine (after it is allowed) thro' the Offices till finished. 606
 (Y) Of Fines by Husband and Wife, or one of them. 607
 (Z) Of Fines by Tenant for Life, Tenant in Tail, &c. 609
 (AA) Of Fines barring Estates in general. 618
 (BB) How Parties shall be barred. 618
 (CC) How Privies shall be barred. 619
 (DD) How Strangers shall be barred. 619
 (EE) Persons having Natural or Civil Capacities how barred. 621
 (FF) Heirs when barred. 621
 (GG) Where a Disseisee, &c. may be barred by a Fine of the Disseisor, &c. 621
 (HH) Where a Fine shall be a Bar as to one Person and not to another; or as to one Part of the Land and not to another. 622
 (II) What Estate may be barred by a Fine. 622
 (KK) Where

(KK) Where a Fine is a <i>Corroboration</i> only, and no Bar. Page 624	(G) Of the Parties in Common Recoveries in general. Page 652
(LL) How a Fine is a Bar by <i>Estoppel</i> . 624	(H) Of the Demandant. 653
(MM) Where a Fine works a <i>Discontinuance</i> . 625	(I) Of the Tenant. 653
(NN) Where a Fine works by way of <i>Remitter</i> . 625	(K) Of the Vouchee. 656
(OO) Where a Fine is an <i>Extinguishment</i> of an Estate. 626	(L) Of the Use of Vouchers, and the Intent of Recoveries, with single, double, treble, &c. Vouchers. 656
(PP) How a Fine levied by <i>Decree</i> in Chancery works. 627	(M) Of the due Order and Form required in Recoveries. 657
(QQ) Where a Fine enures as a <i>Release</i> . 627	(N) Who may suffer a Common Recovery. 658
(RR) Where levying a Fine makes a <i>Forfeiture</i> , and where not; and where the <i>Entry</i> for such <i>Forfeiture</i> is good. 627	(N) Of what Things a Writ of Entry may be brought, and what it will bar. 661
(SS) Where Equity will relieve against a <i>Forfeiture</i> by levying a Fine. 628	(O) Of what it does not lie. 663
(TT) <i>Claim</i> what, and the different Kinds of Claim. 629	(P) Rules to be observed in placing the Particulars in a Writ of Entry. 664
(UU) Of <i>Non-claim</i> . 629	(Q) How to suffer Recoveries. 665
(VV) Of <i>Entry</i> . 629	First, <i>Of suffering a Recovery by the Parties in open Court</i> . 665
(WW) The Time of <i>Entry</i> or <i>Claim</i> . 631	Secondly, <i>Of suffering Recoveries when the Parties appear by Attorney</i> . 667
(XX) Where there is no need of Claim. 634	Thirdly, <i>How to sue out the Writ of Entry</i> . 667
(YY) How Fines executory are to be executed. 634	Fourthly, <i>How to sue out the Writs of Summons and Seisin</i> . 668
(ZZ) Of Attornment upon a Fine. 636	Fifthly, <i>Of passing the Writ of Entry, and of returning it and the Summons</i> . 668
(AAA) Of avoiding Fines in general. 636	Sixthly, <i>Of drawing Recoveries, and entering the Summons, Mittimus, Transcript and Recovery on the Rolls</i> . 669
1. <i>By Death of some of the Parties</i> . 636	Seventhly, <i>Of Exemplifying, Examining, Docketing, Signing and Sealing Recoveries</i> . 669
2. <i>By Error</i> . 637	(R) Of Execution after Recovery, and the Estate the Recoveror has by the Recovery. 670
3. <i>By Fraud, Deceit or Covin</i> . 641	(S) The Remedy of Recoverors against Lessees for Rents, Services and Waste. 670
4. <i>By Claim, Entry, &c.</i> 642	(T) Of Evidence allowed in Common Recoveries, in what Time to be disputed, or deemed valid, and of its Validity as to the Time of making Tenants to the <i>Præcipe</i> . 670
5. <i>By Plea</i> . 642	(U) Of avoiding Recoveries. 672
6. <i>By Sentence of a Court</i> . 644	(W) Of Errors in Common Recoveries, and in what Cases they may be amended. 673
(BBB) Where Equity will not make good a Fine, nor supply any Defect in the Levying it. 644	
Sect. V. Of Common Recoveries. 644	
(A) Recovery what, and how a Common Recovery differs from other Recoveries. 644	
(B) Of the Origin of Common Recoveries. 645	
(C) The Nature and fictitious Formality in suffering Common Recoveries. 645	
(D) The Use and Operation of Common Recoveries. 647	
(E) The Reason why Common Recoveries are a Bar. 648	
(F) Who is bound and barred by a Common Recovery. 648	
	Sect. VI. Of Deeds declaring (or leading) the Uses of Feoffments, Fines and Recoveries. 675
	(A) Use what. 675
	(B) Trust or Confidence what. 675
	(C) Of

- (C) Of the Difference between Uses and Trusts. Page 673
- (D) *Cestuy que Use* who. 676
- (E) Of the different Kinds of Uses. 676
- (F) Of the Nature of Uses. 676
- (G) Of Incidents to Uses. 677
- (H) Of the Original and Antiquity of Uses. 677
- (I) Why Uses were invented, the Mischiefs thereof, and the Remedies by sundry Statutes. 678
- (K) What shall be said a good Use of Land, or not; and when and where such an Use shall be raised, altered or created, or not. 681
- First, *In Respect of the Manner of raising it, and the several Ways whereby Uses may be raised.* 681
- Secondly, *In Respect of the Persons trusted, and what Persons may not be seised to the Use of another, but to their own Use.* 682
- Thirdly, *In Respect of Persons for whom the Trust is, or the Cestuy que Use.* 683
- Fourthly, *In Respect of the Estate and Possession of him that creates the Use.* 683
- Fifthly, *In Respect of the Estate and Possession of him that takes by the Conveyance.* 683
- Sixthly, *In Respect of the Cause or Consideration of an Use, and what shall be a sufficient Consideration to raise or alter an Use.* 684
- Seventhly, *In Respect of the Manner and Frame of the Words used in raising of Uses, &c.* 687
- Eighthly, *In Respect of the Nature and Quality of the Use.* 689
- (L) Of Deeds declaring (or leading) the Uses of Feoffments, Fines or Recoveries. 690
- First, *On what Assurances Uses may be declared.* 690
- Secondly, *Of declaring the Use according to the Estate the Party has in the Land.* 691
- Thirdly, *By what Deed Uses may be declared.* 691
- Fourthly, *When a Declaration of Uses may be made.* 692
- Fifthly, *Of a precedent Agreement for the Limitation of Uses.* 692
- Sixthly, *Of the Certainty of the Declaration of Uses.* 693
- (M) Of Averment of Uses, or the Proof of Uses by Witnesses. 694
- (N) To what Use an Assurance of Land shall be by Construction of Law, and how the Limitation of the Uses of Land by a Deed shall be construed. Page 694
- (O) Where and how Uses of Land may be extinguished and destroyed, or suspended or not; and where the ancient Uses shall be revived by the Entry of the Peoffees, or not. 696
- (P) Where a Power to revoke Uses of Land shall be good, and how they shall be taken, and what Revocation by Reason of such Power shall be good, and what not. 697
- (Q) Other Trusts and Confidences of Lands and Chattels Real and Personal; the Nature of such Trusts, the Duty of them that are trusted, and Remedy for Breach. 698
- (R) What Uses require no Execution by the Statute of Uses. 700
- (S) Remedy at Law as to Uses, and Questions as to them how decided. 701
- Sect. VII. *Of Deeds of Covenant to stand seised to Uses.* 701
- (A) What a Covenant to stand seised to Uses is. 701
- (B) The Things necessary to raise an Use by way of Covenant to stand seised. 702
- (C) Of the Consideration in Covenants to stand seised to Uses. 702
- (D) What amounts to a Covenant to stand seised, or not. 703
- (E) Who may covenant to stand seised to Uses. 703
- (F) To whose Use Covenants to stand seised may be, or not. 703
- (G) Of what a Covenant to stand seised may not be. 704
- (H) What Words amount to a Covenant to stand seised. 704
- Sect. VIII. *Of Deeds of Bargain and Sale.* 704
- (A) A Bargain and Sale what. 704
- (B) Kinds of Bargains and Sales, viz. of Lands or Goods. 705
- (C) The Effect of a Bargain and Sale. 705
- (D) Who may make a Bargain and Sale, or not. 706
- (E) To whom a Bargain and Sale may be, or not. 706
- (F) Of what Things a Bargain and Sale may be, or not. 706
- (G) By

(G) By what Deed a Bargain and Sale of Land may be made. Page 706	(O) Of the Commencement and Limitation of the Estate granted. Page 731
(H) By what Words a Deed of Bargain and Sale of Land may be made. 706	First, <i>In the Commencement of the Estate granted.</i> 731
(I) What Consideration is requisite in a Bargain and Sale of Land. 707	Secondly, <i>In the Limitation of the Estate, or in the Habendum of the Grant.</i> 732
(K) Whether Livery or Attornment is necessary in Bargains and Sales of Land. 708	(P) What may or may not be granted by the same Deed. 732
(L) Of inrolling Bargains and Sales of Land. 708	(Q) Of several Grants of the same Thing. 732
First, <i>In the Courts at Westminster, or before the Custos Rotulorum, &c.</i> 708	(R) Of Omissions of Ceremonies, &c. required in Grants. 733
Secondly, <i>How to inrol Deeds in the King's Bench.</i> 709	(S) What shall be said a good Grant in the Nature of a Release or Discharge, or not. 733
Thirdly, <i>Of inrolling Bargains and Sales in Lancashire, Cheshire and Durham.</i> 710	(T) Of void Grants. 733
Fourthly, <i>In Yorkshire.</i> 710	(U) How Grants shall be construed. 733
(M) What Deed shall enure as and be deemed a Bargain and Sale, or not. 710	(W) Of Attornments. 734
(N) How a Bargain and Sale shall be taken. 711	First, <i>Attornment what.</i> 734
First, <i>Of Lands.</i> 711	Secondly, <i>Kinds of Attornments.</i> 734
Secondly, <i>Of Goods.</i> 711	Thirdly, <i>The Effect of Attornments.</i> 734
(O) How and to what Purposes a Deed of Bargain and Sale of Lands, and the Inrolment thereupon, shall relate. 711	Fourthly, <i>In what Cases the Attornment of Tenants is necessary or not, and void or not.</i> 734
(P) Of Bargains and Sales of Goods and Chattels. 713	Fifthly, <i>By whom an Attornment may and must be made, or not.</i> 735
Sect. IX. <i>Of Deeds of Gift.</i> 713	Sixthly, <i>To whom an Attornment may and must be made, or not.</i> 736
Sect. X. <i>Of Grants.</i> 714	Seventhly, <i>At what Time an Attornment must be made.</i> 736
(A) Grant what, and Grantor and Grantee who. 714	Eighthly, <i>How to make an Attornment, and what shall be said a good Attornment, or not.</i> 736
(B) Kinds of Grants. 715	Ninthly, <i>Who shall be compelled to attorn, or not, and where.</i> 737
(C) What Grants must (or may not) be by Deed in Writing. 715	Tenthly, <i>How an Attornment shall enure and be taken.</i> 738
(D) Things necessary to every good Grant. 717	Eleventhly, <i>How an Attornment shall relate.</i> 738
(E) Who may be a Grantor. 717	Sect. XI. <i>Of Leases.</i> 739
(F) Of naming the Grantor. 718	(A) A Lease what, and Lessor and Lessee what. 739
(G) Who may be a Grantee. 719	(B) Kinds of Leases. 739
(H) Of naming the Grantee. 720	(C) Things necessarily required in every good Lease. 739
(I) Of the Power of Grantees where the Grant is for the Benefit of others. 721	(D) What is a good Lease for Life or Years with Respect to the Lessor and Lessee, the Thing leased, and the Estate of the Lessor, &c. therein. 740
(K) Of the Things granted. 721	(E) What Leases (or other Acts) may be made (or done) by a Tenant in Tail, and what Leases made by such a Tenant shall be good to bind the Issue,
(L) Of the Estate, Property and Possession of the Grantor. 725	
(M) The Words of a Grant. 727	
(N) Of naming and describing the Thing granted; and therein of Election. 727	

- Issue, &c. after the Death of the Tenant in Tail, &c. Page 742
- (F) What Leases (or other Acts) may be made (or done) by the Husband with the Lands he has in the Right of his Wife, &c. 744
- (G) What Leases (or other Acts) Bishops, &c. may make (or do) with the Lands they have in the Right of their Churches, &c. 745
- (H) Of the Manner of the Agreement in a Lease, and the Words whereby the same is set down, &c. 747
- (I) Of two Leases at one Time of the same Thing. 749
- (K) Of the Commencement, Continuance and End of the Term. 750
- (L) Of Forfeiture by Lessees. 752
- (M) Where a Lease for Life or Years shall be void *ipso facto* by the Death of the Lessor, or by other Means, or not, or voidable, &c. 752
- (N) What shall be said a good Lease at Will, or not. 753
- (O) Of Repairs, &c. by Lessees. 753
- (P) Of Waste committed by Lessees. 753

Sect. XII. Of Releases. 754

- (A) A Release what, and Releasor and Releasee who. 754
- (B) Kinds of Releases. 754
- (C) What shall be said a Release in Law or not, and how. 755
- (D) The Nature and Operation of a Release in general. 755
- (E) How and after what Manner Things may be released. 756
- (F) What Things may be released or not. 756
- (G) Things requisite in Releases of Lands and Tenements in general. 757
- (H) Things requisite in Releases that enure by way of enlarging Estates. 757
- First, *In Respect of the Estate of the Releasor.* 757
- Secondly, *In Respect of the Estate of him to whom the Release is made.* 758
- Thirdly, *In Respect of Privity.* 759
- Fourthly, *In Respect of Words whereby it is made.* 759
- (H) Things requisite in Releases of Lands and Tenements that only give, discharge or extinguish any Right or Title of Lands. 760
- First, *In Respect of the Estate of the Releasor.* 760

Secondly, *In Respect of the Estate of him to whom the Release is made.* Page 761

Thirdly, *In Respect of Privity.* 762

Fourthly, *In Respect of the Words whereby it is made.* 763

- (I) Of Releases of other Things than Lands or Tenements, as Seigniories, Rents, Common, Debts, &c. 763
- First, *Of a Seigniorie, Rent-service, Common, or the like.* 763
- Secondly, *Of an Advowson, &c.* 764
- Thirdly, *Of a Condition.* 764
- Fourthly, *Of a Power of Revocation.* 764
- Fifthly, *Of a Warranty.* 764
- Sixthly, *Of Debts and other Personal Duties.* 764

- (K) The Force and Virtue of a Release, and how it shall enure and be construed. 765

First, *In Respect of the Persons; and where a Release made to one shall bind another, &c. and where a Release made to one shall enure to others, or not.* 765

Secondly, *In Respect to the Thing released.* 767

Thirdly, *In Respect of the Time or Estate.* 771

- (L) Where Releases shall be avoided and set aside. 773

Sect. XIII. Of Lease and Release. 773

- (A) A Conveyance by Lease and Release what. 773

- (B) Things requisite in a Lease (or Bargain and Sale) for a Year. 774

First, *With Respect to the Consideration.* 774

Secondly, *With Respect to the Estate and Possession.* 774

Thirdly, *With Respect to Inrolment.* 774

- (C) Things requisite in the Release. 775

First, *With Respect to the Consideration.* 775

Secondly, *With Respect to the Estate and Possession.* 775

Thirdly, *With Respect to the Words in a Release.* 775

Fourthly, *With Respect to Recitals, the Uses, Conditions, Defeasances, Warranties and Covenants.* 775

(D) Of

- (D) Of setting aside a Lease and Release, &c. Page 776

Sect. XIV. Of Confirmations. 776

- (A) A Confirmation what, and Confirmor and Confirmer who. 776
 (B) The Nature and Operation of a Confirmation in general. 776
 (C) Kinds of Confirmations. 777
 (D) Of a Confirmation confirming or altering the Quality of the Estate of him to whom it is made. 777
 (E) Of a Confirmation enlarging the Estate of him to whom it is made. 780
 (F) Of confirming, diminishing or abridging Services, &c. 781
 (G) How to make a Deed of Confirmation. 781
 (H) Where the Confirmation of some Persons is needful to perfect the Grant of others, or not; and how it may be done. 781
 (I) Where a Confirmation may be good for Part of the Estate, &c. 782
 (K) The Force and Virtue of a Confirmation, and how it shall enure, &c. 782

Sect. XV. Of Assignments. 784

- (A) Assignment what, Assignor and Assignee who. 784
 (B) Things requisite in an Assignment. 784
 (C) Of what an Assignment may be, or not. 784
 (D) How far a Grantor or a Grantee, Lessee, or his Assigns, are chargeable before or after an Assignment made, with the Rent, &c. 786

Sect. XVI. Of Mortgages. 787

- (A) Mortgages what. 787
 (B) How a Mortgage is made. 788
 (C) What shall be a good Mortgage. 788
 (D) Of usurious Mortgages. 788
 (E) What shall be taken as a new Mortgage. 789
 (F) What shall affect a second Mortgage, or not. 789
 (G) Of buying in old Incumbrances to protect Mortgages. 789
 (H) In what Order Mortgages, Judgments, &c. are to be paid. 790
 (I) How Mortgagee must be satisfied where the Premises fall short. 790

- (K) Where Mortgage Money is presumed to be satisfied. Page 790

- (L) To whom Mortgage Money shall be paid on Death of Mortgagee, and to whom Mortgages shall descend. 790
 (M) What shall be accounted Principal and what Interest, &c. 791
 (N) Who may redeem Mortgages. 791
 (O) Of what a Bill in Equity may or may not be to redeem. 792
 (P) Where one of two Things mortgaged, or Mortgage and Bond cannot be redeemed without the other. 792
 (Q) Where a new Term is subject to an old Redemption. 792
 (R) What a Mortgagor, &c. is liable to pay on Redemption. 792
 (S) In what Time Redemption must be made. 793
 (T) Where a Mortgagor concealing a former Incumbrance shall lose his Equity of Redemption. 794
 (U) Where a Court at Law may relieve the Mortgagor (Ejectment for the Land, Actions on the Bonds for the Mortgage Money, Bills of Foreclosure, &c. being brought) on Payment of Principal, Interest and Costs. 795
 (W) Where a Court of Equity may make a Decree on a Bill of Foreclosure before the Suit shall be brought to a regular Hearing. 796
 (X) Of Reconveyance of Mortgage on Payment of the Money. 797

Sect. XVII. Of Exchanges. 797

- (A) Exchange what. 797
 (B) The Nature and Effect of an Exchange. 797
 (C) When a Deed shall take Effect as an Exchange, or not. 798
 (D) Things requisite to the Perfection of an Exchange. 798
 (E) Of the Parties to Deeds of Exchange. 799
 (F) Of the Things exchanged. 800
 (G) How an Exchange must be made. 801
 (H) Of the Equality of the Estates or Interests exchanged. 802
 (I) Of the Execution of the Exchange. 803
 (K) Where an Exchange shall be determined, or the Nature of it changed by Matter *ex post facto*, and where not. 804
 (L) Where an Exchange voidable at first becomes good by Matter *ex post facto*, or not. 804
 (M) Who

(M) Who may take Advantage of a void or voidable Exchange, or not. Page 805	(D) What may be revoked. Page 817
(N) How an Exchange shall be construed and taken. 805	(E) Revocation, how made, and when defective may be helped. 817
Sect. XVIII. Of Surrenders. 805	(F) In what Cases a Person may make a Revocation and new Declaration both, or only one of them. 817
(A) Surrender what. 805	(G) What Act, Deed or Will is a Revocation. 817
(B) Kinds of Surrenders. 806	(H) How Revocations are interpreted. 819
(C) The Nature and Effect of a Surrender. 806	(I) What is an Extinguishment of a Power of Revocation, or not. 819
(D) What shall be said a Surrender in Law of Lands; and by what Means an Estate shall be surrendered in Law, or not. 806	Sect. XX. Of Statutes. 819
(E) Where Copyhold Lands shall pass without a Surrender. 808	(A) A Statute what. 819
(F) Things requisite in a good Surrender of Lands. 808	(B) Kinds of Statutes. 820
(G) Of the Parties between whom a Surrender is made, and their Estate and Possession. 808	(C) What shall be said a good Statute or Recognisance, and what not. 821
(H) Of the Place where the Surrender is made. 810	First, <i>With Respect of the Persons before whom it is acknowledged.</i> 821
(I) Of the Things surrendered. 811	Secondly, <i>In Respect of the Manner of making, acknowledging and registering of it.</i> 821
(K) How a Surrender is made, and by what Words. 811	(D) All the Proceedings upon a Statute or Recognisance, and the Manner and Order of Execution thereupon. 821
(L) Of the Agreement of the Surrenderee to the Surrenderor. 812	(E) What Things are subject and liable to Execution upon a Statute or Recognisance. 824
(M) Where a Surrender in Pursuance of a Bond shall be compelled in Equity. 813	First, <i>In Respect to the Nature and Quality of the Things themselves.</i> 824
(N) Where a Feoffment, Lease, Grant, or other Act made or done by the Tenant for Life or Years shall be deemed a Surrender, or not. 813	Secondly, <i>In Respect of the Estate, Property and Possession of the Conusor in the Things.</i> 824
First, <i>Where it is made to him in Reversion or Remainder.</i> 813	Thirdly, <i>In Respect of the Quantity.</i> 825
Secondly, <i>When it is done or made to him and a Stranger.</i> 814	(F) Where a Man shall have a Re-ex-tent or new Execution, or not. 825
Thirdly, <i>When it is done both with the Tenant and him in Reversion or Remainder.</i> 814	(G) Where the Conusor or his Heir, &c. shall have Contribution upon a Statute or Recognisance, or not. 827
Fourthly, <i>When a Grant, &c. is made of the same Land, or a Thing out of the same Land, &c.</i> 814	(H) Where and by what Means a Statute or Recognisance, and the Execution thereof, shall be discharged, suspended or avoided in all or in Part, and where not. 827
(O) In what Cases a defective Surrender, or the want of a Surrender, may be supplied or not. 815	Sect. XXI. Of Obligations or Bonds. 828
(P) How a Surrender shall be construed and taken. 815	(A) An Obligation what. 828
Sect. XIX. Of Revocations and new Declarations. 816	(B) Kinds of Obligations. 828
(A) What a Revocation and new Declaration is. 816	(C) What is a good Obligation or not, as to its original Creation; and where an Accident or Fraud in the Writing of
(B) The Effect of a Revocation. 816	
(C) Who may revoke. 816	

of it has been relieved in Equity.

Page 829

First, *As to the Manner and Form of making it.* 829

Secondly, *As to the Matter and Substance of an Obligation.* 831

(D) What is a good Condition of an Obligation, or not. 831

First, *As to the Manner and Form of making it.* 831

Secondly, *As to the Matter and Substance of the Condition of an Obligation.* 832

(E) What Bonds or Obligations are void by the Statute Law. 833

(F) How a single Obligation shall be construed. 835

(G) How an Obligation with a Condition, or the Condition of an Obligation shall be construed, and how it must and ought to be performed. 836

First, *With Respect to the Persons that are to do the Thing.* 836

Secondly, *With Respect to the Time of doing the Thing.* 836

Thirdly, *With Respect to the Place where the Thing is to be done.* 837

Fourthly, *In Respect of the Thing itself to be done.* 838

Fifthly, *In Respect of the Manner and Order of doing the Thing, &c.* 839

(H) When the Condition of an Obligation shall be said to be performed, and the Obligation saved or satisfied, or not. 840

(I) When a single Obligation shall be said to be broken and forfeited, or not. 844

(K) When the Condition of an Obligation shall be said to be broken, and the Obligation forfeited, or not. 844

(L) In what Cases an Obligation, altho' good in its original Creation, is void or discharged by Matter *ex post facto*, or not. 846

(M) Where a Bond is extinguished at Law; and where after Extinguishment at Law it is good in Equity. 848

(N) What shall be recovered on a Bond in Law or Equity. 849

(O) In what Cases Obligees have Remedy in Equity where Bonds are lost or clandestinely taken away. 849

Sect. XXII. Of Defeasances. 849

(A) Deafance what. 849

(B) The Difference between a Condition and a Defeasance. 850

(C) In what Cases a Defeasance may be made, and what Things may be defeated and avoided thereby, and what not. Page 850

(D) Things requisite in a good Defeasance. 850

Sect. XXIII. Of Wills and Testaments. 852

(A) Wills, Testaments and Devises, what. 852

(B) Kinds of Wills and Testaments. 852

(C) The Parts of a Will or Testament. 852

(D) A Devise or Legacy what, and a Devisor and Devisee or Legatee who. 852

(E) Kinds of Devises or Bequests. 853

(F) Executor and Administrator who. 853

(G) Kinds of Executors and Administrators. 853

(H) The Nature and Effect of a Will or Testament, and of a Codicil. 854

(I) Things requisite in making a good Will. 854

(K) Who are capable of making Wills. 854

(L) Of the Testator's Resolution to make a Will. 856

(M) Of the Occasion or Motive to make a Will. 856

(N) Things requisite in a good Devise. 857

(O) Who may make a Devise, or not. 858

(P) What Things may be devised or bequeathed. 858

(Q) Of naming Things devised. 861

(R) Who may be a Devisee or Legatee. 861

(S) Of naming the Devisee or Legatee. 862

(T) Of the Devisee's Capacity to take by the Name whereby he is described. 862

(U) Of misnaming the Devisee. 863

(W) Of the Words of a Devise. 863

(X) Of the Intent of making a Devise. 863

(Y) Of the Manner and Form of making Wills and Testaments, and of Revocations of them. 863

First, *Of naming an Executor.* 863

Secondly, *Where it must be in Writing.* 864

Thirdly, *On what, and in what Hand and Language a Will may be written.* 865

Fourthly,

Fourthly, Of the Testator's sealing and subscribing his Name.	Page 865
Fifthly, Of Interruption in the making a Will.	865
Sixthly, Of the Proof of a Will.	865
(Z) Of Nuncupative Wills.	687

C H A P. VII.

**Of fraudulent, forged, void
and voidable Deeds and
Wills.** 868

Sect. I. Of void Deeds in general.	868
Sect. II. Of Deeds obtained by Menace, Durefs, or false Suggestions.	868
Sect. III. Of Deeds made or concealed by Collusion or Fraud.	869
(A) In general.	869
(B) To deceive Purchasers.	869
(C) To defraud Creditors.	871
Sect. IV. Of usurious Contracts.	872
Sect. V. Where a Deed good in its Crea- tion may become void, or become frau- dulent by Matter ex post facto, or not.	873
(A) By the Cause or Consideration of a Grant's failing.	873
(B) By Rasure or Interlining.	874
(C) By breaking or defacing the Seal.	875
(D) By Re-delivery or cancelling it.	875
(E) By Disagreement and Refusal.	875
(F) By Judgment of a Court.	876
(G) By Forfeiture.	876
Sect. VI. Of fraudulent and void Wills in general.	876
Sect. VII. Where a Will or Testament good in its Creation and Beginning may	

become void by Matter ex post facto,
or not. Page 877

- (A) By Countermand or Revocation. 877
- (B) By cancelling it. 878
- (C) By Alteration of the Estate of the
Testator. 878
- (D) By Intention to alter it. 878
- (E) By making another of the same
Date. 879
- (F) By the Declaration of the Testator.
879

Sect. VIII. Where and by what Means a
Feoffment, Gift, Grant, Lease, &c. or
the Estate thereby made being void or
voidable at the first, &c. may become
good by Matter ex post facto. 879

Sect. IX. Where a Will void or voidable
in its Inception may become good by
some Matter or Accident ex post facto,
or not. 880

Sect. X. When and where a Deed may
be good in Part, and void in Part;
or good against one Person and void
against another, or not; or good for
one Time and void for another. 880

Sect. XI. In what Cases a Man may a-
void his own Grant, &c. or not, and
at what Time. 882

Sect. XII. Where Defects and Mistakes
in Deeds may be supplied and amend-
ed, or not. 882

C H A P. VIII.

**General Rules for the Expo-
sition of Deeds and Wills.** 883

Sect. I. Of Deeds.	883
Sect. II. Of Wills.	884

PART I.

The Theory of Conveyancing.

CHAP. I.

Of Conveyancing in general.

SECT. I.

Conveyancing, what.

CONVEYANCING is the Art of transferring whatsoever is alienable, in due Form of Law. Definition of Conveyancing.

The Word *Conveyancing* is derived from the Latin *Conveho*, to convey, to carry or send into another Place; and by Analogy stands for the making over or transferring Estates, &c. Derivation and Definition of the Name.

Conveyancing is a Noun Substantive, Appellative; and by use is become a Technical Term for (or the Name of) the Art of Conveying or Transferring Estates, &c. from one to another.

He who makes it his Business to draw and peruse the Writings or Instruments by which Estates, &c. are conveyed, is called a *Conveyancer*. Conveyancer, who.

Conveyancing is an Art, because it is a practical Habit, including (besides the Theory of the Law relating thereto, the Knowledge of the Facts, and all other requisite Circumstances) a certain Dexterity in making the Deeds or Instruments of Conveyance according to Law. Conveyancing, an Art.

It is the Art of transferring whatsoever is alienable; for to transfer is to grant, sell, assign or make over; all which Actions, in a legal Sense, can only be of Things alienable. To transfer, what.

And the Act or Deed whereby whatsoever is alienable is conveyed, must be in due Form of Law, i. e. in such Form as the Law requires, as well with Regard to what is conveyed, as to the Parties, the Kinds of Deeds, their constituent Parts, the Manner of executing them, and their Uses and Effects, &c. Due Form.

SECT. II.

What Estates or Things may be conveyed, &c.

As to Estates of Inheritance.

AN Estate in Fee-simple is transmissible in its very Nature, Hale's Anal. §. 30.

1. To the Successor in *Bodies Corporate*. In this Case the Nature of the Corporation directs the Rule of Succession.
2. To the Heir in the Case of *Persons natural*, by *Descent*. Of which *vide Chap. 2. §. 2. postea*.
3. Or to any other Person, by *Alienation*. *Vide Chap. 2. §. 3.*

An Estate in Fee-tail, as to its *incidental Qualities*, may be considered either,

1. In Relation to the *Hereditary Transmission* thereof, pursuant to the Rules of Descents. *Vide Chap. 2. §. 2.*
2. Or in Relation to the *Alienation* thereof; for regularly, by the Stat. of *Westm. 2. De Donis Conditionalibus*, it cannot be alienated, so as to bar the *Issue*, *Reversion*, or *Remainder*; but see of *Fines and Recoveries post.*

As to Estates less than Inheritance.

Hale's Anal.
§. 31.

Estates which are less than Inheritance, (as by Leases for Years, &c.) except Tenancy at Will, are *transferrable* from one to another, unless particularly restrained by Condition or by Limitation.

Hale's Anal.
§. 37.

Customary Estates, or Tenancy by *Virge*, or by Copy of Court-Roll, may be transferred,

1. By Hereditary Descent. *Vide Chap. 2. §. 2.*
2. Or by Surrender.

Personal Estates either in Possession or Action may be transferred or acquired, (1.) By Succession, (2.) Devolution, (3.) Prerogative, (4.) Custom, (5.) Judgment and Execution, or (6.) Sale in a Market overt; of which *vide Chap. 3.*

S E C T. III.

By whom and to whom Estates may be conveyed.

AN Estate cannot be limited to the Party himself, who gives it on a Grant at Common Law; but a Man may covenant to stand seised to the Use of himself for Life, &c. 3 *Danv.* 158. 1 *Rep.* 127. a. 1 *Mod.* 121, 238.

A Man cannot by the Rule of Law give himself an Estate in Possession or Remainder, unless perhaps in some Cases by Conclusion. 1 *Co.* 127. a. 3 *Danv.* 158.

If a Man gives to A. for Life, reserving the Reversion to himself for Life, the Remainder over to another, it is a void Reservation of the Reversion to him. 42 *Aff. Dubitatur.* 3 *Danv.* 158.

So an Estate cannot be limited to the Heir of the Donor on a Grant. *Ibid.*

If a Man gives to one for Life, the Remainder to the right Heirs of the Donor, it is a void Remainder, because he cannot make his right Heir a Purchaser, without departing with the Fee out of himself, for the Heir and Ancestor are Correlatives and one Thing in the Eye of the Law. *Ibid.* § 1 *Mod.* 98, 237.

So if the Gift be to him in Tail, Remainder to the right Heirs of the Donor. *Co. Lit.* 22. b.

A Man cannot lease to one for Life, reserving a Fee-tail to himself, he having a Fee before. 3 *Danv.* 158.

So if Tenant in Fee levies a Fine to one for Life, reserving a Tail to himself, it is no good Tail. *Ibid.*

If one leases for Life, Remainder to the Heirs Male of his own Body; this is a void Remainder, for the Donor cannot make his own right Heir a Purchaser of an Estate-tail, without departing with the whole Fee-simple out of him.

But if one makes a Feoffment in Fee to the Use of himself for Life, and then to the Heirs Male of his Body; this is a good Estate-tail executed in himself, being raised out of the Estate of the Feoffees which the Feoffor departed with. *Co. Lit.* 22. b.

So if one covenants to stand seised to the Use of his Heirs Male on the Body of his second Wife, he takes an Estate for Life by Implication, and so it is an Estate-tail executed in himself. *Mitford's Case*, 2 *Lev.* 75. 1 *Vent.* 372. *Raym.* 228. 1 *Mod.* 98, 122, 159. 3 *Keb.* 229, &c.

But if one makes a Lease and Release to the Use of himself for ninety-nine Years, Remainder to Trustees for twenty-five Years, Remainder to the Heirs Male of his own Body; this Limitation to the Heirs Male of, &c. is void, there being no Estate of Freehold limited to support it, and one cannot be implied contrary to the Intent of the Conveyance, and this Estate takes Effect out of the Seisin of the Trustees, and is not like *Mitford's Case*, where one covenanted to stand seised to the Use of the

Heirs

Heirs of his own Body; and even in that Case *Powel* said, if there had been an express Estate (I suppose he intended for Years) limited to the Covenantor, it would have been otherwise. *Salk.* 679.

If one levies a Fine to the Use of his Wife for Life, the Remainder to the Use of his eldest Son, and the Heir Male of his Body, and for Want of such Issue, to Use of his right Heir; this Limitation to Use of his right Heir is meerly void, and he hath a Reversion and not a Remainder in him. *1 Leon.* 182.

See more in the 3d Section of the 2d Chapter concerning the Acquisition of Real Estates by Purchase.

S E C. T. IV.

The different Ways and Means whereby Properties in Estates may be acquired, or conveyed in General.

By Act of Law.

THERE is a various Acquisition of Things by *Act of Law* according to their several Natures, whether they are of *Inheritance*, *Freeholds* or *Chattels*. *Hale's Anal.* §. 33.

First, As to Estates of *Inheritance* the Titles of Acquests therein by Act of Law seem to be of two Kinds, viz.

1. Such as are applicable to all Estates of *Inheritance* whether in *Tail* or in *Fee-simple*; for if in *Tail*, the Manner of the Limitation directs the *Descent*; but an *Inheritance* in *Fee-simple* is directed by the Rules of *Descent*.

2. Or such as are applicable only to the Acquest of Estates in *Fee-simple*; the Acquisition thereof may be (1.) By *Prescription* or *Custom*, (2.) Or by *Escheat*.

Secondly, As to Estates of *Freehold*, the Acquest by Act of Law of them is only by *Entry*.

Thirdly, And as to *Chattels Real* or *Personal* by Act of Law they may be acquired, *Ib.* §. 27, 33. (1.) By *Succession*, (2.) By *Devolution*, (3.) By *Prerogative*, (4.) By *Custom*, (5.) By *Judgment* and *Execution* thereupon, (6.) Or by *Sale* in a *Market overt*.

By Means of the Party.

A Property in Real Estates may be acquired or transferred by Means of the Party. *Hale's Anal.* §. 34.

(1.) By *Conveyance*, (2.) Or by *Forfeiture*.

Note; These Acquests are by *Right* or *Title*, there are also others by *Wrong*, which are, (1.) To a *Freehold*, as *Abatement*, *Disseisin*, *Intrusion*, *Usurpation*; or (2.) To a *Chattel*, as *Ejectment* of *Farm*, or *Ejectment* of *Gard*. But these Acquisitions by *Wrong*, do not gain a Property tho' they do the Possession, &c.

And a Property in *Personal Estates* may be acquired or transferred by Means of the Party, three Ways, viz. (1.) By *Grant*, (2.) By *Contract*, (3.) And by *Assignment*. *Ib.* §. 28.

By a Mix'd Act.

AND Properties in *Personal Estates* may be acquired by a *Mix'd Act*, partly by Act of Law and partly by Act of the Party. And thus Things in Action, as well as in Possession, are transferrable two Ways. (1.) By Act of the Party, with *Custom* Co-operating; thus a *Bill of Exchange* is Assignable. (2.) Or, By Operation of the Law concurring with the Act, or Default of the Party; as *Forfeitures* of several Kinds.

C H A P. II.

Of the different Ways of Acquiring, or Conveying Real Estates in particular, and of claiming Titles thereto.

S E C T. I.

Of the Acquisition of Real Estates by Entry, and therein of Occupancy.

(A) Of Entry in general.

Entry what.

AN Entry is where a Man enters personally, or another by his Order, into any Lands, Tenements or Hereditaments to which he has a Title of Entry, and takes Possession of them. *Terms de la Ley*, Tit. Entry. 1 *Lit. Conv.* 131.

Property by Entry, what it is.

And Property gained by Entry, is where a Man finds a Piece of Land that no other possesses, or has Title unto, and he that so finds it Enters; this Entry gaineth a Property. *Bac. L. Tracts*, p. 126.

Derivation of this Law.

This Law seems to be derived from this Text, *Terra dedit filiis hominum*, which is to be understood to those that will till and manure it, and so make it yield Fruit. *Ibid.*

Antiquity.

But this Manner of gaining Lands was in the first Days, and is not now of Use in England; for that by the Conquest, all the Lands of this Nation were in the Conqueror's Hands, and appropriated unto him; except Religious and Church Lands, and the Lands in Kent, which by Composition were left to the former Owners, as the Conqueror found them; so that no Man but the Bishopricks, Churches, and the Men of Kent can at this Day make any greater Title than from the Conquest, to any Lands in England; and Lands possessed without any such Title, are in the Crown, and not in him that first enters, as it is by Land left by the Sea; this Land belongs to the King, and not to him that has the Lands next adjoining, which was the ancient Sea-banks. This is to be understood of the Inheritance of Lands, viz. that the Inheritance cannot be gained by the first Entry. *Bac. L. Tracts*, p. 126.

Titles before and after the Conquest.

Of Occupancy.

But an Estate for another Man's Life by Out-Laws, may at this Day be gotten by Entry: As a Man called A. having Land conveyed unto him for the Life of B. dieth without making any Estate of it, there, whosoever first enters into the Land after the Decease of A. getteth the Property in the Land for the Time of the Continuance of the Estate which was granted to A. for the Life of B. which B. yet liveth, and therefore the said Land cannot revert 'till B. dies. And to the Heir of A. it cannot go, for that it is not any Estate of Inheritance, but only an Estate for another Man's Life; which is not descendable to the Heir, except he be specially named in the Grant, viz. *To him and his Heirs*. As for the Executors of A. they cannot have it, for it is not an Estate Testamentary, that it should go to the Executors as Goods and Chattels should, so as in Truth no Man can entitle himself unto those Lands; and therefore the Law preferreth him that first enters, and he is called *Occupans*, and shall hold it during the Life of B. but must pay the Rent, perform the Conditions, and do no Waste, and he may by Deed assign it to whom he pleases in his Life-time; but if he dies before he assign it over, then it shall go again to whomsoever first entereth and holdeth; and so all the Life of B. so often as it shall happen. *Ibid.* 126, 127. But see more concerning Occupancy in the Division (D) post.

Disseisin.

Likewise, if any Man does wrongfully enter into another Man's Possession, and put the right Owner of the Freehold and Inheritance from it; he thereby gets the Freehold and Inheritance by Disseisin, and may hold it against all Men, but him that hath Right, and his Heirs, and is called a *Disseisor*. *Bac. L. Tracts*, p. 127.

Abatement.

Or if any one dies seised of Lands, and before his Heir does enter, one that has no Right does enter into the Lands, and holds them from the right Heir, he is called an *Abator*, and is lawful Owner against all Men but the right Heir. *Ibid.*

In what Time an Abator, or Disseisor may be sued.

And if such Person, *Abator* or *Disseisor* (so as the Disseisor has quiet Possession five Years next after the *Disseisin*) do continue their Possession, and die seised, and the Land descend to his Heir, they have gained the Right to the Possession of the Land against

against him that hath Right, 'till he recover it by fit Action real at the Common Law. And if it be not sued for at the Common Law, within sixty Years after the Disseisin, or Abatement committed, the right Owner has lost his Right by that Negligence. *Rac. L. Tracts* 127.

And if a Man has divers Children, and the elder, being a Bastard, does enter into the Land, and enjoyeth it quietly during his Life, and dies thereof so seised, his Heirs shall hold the Land against all the lawful Children, and their Issues. *Ibid.*

Where the Heirs of a Bastard shall Inherit.

Note, The Titles, Entry, Occupancy, Disseisin, Abatement, &c. being very extensive and necessary to be known, they are hereafter more particularly treated of.

(B) Entry congeable.

IF the Conusee of the Statute sues an Extent, by which the Lands of the Conusor are seised into the Hands of the King, the Conusee after a *Liberate* is sued, (*but not before*) may enter into the Land before the *Liberate* executed, for this *Liberate* is a sufficient Warrant for his Entry. 2 *Danv.* 785.

Entry, in what Cases congeable.

After an Extent upon a Statute-Merchant, Staple or Recognisance returned, the Conusee may enter without any Delivery by the Sheriff, by Force of the *Liberate*. 2 *Inst.* 678. But by 1 *Vent.* 41. in an Execution upon a Statute-Merchant there is no need of a *Liberate*, as there is upon a Statute-Staple, for in Case of a Statute-Staple the Conusee can bring no Ejectment before the *Liberate*.

After an Extent upon a Statute.

A *Liberate* made to the Sheriff to deliver the Land to himself is void, and an Entry in that Case is void. 2 *Danv.* 785.

If the King seises certain Lands, upon which an *Ouster le Mayn* is sued to the Escheator to deliver this Land to the Party again, he may after enter into the Land before any Execution of the Writ, because there is a Judgment given before that the Hands of the King shall be removed. *Ibid.*

Ouster le Mayn.

Upon an *Elegit*, if the Sheriff takes an Inquisition, though the Sheriff does not deliver the Land to the Party Plaintiff, yet the Plaintiff may enter presently after the Inquisition taken, before the Return thereof to the Courts without any *Liberate* to him directed. *Ibid.* 786.

Elegit.

If a Judgment be reversed in a Writ of Error against the Heir of the Recoveror, the Demandant may enter upon him without more, tho' he be in by Descent, but he cannot upon the Tertenant without a *Scire Facias*. 3 *Danv.* 298, 299.

Error.

If a Man recovers in a real Action, and the Tenant dies before Execution; yet the Demandant may enter upon the Heir, because the Record binds his Title: So tho' it be of Lands in Tail. *Ibid.* 299. Otherwise in a false or feint Action. *Co. Lit.* 361. b.

Recovery.

So if a Man recovers in a real Action tho' there be two, three or four Descents before his Entry, yet he may enter upon those to whom descended, because the Recovery binds the Blood and disproves the Title. 3 *Danv.* 299.

And if after a Recovery in a real Action, and before Execution, a Stranger enters and dies seised, yet the Recoveror may enter upon his Heir. *Ibid.*

If a Man recovers in a Writ of Right of Advowson, and after, at an Avoidance, a Stranger presents, yet when the Church is void again, the Recoveror may present. *Ibid.*

If there be a Recovery in an Ejectment, the Plaintiff may enter and execute his Judgment, and the Assistance of the Sheriff is only to keep the Peace. *Far.* 66, 69.

He that Recovers may as well enter after the Year as within the Year against him, upon whom the Recovery was had. 3 *Danv.* 299.

But he cannot enter upon a Stranger to the Recovery after the Year. *Ibid.*

He cannot enter after a Descent cast. *Ibid.* and *Fitz. Entry Congeable* 35. *Sed vide supra.*

In all Cases where the Writ demands Lands, Rent, or other Thing in certain, the Demandant after Judgment may enter, or Distrain before any Seisin delivered to him by the Sheriff. *Co. Lit.* 34. b.

But in Dower where the Writ demands nothing in certain, the Demandant, after Judgment cannot Enter or Distrain 'till Execution sued, upon which the Sheriff delivers the third Part in certain. *Ibid.*

So where the Wife of one Tenant in Common demands the third Part of a Moiety, she cannot, after Judgment, enter till the Sheriff has delivered her the third Part, tho' it is thereby reduced to no more Certainty than it was. *Ibid.*

If one recovers in an Assise, or Assise of Mortdancestor, he may enter and execute the Judgment without being put in Seisin by the View of the Jury, *Moor* 54. pl. 156.

but it was said in this Case, that if he be again disseised, he shall not have a *Redisseisin* but a *Post-Disseisin*. *Ibid.*

An Entry shall be intended to be a good Execution of a Recovery without a Writ of Seisin. *T. Jones 20.*

Entry within View.

There is a Difference between a Feoffment and an Entry; for a Man may make a Feoffment of Lands in another County, and make Livery within the View, altho' he might enter peaceably to make Livery. *Pollex. 47.* But a Man cannot make an Entry into the Lands, within the View, where he may actually enter without Fear; for it is one Thing to Invest, and another to Devest. *Co. Lit. 252. a. b.*

What shall be said, an Entry to reduce an Estate.

If the *Disseisee* enters into the Land, and continues in it with the Disseisor, and manures it with him, claiming nothing of his first Estate, yet this is an Entry that will reduce his first Estate. *2 Dav. 790.*

And if he enters and takes the Profits as Lessee at Will of the Disseisor, or in any Manner, this is an Entry, and reduces his Estate. *Ibid.*

And if he commands a Stranger to put the Cattle of such Stranger into the Land to feed there, this is an Entry in Law into the Land. *Ibid.*

If *A.* Leases to *B.* for Years, the Remainder to *C.* in Fee, and *A.* comes upon the Land to make Livery, and *B.* to take it, this shall not be said any Entry of *B.* to vest the actual Possession in him 'till Livery made, for then the Remainder would be void, which would be against the Intention of the Parties. *Co. Lit. 49. b.*

If an Entry is made to a special Purpose, such Entry shall be guided by the Intent, and tied up to that special Purpose: As if it is agreed between Disseisor and Disseisee, that the Disseisee shall Release all his Right to the Disseisor upon the Land, and accordingly the Disseisee enters into the Land and delivers a Release; there this is a good Release; and the Entry of the Disseisee being for this Purpose, does not avoid the Disseisin. *Co. Lit. 49. b. 1 Lil. Conv. 131.*

But if the Disseisor makes a Feoffment to the Disseisee and others, there though the Disseisee comes to take the Livery, yet when the Livery is made, the Disseisee is remitted. *Co. Lit. 49. b.*

If the Disseisee comes upon the Land and puts his Foot in, but takes no Profits, but the Disseisor ousts him, this Entry does not settle any Estate in him (at the Election of the Disseisee, as it seems) for the Disseisee may have an Affise of the first Disseisin. *2 Dav. 791.*

If I have a House and Land adjoining to a Plot of Land in Question between me and another, and I stand upon one Piece of the Stone Wall, which is my own Soil, and put my Hand through a Wall made of Lime and Laths which stands upon the Land in Question, and there deliver a Lease sealed to try the Title, this is a good Entry, tho' I do not come within the Plot in Question. *Ibid.*

If a Bastard Eigne after his Father's Death enters, and invites the Mulier Puisne to see the House, Pictures, &c. or to dine, hunt, hawk or sport with him, or the like, upon the Land descended, and the Mulier comes upon the Land accordingly; this is no Interruption of the Possession of the Bastard, because he came by his Consent, so that the coming upon the Land could be no Trespass. *Co. Lit. 245. b. 368. a.*

But if the Mulier of his own Head comes upon the Ground, and cuts down a Tree, or digs the Soil, or takes the Profits, these are Interruptions; for rather than the Bastard shall punish him in an Action of Trespass, these Acts shall amount to an Entry in Law. *Ibid. 245. b.*

Vide 3 Leon.
144.

So if a Mulier puts his Beasts into the Grounds, or Commands a Stranger to put in his Beasts, these Acts without Words amount to an Entry, for Acts without Words may make an Entry, but Words without an Act, viz. Entry on the Land, &c. cannot. *Ibid.*

If the Disseisor requests the Disseisee to go to the Cellar, and see the Antiquity of, &c. this is no Entry to abate an Affise brought by the Disseisee. *Pl. Com. 93.*

So if the Disseisee seeing several cut Wood upon the Land, goes upon the Land and admonishes them at their Peril to desist; this is no Entry to abate his Writ. *Ibid. 1 Bulst. 9. 2 Brownl. 231, 239.*

Such Entry as will abate a Writ ought to be unto the Thing demanded, and with an Intent to have the Thing demanded. *2 Bulst. 9. 2 Brownl. 231, 235.*

Where the Beasts of him that had a Right stray'd of their own accord into the Land, and it was held no Entry, vide 1 Leon. 110.

If the Office of Keeper of a Park is granted to one, who is thereof disseised, and he brings an Affise, and, pending this Affise, enters into the Park, kills a Stag, and takes

takes a Shoulder of it for his Fee, this is no such Entry as to abate his Writ, for that his Entry was not as an Officer *ad custodiend'*, but as a Wrong-doer to kill, &c.
1 *Bulst.* 4, 8, 9.

If a Man has Common in *J. S.*'s Lands, between twenty-fifth *March* and twenty-ninth *September*, and he brings an Affise for it, and at *Christmas* puts in his Beasts, this is no Entry to abate his Writ; for it cannot be intended for the same Common.
2 *Brownl.* 238.

If a Tenant for Life levies a Fine with Proclamations, and he in the Remainder within five Years after the Death of Tenant for Life directs one to deliver a Declaration in Ejectment to the Tenant in Possession, which is done accordingly, yet this is no Entry to avoid the Fine, tho' it was the Declaration which contained the Lease upon which the Ejectment was brought.

If a Disseisor leases several Parcels of Land to several Men for Years, and after the Disseisee enters upon *one* in the Name of *all*, this is a good Entry for the whole, because there is but one Tenant to the Precipe, who is the Disseisor, who is only Tenant of the Freehold. 2 *Danv.* 786.

Where an Entry into Part, shall be an Entry for the whole.

If he Leases the several Parcels for Life, the Entry upon one Lessee in the Name of the whole is good for no more than that Lessee had in his Possession. *Co. Lit.* 252. b. 1 *And.* 28. 4 *Leon.* 8.

But if his Entry was taken away in that one Parcel and not as to the others, then he gains no Possession in the others, but in that Parcel only. *Kelw.* 20. b.

Lessee for Years being in a House, let with a Close, the Lessor enters into the Close, and makes Livery; (Lessee being in the House) it is void as well for the Close as the House; for when a House and Land are demised, the House is the Principal, and the Land is the Accessory, and Possession of the House is a good Possession of the Land; for the Tenant cannot be in Possession of every Part of the Land at the same Time: But Possession of the House and some Part of the Land, is a good Possession of the Residue. 2 *Rep.* 31. b. *Moor pl.* 397. 2 *Roll. Abr.* 4. *Co. Lit.* 48. b. *Dyer* 18. b. *Bro. Tit. Feoffment* 66. But *Moor* 11. *contr.*

If a Man be Disseised of two several Acres (*tho' both lie in the same County*) by two several Persons, and after enters into one Acre in the Name of both, this is not an Entry into the other Acre, for the Entry of a Man to continue his Freehold or Inheritance must ensue his Action for Recovery of the same, and each Disseisor is a several Tenant of the Freehold; and as he must have several Actions against them for the Recovery of the Land, so his Entry must be several. *Co. Lit.* 252. b. *Kelw.* 20. b. 1 *And.* 28.

Where the Possession is in no Man, but the Freehold in Law is in the Heir who enters, (where the Ancestor died seised) there a general Entry into one Part reduces all into his Actual Possession. *Co. Lit.* 15. b. 1 *Lil. Conv.* 131. *Sed vide* 1 *Leon.* 265.

But if in this Case the Entry be special, *viz.* that he enters only into that Part and no more, this reduces that Part only into actual Possession. *Co. Lit.* 15. b.

Where an Entry shall vest or divest an Estate, there must be several Entries (*if the Lands are in the Possession of several Persons*) into the several Parcels of the Land in the several Tenants or other Persons Possessions. *Co. Lit.* 15. b. 1 *Lil. Conv.* 131.

For if the Lord enters into Parcel generally for a Mortmain, or the Feoffor for a Condition broken, or the Disseisee into Parcel, generally such Entry in these and the like Cases shall not vest or divest but for that Parcel. But where a Man dies seised of divers Parcels in Possession, and the Freehold in Law is cast upon the Heir, and the Possession in no Man, there the Entry into Parcel generally (*In the Name of all the Lands and Tenements in which he has a Right to enter, within all the Towns of the same County*) will vest the actual Possession of the whole; but if he enters only into that Parcel and no more, (*without saying in the Name of the whole,*) there it reduces that Parcel only into actual Possession. *Lit.* §. 417. *Co. Lit.* 15. b. 252. b. *Hardr.* 400. 1 *Lil. Conv.* 131, 132.

If a Man disseise me of one Acre at one Time, and after at another Time disseise me of another Acre in the same County, in this Case my Entry into one of them in the Name of both is good, for that one Affise lay against him for both Disseisins. *Co. Lit.* 252. b.

Otherwise if the several Acres lay in several Counties, for then there must be several Actions, and consequently several Entries. *Ibid.*

Anciently, if a Man had leased several Parcels of Land in a Town, for the Trial of the Title in an Ejectment, he ought to have entered into every Part, and then to have delivered the Lease of all. *Win. 50. Godb. 72. Vide 1 Sid. 223.*

If I enfeoff a Man of one Acre upon Condition, and at another Time I enfeoff him of another Acre in the same County, upon Condition also, and both Conditions are broken, an Entry into one Acre in the Name of both is not sufficient, but several Entries must be made in respect of the several Conditions. *Co. Lit. 252. b.*

But an Entry into Part of the Land in the Name of all the Land, subject to one Condition, is good, though the Parcels be several, and in several Towns. *Co. Lit. 252. b.*

If A. disseises B. of Lands in three Towns, and levies a Fine with Proclamations of the Lands in one Town to C. in Fee, and the Disseisee within five Years enters into the Lands in the other two Towns only (being in the Possession of the Disseisor) in the Name of all the Lands in the three Towns; by this the Estate of the Conusee in the third Town was not divested. *2 Danv. 787.*

Where an Entry by one shall serve for another.

If a Rent descends to an Aunt and Niece as Coparceners, and the Aunt has the Niece in Ward, (*viz.* as Guardian in Socage) and takes the Rent to her own Use, and never claims to the Use of the Niece, yet this Seisin of the Aunt shall be an actual Seisin for the Niece, for in Law the general Seisin of one is in both, and here is not any express Act that her Entry was to her own Use. *2 Danv. 792.*

If Lands descend to two Coparceners and a Stranger abates, and after one enters generally into the Land; this shall be an Entry for both, and settle the Possession in both. But if after such Abatement one Coparcener enters into the whole to her own Use, this shall not settle any Possession in the other, but all the Estate shall be in herself by the special Entry. *2 Danv. 792, 794.*

Where one Parcener after the Death of their Ancestor enters specially, claiming the whole Land and taking the whole Profits, she gains the Moiety of her Sister by Abatement. *Co. Lit. 243. b. 373. b. Dalt. 62.*

But where one Parcener is in Possession, and the other enters, and claims all expressly, this will not dispossess her Fellow, for her Possession is over all lawful as well before such Claim as after, so that there is no Possession altered by such Claim, and one Parcener, Jointenant or Tenant in Common, cannot disseise his Fellow but by an actual Ouster. *2 Danv. 794.*

When one Parcener enters generally and takes the Profits, this shall be accounted in Law the Entry of both, and no Divesting the Moiety of her Sister. *Co. Lit. 243. b. 273. b.*

And so, where the Husband of one of the Parceners enters. *Dalt. 62. Moor 59. pl. 268.*

If Lands come to two in Common, and one enters into it generally, this shall be an Entry for both. *2 Danv. 792.* A general Entry by one Tenant in Common, is an Entry for all the rest. *Carter 176.* For a general Entry shall always be taken according to Right, as being under Construction of Law, and therefore ever construed lawful. *Moor 868. pl. 1201.*

If a Man devised Lands held *in Capite* by Knights Service to his younger Son, the Devise was void for a third Part, and the Devisee entered generally into the whole, the Entry was in Law for the eldest also. So if the Devisee after his Entry makes a Lease for Years of the whole, yet this shall not be any such Explanation of his Entry, but that his Entry shall be said an Entry for both; and so if the Devisee levies a Fine of the Whole. *2 Danv. 793.*

But it is otherwise if a Parcener after such general Entry makes a Feoffment of the whole with Warranty, for this subsequent Act explains the Entry precedent into the whole, and by Construction of Law she only was seised of the Whole. *Co. Lit. 374. a.*

If a Man devises certain Annuities to his four Sons out of certain Lands, and devises further, that if his Heir does not pay the said Annuities, then his said Sons shall have the Land to them and the Survivor of them, and after the said Annuities are not paid, upon which one of the Sons enters generally; this shall be an Entry for all the four Sons, inasmuch as they are Jointenants. *2 Danv. 793.*

In what Cases the Entry of one, to the Use of another, settles the Possession in him without Agreement.

If a Baron enters to the Use of his Feme, where the Entry of the Feme is lawful, this settles the Possession in the Feme presently without any Agreement. *2 Danv. 787.*

And if a Feme enters in the Baron's Name, and he agrees to it afterwards, the Entry is good. *Cro. Eliz. 72.*

And if a Man enters to the Use of an Infant into Lands where his Entry is lawful, this settles the Possession in him before Agreement by the Infant. *2 Danv. 787.*

So if the Entry be to the Use of one of full Age, where his Entry is lawful, this vests the Possession in him before Agreement. *2 Danv. 787.*

If a Man enters to the Use of one of the Plaintiffs, where his Entry is not lawful, this vests nothing in him before Agreement, because he shall be a Disseisor by the Abatement. *2 Danv. 788.*

So if a Man enters to the Use of an Infant, where his Entry is not lawful, this vests no Possession in the Infant. *Ibid.*

If a Man disseises me, and I make continual Claim, and after he dies, and this descends to two Coparceners, upon which I enter, by which the Coparcenary is defeated, if after one enters claiming to the Use of herself and Coparcener, yet nothing vests in the other before Agreement, for their Entry is not lawful. *2 Danv. 788.*

So if a Man enters upon two Jointenants, where his Entry is lawful, by which the Jointenancy is defeated, if after one enters to the Use of both, yet nothing vests in the other before Agreement. *Ibid.*

If two Coparceners have a Right of Action to certain Land, but their Entry is not lawful, and the one enters claiming to the Use of both, yet nothing vests in the other till Agreement. *2 Danv. 788.*

If two Jointenants are disseised, and the Disseisor aliens, and one Jointenant enters upon the Alienee to the Use of both, this settles the Freehold in both. *Ibid.*

If a Man commands *J. S.* to enter into certain Lands in his Name, if he hath Right, otherwise not, if he enters accordingly, yet if the Commander hath no Right, no Estate vests in him by this Entry, because his Command was conditional. *Ibid.*

A Stranger cannot enter upon the Bastard in the Name of the Mulier without his Command, for that the Bastard may gain the Estate, and bar the Mulier. *Co. Lit. 245. a.*

A Stranger of his own Head cannot enter in the Name of him that hath Right to avoid a Fine. *Co. Lit. 245. a.* This was grounded upon the Stat. *4 H. 7. c. 24.* for by that Statute a Fine shall bind, unless avoided by Entry, Claim or Action of him who has Right thereto within the five Years. For tho' he has a Right of Entry, which naturally by the Common Law might have been reduced into Possession by the Entry of a Stranger in his Name, yet it is not so in Case of a Claim to avoid a Fine, because by the Body of the Statute of Fines the Right is bound, unless the Party lays claim within five Years; so that an Election is given to the Party who has Right, whether he will be bound or not, which Election a Stranger without his Direction cannot make for him. *Moor 457. pl. 630.* The Agreement of the Disseisee to the Entry would not perfect it, so as to avoid the Fine. *Sed Q.* if the Agreement had been within the five Years, for it did not there appear at what Time the Disseisee agreed. *Poph. 108.*

But in these Cases, if the Mulier agrees to the Entry before the Descent, and he that has Right enters before the five Years are past, the Estate both of the Bastard and of the Conusee shall be avoided by such Entry. *Co. Lit. 245. a.*

But now by Stat. *4 & 5 Ann. c. 16. §. 16.* it is Enacted, that no Claim, or Entry to be made upon Lands, Tenements or Hereditaments, shall be of any Force or Effect to avoid any Fine levied with Proclamations * according to the Form of the Statute in that Case provided in the Court of Common Pleas at Westminster, or the Court of Sessions in any of the Counties Palatine, or in the Courts of the Grand Sessions in Wales, of any Lands, Tenements or Hereditaments, or shall be a sufficient Entry or Claim, within the Statute *21 Jac. 1. of Limitations, &c.* unless upon such Entry or Claim, an Action shall be commenced within one Year next after making such Entry or Claim, and prosecuted with effect.

* This does not extend to other Fines.

If an Infant makes a Feoffment in Fee, a Stranger of his own Head cannot enter to the Use of the Infant, for the Estate is voidable. *Co. Lit. 245. a.*

So if a Tenant for Life makes a Feoffment in Fee, a Stranger may enter for a Forfeiture in the Name of him in Reversion, and thereby the Estate shall be vested in him. *Ibid.*

If a Copyholder in *Borough-English* surrenders to the Use of his Will, and having three Sons, devises to the middle Son in Fee, upon Condition that he shall pay to his Daughters *20 l.* if the Money is not paid, a Stranger without the Command of the Eldest cannot enter for him, because he has only a Title of Entry. *Cro. Jac. 56, 57.* adjudged, where the Youngest Son, without the Command of the Daughters and

Heirs of the Eldest (who was Dead), entred, and the Daughters afterwards disaffessed.

What is a good Agreement to settle an Estate, where the Entry is to the Use of another.

If a Man disseises another to the Use of Baron and Feme, and they agree to this, the Estate is in both; but if to the Use of a Feme Covert, the Agreement of the Feme without the Husband will not settle the Estate in the Feme, because the Agreement is void, for her Will is transferred to the Baron: But in this Case, the Agreement of the Baron will settle the Estate in the Feme, though she is no disseisor's thereby, for the whole Will of the Feme is put in the Baron during the Coverture, and he may agree to the Feoffment made to the Wife. 2 *Danv.* 789.

If the Baron disseises another to the Use of the Feme, this shall settle the Estate in the Feme; for the Baron upon a Disseisin by another by his Agreement might have settled the Estate in the Feme, and this Disseisin to the Use of the Feme is an Agreement in Law. *Ibid.*

If a Baron and Feme enter into Land in the Right of the Feme where the Feme has no Right, the Feme is Tenant of the Land thereby. 2 *Danv.* 789.

If a Baron seised in the Right of the Feme aliens in Fee; and after disseises the Discontinuee, claiming his first Estate, without saying any Thing of the Feme, this shall vest nothing of the Tenancy in the Feme, because he does not claim by express Words in the Name of the Feme. *Ibid.*

If a Man enfeoffs Baron and Feme of a Manor, and after the Baron and Feme, by colour of this Feoffment, enter into Lands which are not Parcel of the Manor, but they thought they were, yet the Feme shall gain nothing in the Land by this but the whole Estate is in the Baron. 22 *Aff.* 1. 2 *Danv.* 790.

If the Guardian enters, and disseises a Man claiming the Freehold to the Use of the Heir, this settles the Freehold in the Heir. 2 *Danv.* 790.

If a Man leases Lands for Years to *I. S.* and delivers the Deed to *I. D.* to the Use of *I. S.* and after *I. D.* enters into the Land to the Use of *I. S.* without Commandment of *I. S.* and is ejected, and after *I. S.* assents thereto, he shall have an *Ejectione Firmæ* upon the said Ejectment. *Ibid.*

Of what Things Advantage may be taken without an Entry.

If a Man is disseised of Lands whereunto a Common is appendant, the Disseisee cannot use the Common 'till he enters into the Land to which it is appendant, because it might be a Prejudice to the Tenant of the Soil, for if the Disseisee might do it, so might the Disseisor, which would be a double Charge to the Tenant. *Co. Lit.* 122. *b.*

But if a Man is Disseised of a Manor to which there is an Advowson appendant, he may present to the Advowson before he enters into the Manor. *Ibid.*

In what Cases an Estate shall be in a Person without Entry or Claim.

If a Man seised in Fee of Land bargains and sells it by Deed inrolled, and dies, the Freehold is in the Bargainee before Entry or Claim, *viz.* a Freehold in Law. 3 *Danv.* 163.

So in Case of a Devise. *Ibid.*

So where Uses are raised by Covenant upon a good Consideration. *Co. Lit.* 266. *b.*

And so upon a Bargain and Sale of Lands for Years, the Possession is in the Bargainee before Entry. 1 *Danv.* 621.

If the Disseisor dies seised, and the Lands descend to his Son, he has the Freehold in Law in him before any Entry. *Lit.* §. 448.

If a Fine *Sur Connaissance de droit come ceo*, &c. or a Fine *Sur Connaissance de droit tantum*, is levied to one, these are Feoffments of Record, and the Conusee has a Freehold in Law (*but not the actual Freehold.* *Cro. Jac.* 604.) in him before Entry. *Co. Lit.* 266. *b.*

Upon an Exchange, the Parties have neither Freehold in Deed or Law before Entry. *Ibid.*

So upon a Partition, the Freehold is not removed 'till Entry. *Co. Lit.* 266.

Upon a Livery with View no Freehold vests before Entry. *Ibid.*

If an Estate be conveyed to a Feme Covert, it vests in her presently before any Agreement thereto by the Husband, subject to be divested by his Dissent thereto. *Co. Lit.* 3. *a.* 356. *b.*

If *A.* disseises one to the Use of *B.* who knows nothing of it, and *B.* assents thereto, in this Case *A.* is Tenant of the Land 'till Agreement, and after *B.* is Tenant thereof. *Co. Lit.* 180. *b.*

If there be Tenant in Tail, Remainder in Tail, &c. and Tenant in Tail in Possession leases for three Lives, according to the Stat. 32 *H.* 8. and afterwards dies without Issue, and he in Remainder before any Entry, levies a Fine, it is good; for

for by the Death of Tenant in Tail without Issue, the Freehold was vested in him in Remainder in Tail. 1 *Leon.* 268.

If Lessee for Years surrenders, to which the Lessor agrees, the Possession and Interest is in the Lessor without Entry. *Hut.* 95.

So if the Lessee for Years assigns, the Assignee before Entry, or Waiver of the Possession by Lessee, has an actual Estate in him. 2 *Roll. Abr.* 495.

If Tenant for Life surrenders to him in Remainder, this will vest the Estate in him before Notice or Agreement thereto, as the Grant of Goods made in the Absence of the Grantee vests the Property, and a Bond made to Obligee in his Absence creates a Lien before Notice. *Salk.* 618.

If Lessee for Life aliens for Life, the Remainder over, and Remainder enters after the Death of the Lessee, the first Lessor may enter on him for the Forfeiture; for by Agreement to the Remainder he agreed to the Whole, and so a Party. 3 *Danv.* 227.

If the Lessor may enter on the Alienee of his Lessee, or any who is Party to the Forfeiture. *Ibid.*

So he may enter on the Alienee of the Alienee, or any that has the Land, altho' he be not Party to the Forfeiture. 3 *Danv.* 228.

If Lessee for Life gives in Tail, the Remainder in Fee to another, and afterwards he in Remainder dies, and afterwards the Donee dies without Issue, the Lessor may enter on the Heir of him in Remainder; for by his Entry he agrees to the Disinheritance made by the Alienation. *Ibid.*

If Tenant for Life gives it in Tail, and the Donee dies, the Lessor may enter on the Donor for the Forfeiture. *Ibid.*

Where a Tenant for Life makes a Feoffment in Fee, a Stranger may enter for a Forfeiture in the Name of the Reversioner, and thereby the Estate shall be in him. *Co. Lit.* 245. a.

If a Lessee for Life aliens in Fee and dies, he in Remainder or Reversion may enter after the Death of the Lessee. 3 *Danv.* 228.

If Tenant for Life of an Advowson in Gros levies a Fine come ceo, &c. of it, and before any Claim made by him in Reversion, the Church becomes void; afterwards he in Reversion shall not have Advantage of the Forfeiture as to the present Presentation, because before Election made by him in Reversion, the Estate of the Lessee was not defeated nor destroyed, which Election ought to be by Claim; and then it was a Chattel vested in the Lessee before the Election made by him in Reversion, which cannot be defeated afterwards by the Presentation of him in Reversion. *Ibid.*

If A. being Tenant for Life, leases to B. for his Life, and B. dies, and A. re-enters; yet the Forfeiture remains, and the first Lessor may enter. *Co. Lit.* 252. a.

If Tenant for Life suffers a common Recovery, and Execution is thereupon had, yet he in Remainder may enter; for being a Forfeiture, the Suing Execution will not prevent him. *Hil.* 32 *Eliz.* 1 *Co.* 14, 15. adjudged; tho' it appeared the Recovery was suffered before the Statute of 14 *Eliz.*

If a Man leases two Mills, upon Condition that if the Lessee leases them, or assigns either of them to another, it shall be lawful for him to re-enter: If he leases one, the Lessor may enter into both, for the Condition goes to both. 2 *Danv.* 121.

If A. leases a Messuage for Years, rendering Rent, with a Condition of Re-entry for Non-payment; and the Lessee assigns his Term in Part to one, and in other Part to another, and in another Part to another, and retains Part himself, and after A. by Fine grants the Reversion of the Whole: If Rent be in Arrear, afterwards the Grantee may enter into all the Messuage; for the Lessee, by Apportionment of the Land, cannot destroy the Condition, as the Lessor may by Grant of Part of the Reversion. *Palm.* 382.

If there be two Lessees for Years, upon Condition that they, nor either of them, shall not alien without Assent of the Lessor, and they make Partition; and afterwards one aliens without Assent of the Lessor; this is a Forfeiture of the Whole. *Cro. El.* 163.

Where an actual Entry ought to be made to avoid a Condition, &c. there the Confession of Lease, Entry and Ouster, will not do. 1 *Vent.* 332. 1 *Saund.* 319. 1 *Sid.* 223. 1 *Mod.* 10. 1 *Vent.* 42. 3 *Keb.* 218. 1 *Salk.* 246. *Skin.* 424.

The Successor of a Bishop for a Breach of a Condition in Time of his Predecessor, or in Time of Vacation, may enter. *Moor* 52. pl. 152.

If a Feoffment be made upon Condition to enfeoff a Stranger, and the Feoffee does not perform it, the Stranger cannot enter for the Breach of it, because he is a Stranger

By whom and on whom an Entry may be for a Forfeiture.

At what Time an Entry may be for a Forfeiture.

Entry for the Breach of a Condition. 1. In what Cases it may be.

2. Who may enter.

Stranger to the Condition; but in this Case the Feoffor himself may enter for the Condition broke. 2 *Danv.* 122.

If the Condition of a Feoffment be to enfeoff *J. S.* and his Heirs, and he refuses, the Feoffor may re-enter; for by the express Intent of the Condition, the Feoffee should not have any Benefit, but only an Instrument to convey over the Land. *Co. Lit.* 209. a. 1 *Leon.* 266. 2 *Leon.* 222. 1 *Roll. Abr.* 452. pl. 4.

But if the Condition had been to make a Gift in Tail, or to grant a Rent-Charge to *J. S.* and he refused, the Feoffor should not re-enter, because the Feoffor was to retain the Land. *Co. Lit.* 209. a. 1 *Leon.* 266. 2 *Leon.* 222. 1 *Roll. Abr.* 452.

He in Remainder cannot enter for a Condition broke by the particular Estate. 2 *Danv.* 122.

If the King's Tenant aliens upon Condition, and dies, his Heir in Ward to the King for other Land, the King may enter in the Right of the Heir for the Condition broke. *Ibid.*

And if such Tenant aliens in Fee upon Condition, and dies, his Heir within Age, the King may enter in the Right of the Heir for the Condition broke. *Ibid.*

If a Man leases for Years, upon Condition if the Rent be in Arrear, that the Lease shall cease, and after grants over the Reversion; and after the Condition is broke, the Grantee of the Reversion may enter into the Land, for the Lease is determined before Entry, by the Breach of the Condition. *Ibid.*

Otherwise, if a Lease for Life, because a Freehold cannot cease before Entry. *Co. Lit.* 214. b. 2 *Leon.* 134. 1 *Roll. Rep.* 360.

If a Man seised of Lands in Right of his Wife makes a Feoffment in Fee upon Condition, and dies; and after the Condition is broke, the Heir of the Husband shall enter; for tho' no Right descended to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reserved to the Feoffor and his Heirs, descended. 8 *Co.* 43. b. 44. a.

So if a Man makes a Feoffment in Fee of Lands in *Borough-Englisch*, &c. the Heir at Common Law shall enter. *Godb.* 3. Q. If the younger Son after shall enter upon him.

If a Man seised in Fee makes a Lease for Life, rendring Rent, and for Default of Payment, a Re-entry, &c. and after dies without Heir, living the Tenant for Life: Tho' the Lord by Escheat shall have the Rent, as incident to the Reversion, and may distrain for it, yet he cannot enter, &c. *Lit.* §. 348. *Co. Lit.* 215. b.

A Bailiff, without a particular Authority for that Purpose, cannot enter for Non-payment of Rent. *Hob.* 154. 5 *Rep.* 76. a.

3. At what Time.

If *A.* makes a Feoffment of Land to *J. S.* in Fee, upon Condition that if he pays 10 *l.* to *J. S.* the first of May, 6 *Car.* that it shall be lawful for him to re-enter, and after he pays the 10 *l.* before the Day, viz. the first of April, and *J. S.* accepts it: Tho' this is a good Performance of the Condition, inasmuch as Payment before the Day is Payment at the Day, yet *A.* cannot re-enter and reveist his old Estate by Force of the Condition till the first of May, because the Condition does not give him Power to re-enter till the said Day. 2 *Danv.* 121.

Where a Demand must be made before Re-entry.

A Rent-Charge is not a personal Duty to be demanded of the Person, but upon the Land, and a Distress is both a Demand and a Distress; and the Party may demand it at any Time. 1 *Lit. Conv.* 137.

Where a Rent is granted, payable at a certain Day, if it be behind and unpaid, the Grantee shall distrain for it: The Grantee need not demand it at the Day, but at any Time after it is due, which will be sufficient; for the Grantee may demand it when he will, to enable him to distrain. *Co. Lit.* 202. a.

But where a Penalty or Re-entry is joined to the Thing, you cannot take Advantage of the Pain or Forfeiture without a Demand at the very Time prefixt. *Hob.* 207, 331. *Hutt.* 13, 23, 42, 114. 7 *Co.* 56. b. 2 *Roll. Abr.* 42. *Moor* 883. *Dyer* 51. *Plowd.* 70.

Where a Feoffment is made reserving a Rent upon Condition, that if the Rent is behind, it shall be lawful for the Feoffor and his Heirs to enter. Now, if the Rent be behind, the Feoffor or his Heirs may enter and oust the Feoffee. *Lit.* §. 325. *Co. Lit.* 201. b. 202. a. *Hob.* 207, 331. 5 *Co.* 56. *Dyer* 51.

If the Words of a Lease for Years be, *That the Lease should be void*, yet the Non-payment is no Avoidance without a Demand and a Re-entry. 1 *Lit. Conv.* 137.

In Case of a Demand of Rent, these Things are to be observed :

First, That tho' the Rent is behind, yet if the Feoffor or his Heirs do not demand it, he shall never re-enter ; for the Land is the principal Debtor, and the Rent issues out of the Land ; and in an Affise for the Rent the Land shall be put in View, and if the Land be evicted by a Title Paramount, the Rent is avoided, and after such Eviction the Person of the Feoffee shall not be charged therewith, for the Person of the Feoffee was only charged with the Rent in Respect of the Grant out of the Land. *Co. Lit. 201. b.* And in Case of an Entry for a Condition broken on the Non-payment of Rent, you ought to demand but the last Quarter's Rent, and not all the Rent due ; for a Default of any one Quarter's Rent (upon Demand) gives a Title of Entry. *1 Lil. Conv. 137.*

Things to be
observed on
demanding
Rent.

Secondly, That the Demand must be upon the Land, because the Land is the Debtor, and that is the Place of Demand appointed by Law. If the King makes a Lease for Years, rendring a Rent payable at his Receipt at *Westminster*, and after the King grants the Reversion to another and his Heirs, the Grantee shall demand the Rent upon the Land, and not at the King's Receipt at *Westminster* ; for as the Law without exprefs Words does appoint the Lessee in the King's Case to pay it at the King's Receipt, so in Case of a Subject, the Law appoints the Demand to be on the Land. If there is a House upon the same, the Demand must be at the Fore-door of the House, that being the most notorious Place, and it is no Matter whether any Body be there or no ; and altho' the Door be open, and the Feoffee in his Hall, or other Part of his House, yet the Feoffor need not come any further than the Fore-door. *Co. Lit. 201. b.* And if the Feoffment was made of a Wood only, the Demand must be made at the Gate of the Wood, or at some Highway leading through the Wood or other most notorious Place. And if one Place be as notorious as another, the Feoffor has Election to demand it at which he will ; and altho' the Feoffee be in some other Part of the Wood ready to pay the Rent, yet that shall not avail him. *Et sic de similibus. Co. Lit. 202. a.*

Thirdly, That if the Feoffor demand it on the Ground at a Place which is not most notorious, at the Back-door of a House, &c. and in Pleading the Feoffor alleges a Demand of the Rent generally at the House, the Feoffee may traverse the Demand, and upon the Evidence it shall be found for him, for that is a void Demand. *Co. Lit. 202. a.*

Fourthly, That if the Rent be reserved to be paid at any Place from the Land, yet it is in Law a Rent, and the Feoffor must demand it at the Place appointed by the Parties, observing that which has been said before concerning the most notorious Place. *Co. Lit. 202. a.*

Fifthly, That all this is to be understood when the Feoffee is absent ; for if the Feoffee comes to the Feoffor at any Place upon any Part of the Ground at the Day of Payment, and offer his Rent, altho' they be not at the most notorious Place, nor at the last instant, the Feoffor is bound to receive it, or else he shall not take any Advantage of any Demand of the Rent for that Day. *Co. Lit. 202. a.*

Sixthly, And that the Place of Demand being now known, it is further to be known what Time the Law has appointed for the same. This partly appears by what has been said, for altho' the last Time of Demand of the Rent is such a convenient Time before the Sun-setting of the last Day of Payment as the Money may be numbered and received, notwithstanding if the Tender be made to him that is to receive it upon any Part of the Land at any Time of the last Day of Payment, and he refuseth, the Condition is saved for that Time, for by the exprefs Reservation the Money is to be paid on the Day indefinitely, and a convenient Time before the last instant, is the uttermost Time appointed by Law, to the Intent that then both Parties should meet together, the one to demand and receive, and the other to pay it, so as the one should not prevent the other. But if the Parties meet upon any Part of the Land whatsoever on the same Day, the Tender shall save the Condition for ever for that Time. And if the Reservation of the Rent be at certain Feasts, with Condition, that if it happen the Rent to be behind by the Space of a Week after any Day of Payment, &c. In this Case the Feoffor needs not demand it on the Feast-Day, but the uttermost Time for the Demand is a convenient Time before the last Day of the Week, unless before that the Feoffee meets the Feoffor upon the Land and tender the Rent as aforesaid. And if a Rent be granted payable at a certain Day, if it be behind and demanded, that the Grantee shall distrain for it ; in this Case the Grantee needs not demand it at the Day ; but if he demand it at any

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Time

How he who enters for a Condition broken shall be said to be in,
(1.) Of the same Estate.

Time after, he shall distrain for it; for the Grantee has Election in this Case to demand it when he will to enable him to distrain. *Co. Lit. 202. a.*

Regularly it is true that he who enters for a Condition broken shall be seised in his first Estate, or of that Estate which he had at the Time of the Estate made upon Condition; but this fails in many Cases. *Co. Lit. 202. a. 2 Danv. 123.*

First, In Respect of Impossibility; As if a Man seised of Lands in the Right of his Wife, makes a Feoffment in Fee by Deed indented, upon Condition that the Feoffee should demise the Land to the Feoffor for his Life, &c. the Husband dies, the Condition is broken; in this Case the Heir of the Husband shall enter for the Condition broken, but it is impossible for him to have the Estate that the Feoffor had at the Time of making the Condition: For therein he had but an Estate in Right of his Wife, which by the Coverture was dissolved, and therefore when the Heir has entered for the Condition broken and defeated the Feoffment, his Estate vanishes, and presently the Estate is vested in the Wife. *Co. Lit. 202. a.*

So if a Man seised of Lands as Heir on the Part of his Mother, makes a Feoffment in Fee upon Condition, and dies, the Heir on the Part of the Father, who is Heir at Common Law, shall enter for the Condition broken, but the Heir of the Part of the Mother shall enter upon him, and shall enjoy the Land. *Co. Lit. 12. b.*

Secondly, In Respect of Necessity; As if *Cestuy que use* after the Statute of R. 3. and before the Statute of 27 H. 8. had made a Feoffment in Fee upon Condition, and after had entered for a Condition broken, in this Case he had but an Use where the Feoffment was made, but now he shall be seised of the whole Estate of the Land. So that as in the former Case, the Ancestor had somewhat at the making of the Condition, and the Heir shall have nothing when he has entered for the Condition broken, so in this Case the Feoffor had no Estate or Interest in the Land at the Time of the Condition made, but a bare Use; yet after this Entry for the Condition broken he shall be seised of the whole Estate in the Land, and that also for Necessity; for by the Feoffment in Fee of *Cestuy que Use*, the whole Estate and Right was vested out of the Feoffees, and therefore of Necessity the Feoffor must gain the whole Estate by his Entry for the Condition broken. *Co. Lit. 202. a.*

A Remainder is granted upon Condition; and after the particular Estate determines, and the Condition is broken, the Grantor shall have the Land in Possession. *2 Roll. Rep. 60.*

A Condition or Limitation annexed to an Estate ought to destroy the whole Estate. *1 Rep. 86. b. 6 Rep. 40. b.*

If an Estate for Life be upon Condition, the Remainder over; admitting it a good Condition, if he enters for Breach thereof, it shall defeat the Remainder, because the Livery is defeated. *2 Danv. 123.*

A Gift in Tail, Remainder to the right Heir of the Donee, upon Condition that if the Donee or his Heir alien, &c. this shall defeat the Tail only. *2 Danv. 123.*

Lessee for Life makes a Feoffment upon Condition, and enters for Breach, he shall be Lessee for Life, and reduce the Reversion to the Lessor. *2 Danv. 123.*

If Lessee for Life infeoffs the Reversioner upon Condition, and enters for Breach thereof, he shall be Lessee again, and the Rent due to the Lessor shall be revived. *2 Danv. 123.*

Feoffment of two Acres upon Condition to enter into one; if he enters for Breach thereof, it shall be but into one. *2 Danv. 123.*

Lessee for Life and the Reversioner join in a Feoffment upon Condition, reserved to the Lessee: If he enters for Breach thereof, this shall not defeat the intire Estate. *2 Danv. 123.*

Devise for Life upon Condition, Remainder over, (admitting it a good Condition;) the Entry shall defeat the Remainder, tho' it is not created by Livery, and the Remainder may be without a particular Estate by Devise, for he ought to be in of the same Estate which he had at the Time of the Devise. *2 Danv. 123.*

If a Man leases for Life, the Remainder to another in Fee, reserving a Rent, upon Condition that if the Rent be in Arrear, to enter and retain for all the Life of the Lessee: If he enters for the Condition broke, he shall defeat the Remainder, and shall be seised in Fee. *Dubitatur 29 Aff. 17. 2 Danv. 124.*

Tenant in special Tail has Issue, his Wife dies, and he makes a Feoffment in Fee upon Condition; the Issue dies, the Condition is broke, the Feoffor re-enters; he shall be only Tenant in Tail after Possibility of Issue extinct, though when he made the Feoffment he had an Estate-Tail. *Co. Lit. 202. a. b.*

If a Man makes a Feoffment in Fee, reserving Rent, upon Condition if the Rent be not paid, to re-enter, and hold 'till satisfied, &c. The Feoffor by his Re-entry gains no Estate of Freehold, but only an Interest by the Agreement of the Parties to take the Profits in Nature of a Distress. *Co. Lit. 202. b. 203. a.*

And if a Man makes a Gift in Tail to A. Remainder to A. and his Heirs, upon Condition that he shall not alien: The Condition is good, as to restrain any Discontinuance of the Estate-Tail; but as to the Fee-simple, it is void and repugnant; and therefore some are of Opinion, that this is a good Condition, and that it shall defeat the Alienation for the Estate-Tail only, and leave a Fee-simple in the Alienee. *Co. Lit. 224. a.*

By special Words the Condition may extend to the particular Estate, or to the Remainder only. *Co. Lit. 230. b.*

If the Father surrenders Copyhold Lands to the Use of the Son in Fee, upon Condition that he shall perform certain Covenants, and the Son after Admittance surrenders to the Use of A. in Fee, upon Condition that if the Son pays 10 l. the Surrender shall be void; and the Son pays not the 10 l. nor performs the Covenants, and the Father enters, and dies seised, and it descends to the Son; yet A. cannot enter upon him, for by the Entry of the Father, both the Surrenders were defeated, and the Son may confess and avoid the Estate of A. *Cro. Eliz. 239.*

A Man being intitled to be Tenant by the Curtesy, makes a Feoffment in Fee on Condition, and enters for the Condition broke, and then his Wife dies, he shall not be Tenant by the Curtesy; for tho' the Estate given by the Feoffment was conditional, yet his Title to be Tenant by the Curtesy was absolutely extinct by the Feoffment. *Co. Lit. 30.*

(2.) In respect of Collateral Qualities.

Tenant by Homage Ancestrel makes a Feoffment in Fee upon Condition, and enters for the Condition broke, it shall not be holden by Homage Ancestrel again, for the Right of the Prescription and Privy of Estate were interrupted for the Time. (*Co. Lit. 202. b.*) So if a Copyhold Escheats, and the Lord makes a Feoffment in Fee upon Condition, &c. (*Ibid. 103. a. 202. b.*) For notwithstanding the Entry for the Condition broke the Seignior is extinct, for that was exclusively extinct by the Feoffment. *Co. Lit. 30. b.*

If a Tenant for Life makes a Feoffment in Fee upon Condition, and enters for the Condition broke, he shall be Tenant for Life again, but subject to the Forfeiture; for though the Estate is reduced, yet the Forfeiture is not purged. *Co. Lit. 202. b. 252. a.*

If the Conusee of a Statute, &c. or he that has Lands 'till such a Sum levied, surrenders to the Reversioner upon Condition, and after enters for the Condition broke; he shall not hold over after the Extent incurred, or such Time as the Money might have been levied. *4 Co. 82. b.*

If a Lessee for Life or Years, upon Condition to have a Fee, if, &c. grants his Estate upon Condition, and after enters for the Condition broke, and performs the first Condition; perhaps the Fee will accrue, for the Possibility was not absolutely destroyed; and when he enters for the Condition broken, he is in of his old Estate. *8 Rep. 75. b.*

If the Baron be infeoffed in Fee, upon Condition for the Nonpayment of a certain Rent to re-enter, and after the Baron dies; and after the Condition is broke, and the Feoffor enters upon the Heir for the Breach thereof, the Wife of the Baron shall not be endowed, for her Title is defeated by the Entry for the Condition broke. *2 Danv. 123.*

What Things shall be avoided by Entry for the Condition broke.

Where an Estate for Years, raised out of the Lands of Inheritance, is in Trustees, who were never in Possession, but suffered the *Cestuy que trust* to receive the Profits during his Life, and the Administrator of *Cestuy que trust* (who had no Right to enter) enters and keeps Possession; and the Heirs at Law have prevailed with the surviving Trustee to assign over to a Person in Trust for them, the Term of Years upon Trust, that the Assignee shall perform such Trusts as the same Term is subject to: Now a Bargain and Sale of the Term to the Assignee of the Term, (a) will not pass the Estate, unless the same is sealed upon the Land, and to that Purpose, if the Grantor cannot be upon the Land, to deliver the Deed himself, then he must Sign and Seal

Where Trustees for Years never entred, but suffered Cestuy que Trust to take the Profits, how the Trustees may assign over this Term.

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(a) When the Bargainor is out of Possession: So also of a Bargain and Sale of Inheritance. *3 Lev. 387, 388, 312. 1 Lev. 270, 271, 272.*

How to enter
into, and take
Possession of
Lands, and
execute a
Deed there-
upon.

(but not deliver) the Deed of Assignment (a), and then make a Letter of Attorney of the same Date, to some Person to enter upon the Land and take Possession for him, and then being in Possession the Attorney to deliver the Deed upon the Ground, as the Act and Deed of the Grantor.

The Manner of the Entry and taking of Possession, and executing of the Deed, must be as followeth; If there are several Houses and several Lands in the Possession of several Tenants or Persons, you must make your Entry at every House, and say these Words, *I do here Enter and take Possession of this House, and the Land therewith used, to the Use of A. B.* If there is Land let without the House, then You must enter in at the Gate of the Close, and make your Entry in the Manner aforesaid; and to this Entry you must have two, three or more Witnesses, and leave a Man upon the Ground, to keep the Possession for you, 'till you are gone; and when you have done the same, and left a Man upon the Ground to keep Possession for you, at every one of the Houses, or Parcels of Land (if in the Possession of the several Persons) but the last House or Parcel of Land that you go to; and when at the last House, or Parcel of Land, when you have made your Entry, you must (*viz.* the Attorney) say, *That by Virtue of the Letter of Attorney (See the Form in the second Part) made to me for that Purpose, I deliver this Writing (you then standing upon the Ground) as the Act and Deed of the Grantor;* and then you must make a Memorandum on the back of the Deed, that (such a Day) by Virtue of a Warrant of Attorney to you made and directed, bearing Date, &c. You did enter into, &c. (put in the Words of the Authority given in the Letter of Attorney) and let the Witnesses set their Names thereto, as Witnesses; when this is done, go to every one of the Places, where you left the several Persons to keep the Possession, and take them away with you; you must take care they do not stir off from the Ground 'till you fetch them off. 1 Lil. Conv. 136. See *Winch 50. in the Middle of the Folio at the Word, Nota.*

(C) Forcible Entry and Detainer.

Forcible En-
try and De-
tainer.

A Forcible Entry is, when one or more Persons furnished with unusual Weapons, do violently enter the House or Land of another, or do use violent and threatening Words to the Terror of another, and by that Means gain the Possession; or if one or more do enter peaceably, and then forcibly put another out of his Possession, &c. *Wood's Inst. B. 3. c. 3.*

A Forcible Detainer is, where one or more have enter'd peaceably, and detain the Possession with Force, with Arms, or with an unusual number of People, or with Threatnings to defend it, &c. *Wood's Inst. B. 3. c. 3.*

This was no Crime at Common Law where one had a Title, and Entry was lawful. But now this is made an Offence by Statutes; For,

By Stat. 5 Rich. 2. c. 7. *None shall enter into Lands or Tenements, but where Entry is given by Law, and in a peaceable Manner, upon Pain of Imprisonment and Ransom at the King's Will.*

Here was no Remedy but upon a general Inquiry in the Quarter-Sessions, or by Indictment or Action. Therefore,

By Stat. 15 Rich. 2. c. 2. *When a Forcible Entry is made into Lands, Benefices or Offices of the Church, one or more Justices of the Peace, taking sufficient Power; and going to the Place so kept by Force, and finding any that hold such Places forcibly, may commit the Offender to the next Gaol, there to remain convict by the Record of the Justice, &c. 'till he hath made Fine and Ransom to the King. And all People of the County shall be assisting to the Justice, to arrest such Offender, upon Pain of Fine and Imprisonment.*

The same Justice may assess the Fine for this Offence.

But neither of these Statutes extended to those that enter'd peaceably and detained with Force, nor gave any Remedy, if the Parties, who made the Entry with Force,

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(a) See the Manner of indorsing the Deed in Part II. Tit. Indorsements. But where a Deed was delivered off from the Land, as an Escrow to a Stranger, commanding him to enter upon the Land and there deliver it as his Deed; it was moved that this was void; for that when it is delivered as an Escrow, and afterwards delivered upon the Land as the Deed of the Disfeisee, that has Relation to the Time of delivering it as an Escrow, at which Time he had but a Right to the Lands, not having entred; but per Anderson C. J. It is a good Lease for it is not his Deed 'till the second Delivery. Cro. Eliz. 446, 447.

removed before the coming of the Justices; nor did they give the Justices any Power to restore the Party ejected; nor ordained any Penalty against the Sheriff, if he did not obey the Precepts of the Justices, in the Execution of the said Statutes. Wherefore,

By Stat. 8 H. 6. c. 9. Upon Complaint made to the Justices, or one of them, of a Forcible Entry or Detainer, by the Party grieved, they or one of them shall cause the Statute of the 15 Rich. 2. ch. 2. to be duly executed at the Costs of the Party grieved.

And when Complaint is made of any such Entry or Detainer to any Justice or Justices, He or They, by Warrant or Precept, shall command the Sheriff, to summons a sufficient Jury to enquire of the Force committed; and upon Force found, the Justice or Justices shall cause the Lands, &c. to be re-seised, and shall put the Party disseised in Possession, in the Absence as well as Presence of the Party offending.

The Justices are to restore the Possession, and not to inquire into the Title of either of the Parties.

Provided that this Statute shall not endamage any, where They or their Ancestors have continued their Possessions of the same for three Years.

But if the Disseisee within the three Years makes lawful Claim, this is an Interruption of his Possession.

By Stat. 31 Eliz. ch. 11. There shall be no Restitution upon an Indictment of Forcible Entry or Forcible Detainer, where the Defendant hath been in quiet Possession for three whole Years together next before the Day of such Indictment so found, and his Estate therein not ended; which the Party indicted may alledge for Stay of Restitution; and Restitution is to stay, till that be tried, if the other will traverse the same, &c.

By Stat. 21 Jac. 1. ch. 15. Upon Forcible Entry or Detainer, a Justice, &c. hath Power, upon Indictment found, to give Restitution of Possession to Tenants for Years, by Elegit, Statute Merchant or Staple, Tenant by Copy of Court-Roll, as well as to those that Claim Freehold or Inheritance.

So that now a compleat Remedy is given against those who enter with Force, and continue the Possession peaceably; against those who enter peaceably, and detain or hold out with Force, and against those who both enter by Force, and detain by Force.

(D) Of Occupancy.

Occupancy is a Title by the first Entry, where a Tenant for the Term of another's Life dies whilst he for whose Life the Lease is made is living. Occupancy what.

And he who so enters is called an *Occupant*, because his Title is by his first Occupation. Occupant who.

And after such Entry he is then Tenant *pur auter vie*, and shall be punished for Waste as such, and be subject to the Payment of the Rent reserved, and he shall hold the Land during the Life of *Cestuy que vie*. Co. Lit. 41. b.

The Law of Occupancy is founded upon the Law of Nature, viz. *Quod Terra manens vacua Occupanti conceditur*. So as upon the first coming of Inhabitants into a new Country, he that first enters upon such Part of it, and manures it gains the Property (as is now used in Cornwall, &c. by the Laws of the Stannaries) so that it is the actual Possession and Manurance of the Land, which was the first Cause of Occupancy, and consequently is only to be gained by actual Entry. Pasch. 18 Car. 2. B. R. Geary v. Bearcroft, 1 Sid. 347.

Upon what this Law is founded.

And the true Ground of Occupancy is, that anciently all Trials of Titles were by real Actions, and therefore he who had the Freehold was one to whom the Law had a special Regard. The ancient Law for many Respects did not allow Leases for above forty Years, till 21 H. 8. c. 15. And another Thing was, there was Reason too that not only he who had right Paramount might know how to try his Action, but that the Lord might know how to avow for his Services (which were considerable Things formerly) he ought to know who was his Tenant, and therefore the Law provided that there should be a Person on whom he should avow. Per Bridgman C. J. in the last mentioned Case. Cart. 65.

Occupancy is only for Necessity and to avoid a greater Mischief (per Brown J. Cart. 60.) It is only to supply a Freehold (per Holt C. J. 1 Salk. 189.) for should the Freehold continue in *Abeyance*, no Action could be brought during all that Time, be it ever so long, nor Trial had by him who had Right to recover the Freehold and In-

What it is to supply.

heritance. *Per Tirrel J. Cart. 61.* Copyhold Estate is in the Lord, and the Tenant has only an Estate at Will. *Ld. Raym. Rep. 1000.*

The Subject
and Object of
the Occupant.

Of what Estate
there may be
an Occupant.
Curtesy.
Dower.
Lease.

The Subject and Object of the Occupant are only such Things as are capable of Occupancy, and not the Freehold at all, into which he neither does nor can enter; but the Law casts the Freehold immediately on him who made himself Occupant of the Land or other real Thing whereof he is Occupant, that there may be a Tenant to the *Præcipe*. *Per Vaughan C. J. Hill. 19 & 20 Car. 2. Holden v. Smallbrooke, Vaugh. 195.*

If Tenant by the Curtesy, or Tenant in Dower grant over their Estate and the Grantee dies during the Life of *Cestuy que vie*, there shall be an Occupant tho' the Estate be created by the Law. *Co. Lit. 41. b. contra. 2 Roll. Rep. 123.*

If Lessee for Life leases to the Lessor in Reversion in Fee, and to the Heirs of his Body for the Life of the Lessee, and after the Lessor dies living the Lessee, the Heir of the Body shall be a special Occupant, for this was not any Surrender. *18 E. 3. 44. b. Vin. Abr. Tit. Occupant, (A) pl. 2.*

If Tenant for Life Surrenders to the Remainder in Tail, who dies during the Life of the Lessee, there shall not be any Occupancy, for by the Surrender the Estates were conjoined. *Contra 42 E. 3. 10. Vin. Abr. Tit. Occupant, (A) pl. 3.*

If Remainder in Fee enters, and be an Occupant, he shall be said an Occupant during the Life of *Cestuy que Vie*. *42 E. 3. 10. Vin. Abr. Tit. Occupant, (A) pl. 4.*

If a Man leases to two for their Lives, & *diutius eorum viventi*, and after the Lessees make Partition, and then one dies, yet there shall not be any Occupancy of his Estate; but the Lessor may enter; for the Words (*Et diutius eorum viventi*) are void, not being more than the Law says, and by the Partition the Jointure is severed. *30 Aff. 8. adjudged. Vin. Abr. Tit. Occupant, (A) pl. 5. Same Case cited 4 Rep. 73. b. Borough's Case.*

On a Lease to I. S. to hold to him and his Assigns for his own Life, and for the Life of A. and B. the Question was, whether his Estate was determined, because one cannot have a greater Estate of Freehold than his own Life. But the Court held clearly, that it is a good Limitation, and he has an Estate for all their three Lives, for tho' he himself cannot have an Estate but for his own Life, yet he may have it to grant to another, and the *Habendum* for their three Lives is a good Limitation, and by his Death the Estate is not determined, but *Occupanti conceditur*. *Pasch. 32 Eliz. B. R. Utty Dale's alias Uvedale's Case. Cro. Eliz. 182.*

There shall be no Occupant of an Estate of Tenant by the Curtesy or Dower which are Estates created by Law. *Cro. El. 58.*

Lease.

Tenant *pur auter Vie* makes a Lease for Years to commence from his Death, a Stranger enters, tho' the Stranger is Occupant of the Freehold, yet the Lessee for Years shall enter upon him, and the Lease shall bind the Occupant. *1 Lev. 202, 203.*

So if Tenant *pur auter vie* leases for Years, in Trust for himself for Life, and after in Trust for his Wife for her Life, and the Lessee for Years actually enters, but permits the Baron to enjoy it, who dies, and then the Feme enters, the Feme shall be Occupant, and not the Lessee for Years. *1 Lev. 202.*

Assignment.

The Father had an Estate for his own and his two Sons Lives; he assigns it to Trustees to the Use of himself for Life, Remainder to his Wife for Life, (if his two Sons live so long) Remainder to the Use of one of the Sons and his Heirs. The Question was, whether after the Wife's Death it shall result to the Father or the surviving Trustee shall have it, or the Heir shall be special Occupant. And *Bridgman C. J.* said when the Father had an Estate for three Lives, and he conveyed the Land after to the Use of himself for Life, and to his Wife for Life during the Lives of his Sons, &c. why should not all go out of the Father, as in *Chudlie's Case*. *Trin. 17 Car. 2. C. B. Tinker v. Lidcott, Cart. 46.*

Copyhold.

No Occupancy shall be of Copyhold, without special Custom. *Smartle v. Penballow, Mich. 2 Ann. B. R. 6 Mod. 68. 1 Salk. 188.*

If Copyhold Tenant *pur auter vie* dies, there shall be no Occupant, but the Lord shall enter. *1 Salk. 188. Ld. Raym. Rep. 1000. same Case. Noy 47. Salter v. Butler.*

A Feme, Tenant for Life of a Copyhold, the Reversion being granted over to B. for Life, Remainder to C. for Life *cum acciderit post mortem sursumreditionem vel forisfacturam* of the Feme, and after the Baron surrenders to the Use of B. for his Life, to whom the Lord grants it for his Life, and so he is admitted Tenant, and after dies. In this Case C. shall not have it; because his Estate is not to commence 'till after the Death, Surrender or Forfeiture of the Feme, and the Feme here is alive, and has not made any Surrender or Forfeiture, and the Feme has Right to it by Plaintiff

in Nature of *Cui in vita*; but the Lord in this Case may retain it in his proper Hands or Disposition during the Life of the Baron, as an Occupant. *Roll. Abr.* 150, 151. *Vin. Abr.* Tit. *Occupant*, (C).

If Tenant by the Curtesy grants his Estate to another and his Heirs, and the Grantee dies, his Heir shall be a special Occupant of this Estate. *Vin. Abr.* Tit. *Occupant*, (F).

The Custom of a Manor was, that every customary Copyhold of that Manor might be granted to three Persons, *Habendum* to them *successive, sicut nominatur, & non aliter*. A Surrender was made to *I. S.* and his Assigns for his own Life, and the Lives of two others. *Powel J.* seemed to incline that if *I. S.* had become a Bankrupt, and the Estate assigned, and the Assignee had died, living the Copyholder, the Lord should immediately have the Land; and *Powis J.* thought that upon the Death of the Copyholder the Estate of the Assignee would determine, tho' the *Cestuy que vie's* were living. But it was agreed, that if the Grant had been to *I. S.* for the Lives of *B. C.* and *D.* and *I. S.* had died, the Lord should have the Land again, tho' against his own Limitation, because there can be no Occupant of a Copyhold Estate without a special Custom; and this would be no Mischief, the Failure being on the Side of the Grantee only. 6 *Mod.* 63, 68.

There cannot be any Occupant of any Thing which lies in Grant, and which cannot pass without Deed, because every Occupant ought to claim by a *Que Estate*, and aver the Life of *Cestuy que vie*. *Co. Lit.* 41. *b.*

The only Means the Law gives to one to gain an Estate by Occupancy is by Entry, but there can't be an Entry in an Advowson, Rent, or any other Thing that lies in Grant. *Vangh.* 187. *Bridgman* 94.

But a special Occupant may be of a Rent; as if a Rent be granted to another and his Heirs for the Life of *I. S.* his Heir after his Death shall have this Rent as special Occupant. In such Case the Heir takes not by Descent but as Heir *Nominatim*, and by Limitation only. *Vin. Abr.* Tit. *Occupant*, (D).

And if an Annuity be granted to another and his Heirs for the Life of *I. S.* if the Grantee dies during the Life of *I. S.* his Heir shall have the Annuity. *Vin. Abr.* Tit. *Occupant*, (D).

There shall not be any Occupant against the King; because *Nullum tempus occurrit Regi*, and therefore no Man shall gain of the King by Priority of Entry. *Co. Lit.* 41. *b.*

Neither shall there be any Occupancy of an Estate which a Man has by Letters Patent of the King. 2 *Roll. Rep.* 123.

If Tenant *pur auter vie* makes a Lease for Years and dies, the Lessee for Years being in Possession shall be the Occupant, and his Lease is extinct. *Vin. Abr.* Tit. *Occupant*, (E) pl. 1.

And if he makes a Lease for Years, Remainder for Years, and Tenant for Years enters, and then the Tenant *pur auter vie* dies, here the Tenant for Years shall be an Occupant, and yet his Term for Years is not drown'd by reason of the Mesne Remainder for Years; for in some Cases a Term for Years and a Freehold may well stand together in one and the same Person. 2 *Bulst.* 12.

And if Lessee *pur auter vie* leases at Will to a Feme Covert; Lessee *pur auter vie* dies, her Baron shall be Occupant. *Sid.* 347.

Lessee at Will shall be Occupant. 2 *Roll. Rep.* 123. *Cro. Jac.* 554.

If a Man leases for Years, and after by Covin, to the Intent to extinguish the Lease, make a Lease to an ancient Man *pur auter vie*, who dies, it seems the Lessee for Years shall be Occupant. But it seems by reason of the Covin, that his Lease for Years shall be said to be in *Esse* against the Lessee. *Vin. Abr.* Tit. *Occupant*, (E) pl. 2.

If Lessee *pur auter vie* leases for Years, and Lessee for Years makes a Lease at Will, and after Lessee *pur auter vie* dies, the Lessee at Will being in Possession shall be Occupant, and not the Lessee for Years; but he shall have it in nature of a Reversion, and so the Lease for Years is not extinct. *Vin. Abr.* Tit. *Occupant*, (E) pl. 3.

And the Lessee at Will needs not make Claim; for he has the Occupation of the Land; and this differs from the Cases where a Man comes casually to the Land, or hawks there; for they are not any Occupancies. 2 *Roll. Rep.* 123.

The Freehold by Operation of Law is cast upon him; but this he shall hold and enjoy subject unto the Lease for Years; because he cannot have and enjoy this Estate of Freehold but in the same Manner as the Tenant *pur auter vie* held and enjoyed the same, and he held the same Subject to the Lease for Years; but if there had been no Lease at Will made, then by the Estate of Occupancy falling upon the Termor for Years, the Freehold is presently in him by Operation of Law; and so by this the Term for Years is drowned, extinct and gone. 2 *Bulst.* 12.

If

Special.

If a Lessee for Life leases to another, and to the Heirs of his Body for Life of the first Lessee; in this Case the Heir of his Body shall be Occupant after his Death. *Vin. Abr. Tit. Occupant, (G).*

And if a Man leases Land to another and his Executors for Life of *J. S.* and *Cestuy que vie* dies, the Executors shall be a special Occupant, tho' it be a Freehold. *Vin. Abr. Tit. Occupant, (G).*

And if a Man grants a Rent to another, his Executors and Assigns, for the Life of *J. S.* and after the Grantee dies, making an Executor, but no Assignee, the Executor shall not be a special Occupant, because it is a Freehold, which cannot descend to the Executor. *Vin. Abr. Tit. Occupant, (G).*

And if a Grantee *pur auter vie* of a Rent-Charge, devises it, the Devisee shall have it during the *auter vie*. *Per Gaudy and Fenner. Sed contra per Popham. Noy 47.*

What Actions
will lie a-
gainst an Oc-
cupant.

An Occupant shall be punished for Waste, because he has the Estate of the Lessee for Life; for the Stat. of Gloucester, c. 5. gave an Action of Waste against him who holds in any Manner for Term of Life or for Years; and an Occupant holds for Term of Life. *6 Co. Rep. 37. b. Co. Lit. 44. b.*

What an Oc-
cupant should
plead.

If he in Reversion enters after the Occupant, and brings an Action against him, the Occupant ought to plead the Lease to *Cestuy que vie*, whose Estate he has; but for a Rent or an Estate that lies in Grant, none can plead a *Que Estate*, but ought to intitle himself by the Grant. *Bridgm. 94.*

Relief in
Equity in
Cases of Oc-
cupancy.

In Chancery, *Tupborne v. Gilbie, 5 Car. 1.* the Case was thus: *A.* conveyed Lands to *W. R.* and *W. S.* and their Assigns, to the Use of them, their Heirs and Assigns, during the Lives of the said *A.* and *M.* his Wife, and the longer Liver of them; Provided if *A.* pay to *B.* (who after died intestate) 120*l.* in Feb. 1628. then the Estate to be void, and *A.* to re-enter; the 120*l.* was not paid, so as the Estate became forfeited. *C.* having paid divers Debts for *B.* the said *W. R.* and *W. S.* were ordered to convey their Interest to *C.* which they did; *C.* died, leaving *D.* her Executor, who was settled in the Estate by Order of the Court; but there being no Decree in the Cause, *D.* exhibited his Bill to have the Estate confirmed to him by Decree. The Court, with Advice of the Judges, and View of Precedents, whereby in some special Cases the Court has ordered the Possession against an Occupant, did declare, that tho' in Case of an Occupant upon a general Trust, this Court was doubtful how to decree any Thing upon a Matter of Equity in Opposition to a Ground or Rule of Law; yet this Case differing from a general Trust upon an Estate granted *pur auter vie*, as the same is a Conditional Estate *pur auter vie*, granted as a Security or Pledge for a Debt, which not being paid, the Estate by Forfeiture becomes Assets in the Plaintiff's Hands to pay the Debts of *B.* the Court decreed the Lands absolutely to *D.* and his Assigns, during the Continuance of the said Estate, for Satisfaction of *B.*'s Debts, and the Tenants to attorn, *Nisi causa*; and none was shewn. *1 Chan. Rep. 39, 40.*

And in *Throgmorton v. Wagstaff, 8 Car. 1.* *A.* being indebted, *B.* became Surety for him. *A.* died, *B.* brought a Bill against *A.*'s Widow, suggesting that she had sufficient of her Husband's Estate to discharge the Debts, and prayed to have Leases *pur auter vies*, whereof *A.* the Testator was seised at the Time of his Death, and on which the Widow entered as an Occupant, to be Assets in Equity. But the Court, in Respect the Plaintiff did not get a Case made of this Point by such a Time, discharged the Defendant of any further Demands from the Plaintiff. *1 Chan. Rep. 59.*

In *Price v. Evans, 27 Car. 2.* a Title under an Occupant set forth by the Plaintiff was demurred to and allowed; because this Court will not countenance nor give any Relief thereto. *2 Chan. Rep. 112.*

And in *Ragget v. Clark, Pas. 36 Car. 2.* *A.* seised of a Parcel of Land for his own Life, and the Lives of *B.* and *C.* prevailed with *R.* to be bound with him for a Sum of Money; and that *R.* might raise Money for the Discharge of the said Debt, he permitted *R.* to enter into the said Lands, and take the Profits thereof for two Years, the said Lands being about 12 *l.* per Ann. Value; and the said Lands being so in *A.*'s Possession, *A.* died, and made *E.* his Wife his Executrix. *E.* brought a Bill to have an Account of the Profits, and that the Possession of the Land should be delivered up to her; *R.* by Plea set forth his Title as Occupant, and it was allowed, and the Bill dismissed. *2 Vent. 364.* And it was said for the Defendant in this Cause, that it was not proved, that there was any Deficiency of Assets; but if it had, yet this Occupancy happening before the Statute of Frauds and Perjuries, the Estate was no

wife

wife subjected to the Payment of Debts; and of that Opinion was the Lord Keeper, and therefore dismissed the Bill. S. C. 1 Vern. 234.

To prevent Occupancy, it is advisable at the Making a Grant, to add these Words, *To have and to hold to him and his Heirs*, during the Life of *Cestuy que vie*; for then it is descendible to the Heir; or else the Tenant or Grantee (if he has the Estate without the Word *Heirs*) may assign the Estate over to divers Men and their Heirs, in Trust for him and his Heirs during the Life of *Cestuy que vie*. 1 Inst. 41. b. 388. a. Wood's Inst. 216.

How to prevent Occupancy.

Thus far concerning Occupancy according to the Common Law and Decrees in Equity; but this Title is much abridged by the Statute of Frauds and Perjuries, (29 Car. 2. c. 3. §. 12.) and the Statute to amend the Law concerning common Recoveries, and to explain and amend the Statute of Frauds and Perjuries, so far as the same relates to Estates *pur auter vie*, (14 Geo. 2. c. 20. §. 9.) For by the Statute of Frauds and Perjuries it is (*inter alia*) enacted, That any Estate *pur auter vie* shall be devisable by a Will in Writing, signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions attested and subscribed in the Presence of the Devisor by three or more Witnesses; and if no such Devise thereof be made, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of a special Occupancy, as Assets by Descent, as in Case of Lands in Fee-simple; and in Case there be no special Occupant thereof, it shall go to the Executors or Administrators of the Party that had the Estate thereof by Virtue of the Grant, and shall be Assets in their Hands.

How far this Title Occupancy is altered by Statutes.

And since this Statute, it has been held, That a Title under an Occupant of a Life, for the Lives of B. and C. is good, for the Statute did not take away all Occupancy, but transferred it to Executors, and the Occupant by his Entry on the Land is *Executor de son tort*; because the Statute made it Assets. Per Holt, C. J. Mich. 2 W. & M. B. R. Bradburn v. Kennerdale, Carth. 166.

And it has been adjudged, that an Heir, Executor, &c. shall be charged on this Statute with the Payment of Debts only, and not Legacies, except devised particularly out of the Estate; and an Estate *pur auter vie* of an Intestate was not distributable. Mich. 8 W. 3. B. R. 2 Salk. 464.

The Statute of Frauds does not extend to make Estates *pur auter vie* in Copyhold Lands Assets or devisable. 2 Ld. Raym. Rep. 998.

But the said Statute of 14 Geo. 2. recites, *That Doubts have arisen, where no Devise has been made of such Estates, to whom the Surplus, after the Debts of such deceased Owners are fully satisfied, shall belong*; and enacts, that such Estates *pur auter vie*, in Case there be no special Occupant thereof, of which no Devise shall have been made, according to the said Act, for Prevention of Frauds and Perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed in the same Manner as the personal Estate of the Testator or Intestate.

S E C T. II.

Of acquiring real Estates by Descent.

(A) Of Descents in general.

D E S C E N T S, comes from the Latin Word *Descendere*, *id est, ex loco superiore in inferiorem movere*; and in a legal Understanding it is when Land, &c. after the Death of the Ancestor is cast by Course of Law upon the Heir. Co. Lit. 237. a.

Descent, its Derivation and Signification.

This is the noblest and worthiest Means whereby Lands are derived from one to another, because it is wrought and vested by the Act of Law, and Right of Blood, unto the worthiest and next of the Blood and Kindred of the Ancestor; and therefore it has not in the Common Law altogether the same Signification that it has in the Civil Law, for the Civilians call him, *Hæredem, qui ex testamento succedit in universum jus testatoris*. But by the Common Law he is only Heir which succeeds by Right of Blood. And this agrees well with the Etymology of the Word *Heir*, to whom the Lands descend, for *Hæres dicitur ab hærendo, quia qui hæres est hæret, hoc est, proximus est sanguine illi cujus est Hæres*. So as he who is *Hæres*, *sanguinis est hæres, & herus hæreditatis*. Co. Lit. 237. a. b.

Heir, who.

All possible hereditary Successions may be distinguished into these three Kinds, *viz.* either

First, In the Descending Line, as from Father to Son or Daughter, Nephew or Niece, *i. e.* Grandson or Grandaughter. Or,

Secondly, In the Collateral Line, as from Brother to Brother or Sister, and so to Brothers and Sisters Children. Or,

Thirdly, In an Ascending Line, either direct, as from Son to Father or Grandfather, (which is not admitted by the Law of *England*) or in the Transversal Line, as to the Uncle or Aunt, Great Uncle or Great Aunt, &c. And because this Line is again divided into the Line of the Father, or the Line of the Mother, this transverse ascending Succession is either in the Line of the Father, Grandfather, &c. on the Blood of the Father; or in the Line of the Mother, Grandmother, &c. on the Blood of the Mother; the former are called *Agnati*, the latter *Cognati*. *Hale's Hist.* 233.

All which will be best understood by perusing the Scale of Degrees of Parentage and Consanguinity facing this Page.

(B) *By the Common Law.*

General Rules concerning Descents, or hereditary Successions of Lands in Fee-simple, with Examples, Reasons, Exceptions, Observations, &c.

Rule 1.

In Descents, the Law prefers the worthiest of Blood.

Example 1.

1. Males before Females.

In Descents immediate, the Male is preferred before the Female, *viz.* The Son before the Daughter, the Brother before the Sister, and the Uncle before the Aunt.

Example 2.

2. Descendants from Males before those of Females.

In Descents immediate, the Descendants from Males are preferred before those from Females; and hence it is, that the Daughter of the Eldest Son (in Descents from the Father) is preferred before the Son of the Younger Son; the Daughter of the Eldest Brother, or Uncle, before the Son of the Younger; and the Uncle, nay, the Great Uncle or Grandfather's Brother, before the Uncle of the Mother's Side. *Hale's Hist.* 235.

Rule 2.

Proximity of Blood.

The next of Blood is preferred before the more remote, tho' equally or more worthy. *Hale's Hist.* 235.

Example 1.

The Sister of the whole Blood, before the Brother of the half Blood. *Hale's Hist.* 236.

Reason.

She is more strictly joined to the Brother of the whole Blood (*viz.* by Father and Mother) than the half Brother, tho' otherwise he is the more worthy.

Example 2.

The Son or Daughter, before the Brother or Sister, and they before the Uncle.

Reason.

The Son or Daughter is nearer than the Brother, and the Brother or Sister than the Uncle.

Exception.

Yet the Father or Grandfather, or Mother or Grandmother, in a direct ascending Line shall not immediately succeed the Son or Grandchild: But the Father's Brothers (or Sisters) shall be preferred before the Father; and the Grandfather's Brother (or Sisters) before the Grandfather: Altho' the Father is nearer of Blood to the Son than the Uncle, or the Brother; for the Brother is of the Blood of the Brother, because both derived from the same Parent, the common Fountain of both their Blood: And therefore the Father is preferred in the Administration of Goods before the Son's Brother of the whole Blood, and a Remainder limited *proximo de sanguine* of the Son shall vest in the Father before the Uncle.

<i>Agnati.</i>		A Calendar, containing the De- grees of Consanguinity.		<i>Cognati.</i>	
		^{6.} Tritavus. <i>Great Grand Father's Great Grand Father.</i> Tritavia. <i>Great Grand Father's Great Grand Mother.</i>			
^{5.} Atpatruī. <i>Brothers of Great Grand Father's Grand Father.</i> Atamitzæ. <i>Sisters of Great Grand Father's Grand Father.</i>		^{5.} Atavus. <i>Great Grand Father's Grand Father.</i> Atavia. <i>Great Grand Father's Grand Mother.</i>		^{5.} Atavunculi. <i>Brothers of Great Grand Father's Grand Mother.</i> Atmaterteræ. <i>Sisters of Great Grand Father's Grand Mother.</i>	
^{4.} Abpatruī. <i>Brothers of Grand Fa- ther's Grand Father.</i> Abamitzæ. <i>Sisters of Grand Fa- ther's Grand Father.</i>		^{4.} Abavus. <i>Grand Father's Grand Father.</i> Abavia. <i>Grand Father's Grand Mother.</i>		^{4.} Abavunculi. <i>Brothers of Grand Father's Grand Mother.</i> Abamaterteræ. <i>Sisters of Grand Father's Grand Mother.</i>	
^{3.} Propatruī. <i>Brothers of Great Grand Father.</i> Proamitzæ. <i>Sisters of Great Grand Father.</i>		^{3.} Proavus. <i>Great Grand Father.</i> Proavia. <i>Great Grand Mother.</i>		^{3.} Proavunculi. <i>Brothers of Great Grand Mother.</i> Promaterteræ. <i>Sisters of Great Grand Mother.</i>	
^{2.} Patruī Magni. <i>Brothers of Grand Father.</i> Amitæ Magnæ. <i>Sisters of Grand Father.</i>		^{2.} Avus. <i>Grand Father.</i> Avia. <i>Grand Mother.</i>		^{2.} Avunculi Magni. <i>Brothers of Grand Mother.</i> Materteræ Magnæ. <i>Sisters of Grand Mother.</i>	
^{1.} Patruī. <i>Brothers of the Father.</i> Amitæ. <i>Sisters of the Father.</i>		^{1.} Pater. <i>Father.</i> Mater. <i>Mother.</i>		^{1.} Avunculi. <i>Brothers of the Mother.</i> Materteræ. <i>Sisters of the Mother.</i>	
Fratres Consanguinei. <i>Half Bro- thers on the Father's Side.</i> Sorores Consanguinæ. <i>Half Sisters on the Father's Side.</i>		Linea recta ascendens. <i>The right Line ascending.</i> Propositus. Linea recta descendens. <i>The right Line descending.</i>		Fratres Uterini. <i>Half Brothers on the Mother's Side.</i> Sorores Uterinæ. <i>Half Sisters on the Mother's Side.</i>	
Total.		^{1.} Filii. <i>Sons.</i> Filiz. <i>Daughters.</i>		Total.	
$\frac{1}{2}$		^{2.} Nepotes. <i>Grand Sons.</i> Neptes. <i>Grand Daughters.</i>		$\frac{1}{2}$	
$\frac{1}{4}$		^{3.} Pronepotes. <i>Great Grand Sons.</i> Proneptes. <i>Great Grand Daughters.</i>		$\frac{1}{4}$	
$\frac{1}{8}$		^{4.} Abnepotes. <i>Grand Child's Grand Sons.</i> Abneptes. <i>Grand Child's Grand Daughters.</i>		$\frac{1}{8}$	
$\frac{1}{16}$		^{5.} Atnepotes. <i>Great Grand Child's Grand Sons.</i> Atneptes. <i>Great Grand Child's Grand Daughters.</i>		$\frac{1}{16}$	
$\frac{1}{32}$		^{6.} Trinepotes. <i>Great Grand Child's Great Grand Sons.</i> Trineptes. <i>Great Grand Child's Great Grand Daughters.</i>		$\frac{1}{32}$	

To face Page 22 in the Theory of Conveyancing, Part I.

Rule 3.

No Brother nor Sister of the half Blood shall inherit to his Brother or Sister, but as a Child to his Parents. *Bac. L. Tracts 128.*

Example 1.

If a Man have two Wives, and by either Wife a Son, the Eldest Son over-living his Father, is to be preferred. *Bac. L. Tracts 128.*

Example 2.

But if the Elder Son enters and dies without a Child, the Brother shall not be his Heir, but the Uncle of the Eldest Brother or Sister of the whole Blood. *Bac. L. Tracts 128.*

Reason.

Because the Younger is only of the half Blood to their Elder Brother. *Bac. L. Tracts 128.*

Example 3.

Yet if the Elder Brother dies, or has not entered in the Life of the Father, either by such Entry or Conveyance, then the Younger Brother shall inherit the Father's Land, altho' he be a Child by the second Wife, before any Daughter by the first. *Bac. L. Tracts 128.*

Rule 4.

The Eldest Son, or Brother or Uncle, excludes the Younger, and shall solely inherit. *Hale's Hist. 238. Bac. L. Tracts 128.*

Priority of
the Birth of
Males.

Example 1.

If there be three Brethren, and the Middle Brother purchases Lands in Fee-simple, and dies without Issue, the Elder Brother shall have the Land by Descent and not the Younger, &c. *Lit. §. 5.*

Example 2.

Also if there be three Brethren, and the Youngest Brother purchases Lands in Fee-simple, and dies without Issue, the Eldest Brother shall have the Land by Descent, and not the Middle. *Lit. §. 5.*

Reason.

For the Eldest is the most worthy of Blood. *Lit. §. 5.*

Rule 5.

When Females inherit, those of an equal Degree of Nearness shall inherit all together, as Parceners. *Bac. L. Tracts 128.*

Equality of
Females.

Reason.

The Law makes them but one Heir to the Ancestor. *Bac. L. Tracts 128.*

Example 1.

All the Daughters, whether by the same or divers Venters, do inherit together to the same Father. *Hale's Hist. 238.*

Reason.

Whether they be of the same or divers Venters, they are of the whole Blood to their Father.

Example 2.

All the Sisters by the same Venter do inherit to the Brother. *Hale's Hist. 238.*

Reason.

Those of the same Venter are of the whole Blood to the Brother, but those of another Venter are only of the half Blood.

Exception to this Rule.

But by a special Custom, Descents to the Females may be otherwise. *Hale's Hist. 238. See Of Descents by Custom, post.*

Rule

Rule 6.

Right by Representation.

All Descendants from such a Person as might have been Heir to another, hold the same Right by Representation as that common Root from whence they are derived. *Hale's Hist.* 236, 237.

Reason.

For they are in the same Right of Worthiness and Proximity of Blood, as their Root that might have been Heir was if he had been living. *Hale's Hist.* 237.

Example 1.

The Son or Grandchild (whether Son or Daughter) of the Eldest Son, succeeds before the Younger Son. *Hale's Hist.* 237.

Example 2.

The Son or Grandchild of the Eldest Brother, before the Youngest Brother. *Hale's Hist.* 237.

1. Observation.

And so thro' all the Degrees of Succession by the Right of Representation, the Right of Proximity is transferred from the Root to the Branches, and gives them the same Preference as the next and worthiest of Blood. *Hale's Hist.* 237.

2. Observation.

This Right transferred by Representation is infinite and unlimited in the Degrees of those that descend from the Represented; for the Son, Grandson, Great Grandson, and so *in infinitum* enjoy the same Privilege of Representation as those from whom they derive their Pedigree have, whether in Descents lineal or transversal. *Hale's Hist.* 237.

Example 3.

The Great Grandchild of the Eldest Brother (Son or Daughter) shall be preferred before the Younger Brother. *Hale's Hist.* 237.

Reason.

Tho' the Female be less worthy than the Male, yet she stands in Right of Representation of the Eldest Brother, who was more worthy than the Younger.

Example 4.

If a Man have two Daughters, and the Elder dies in the Father's Life, leaving six Daughters, and then the Father dies; the Younger Daughter shall have an equal Share with the six Daughters. *Hale's Hist.* 238.

Reason.

Because they stand in Representation and Stead of their Mother, who could have had but a Moiety. *Hale's Hist.* 238.

Rule 7.

The Root of the Descent.

The last actual Seisin in any Ancestor, makes him, as it were, the Root of the Descent equally to many Intents as if he had been a Purchaser. *Hale's Hist.* 238.

Observation.

Therefore he that cannot derive his Succession from him that was last actually seised, tho' he might have derived it from some precedent Ancestor, shall not inherit. *Hale's Hist.* 238.

Example 1.

And hence it is, that where Lands descend to the Eldest Son from the Father, and the Son enters and dies without Issue, his-Sister of the whole Blood shall inherit as Heir to the Brother, and not the Younger Son of the half Blood. *Hale's Hist.* 238.

Reason.

Because he cannot be Heir to the Brother of the half Blood. *Hale's Hist.* 238.

Example 2.

If the Eldest Son had survived the Father, and died before Entry, the Youngest Son should inherit as Heir to the Father, and not the Sister. *Hale's Hist.* 238, 239.

Reason.

Because he is Heir to the Father that was last actually seised. *Hale's Hist.* 239.

Example 3.

And hence it is, that tho' the Uncle is preferred before the Father in Descents from the Son; yet if the Uncle enter after the Death of the Son, and die without Issue, the Father shall inherit to the Uncle. *Hale's Hist.* 239.

Reason.

Quia seifina facit stipitem.

Rule 8.

And whosoever derives a Title to any Land, must be of the Blood to him that first purchased it. *Hale's Hist.* 239.

The Blood of
the first Pur-
chaser.

Example 1.

Therefore if a Son purchases Lands and dies without Issue, it shall descend to the Heirs of the Part of the Father; and if he has none, then to the Heirs of the Part of the Mother. *Hale's Hist.* 239.

Reason.

For tho' the Son has both the Blood of the Father and of the Mother in him, yet he is of the whole Blood of the Mother, and the Consanguinity of the Mother are *Consanguinei cognati* of the Son. *Hale's Hist.* 239.

Example 2.

If Lands descend to the Son from his Father or Mother, they shall go to that Side only from which they came. *Bac. L. Tracts* 129.

Example 3.

But if the Father purchases Lands, and they descend to the Son, who dies without Issue, and without any Heir of the Part of the Father, it shall not descend in the Line of the Mother, but Escheat. *Hale's Hist.* 239.

Reason.

For tho' the *Consanguinei* of the Mother, are the *Consanguinei* of the Son, yet they are not of the Consanguinity to the Father, who was the Purchaser. *Hale's Hist.* 239.

Example 4.

Yet if there be none of the Blood of the Grandfather, it may resort to the Line of the Grandmother. *Hale's Hist.* 239, 240.

Reason.

Because her *Consanguinei* are as well of the Blood of the Father, as the Mother's Consanguinity is of the Blood of the Son. *Hale's Hist.* 240.

Example 5.

If the Grandfather purchased Lands, which descended to the Father, and from him to the Son; if the Son entered and died without Issue, his Father's Brothers or Sisters, or their Descendants; or, for want of them, his Great Grandfather's Brothers or Sisters, or their Descendants; or, for want of them, any of the Consanguinity of the Great Grandfather, or Brothers or Sisters of the Great Grandmother, or their Descendants, may inherit. *Hale's Hist.* 240.

Reason.

For the Consanguinity of the Great Grandmother is the Consanguinity of the Grandfather. *Hale's Hist.* 240.

H

Observation.

Observation.

But none of the Line of the Mother or Grandmother, viz. the Grandfather's Wife, shall inherit; for they are not of the Blood of the first Purchaser. *Hale's Hist.* 240.

Note 1.

The same Rule *à converso* holds in Purchases in the Line of the Mother or Grandmother, they shall always keep in the same Line that the first Purchaser settled them in. *Hale's Hist.* 240. *Vide Example 2. of this Rule.*

Note 2.

But it is not necessary, that he who inherits be always Heir to the Purchaser; it is sufficient if he be of his Blood, and Heir to him that was last seised; for if the Father purchases Lands which descended to the Son, who dies without Issue, they shall never descend to the Heir of the Part of the Son's Mother; but if the Son's Grandmother has a Brother, and the Son's great Grandmother has a Brother, and there are no other Kindred, they shall descend to the Grandmother's Brother; and yet if the Father had died without Issue, his Grandmother's Brother should have been preferred before his Mother's Brother, because the former was Heir of the Part of his Father, tho' a Female, and the latter was only Heir of the Part of his Mother. But where the Son is once seised, and dies without Issue, his Grandmother's Brother is to him Heir of the Part of his Father, and being nearer than his Great Grandmother's Brother is preferred in the Descent. But this is always intended so long as the Line of Descent is not broken, for if the Son alien these Lands, and then repurchase them again in Fee, now the Rules of Descents are to be observed, as if he were the original Purchaser, and as if it had been in the Line of the Father or Mother. *Hale's Hist.* 240, 241.

Rule 9.

Male Root
has the Pre-
ference.

In all Successions, in the Line descending, transversal or ascending, the Line that is first derived from the Male Root has always the Preference. *Hale's Hist.* 241.

Example in the descending Line.

A. has Issue two Sons B. and C. B. has Issue a Son and a Daughter D. and E. D. the Son has Issue a Daughter F. And E. the Daughter has Issue a Son G. Neither C. nor any of his Descendants shall inherit so long as there are any Descendants from D. and E. and neither E. the Daughter, nor any of her Descendants shall inherit so long as there are any Descendants from D. the Son, whether they be Male or Female. *Hale's Hist.* 241, 242.

2dly, In the Collateral Line.

So in Descents collateral as Brothers and Sisters, the same Instances as before applied thereto, evidence the same Conclusions. *Hale's Hist.* 242.

*Particular Rules of transversal ascending Successions.**Rule 1.*

Male Line
ascending.

If a Son purchases Lands in Fee-simple, and dies without Issue, those of the Male Line ascending usque infinitum shall be preferred in the Descent, according to their Proximity of Degree to the Son. *Hale's Hist.* 242.

Example 1.

The Father's Brothers and Sisters and their Descendants, shall be preferred before the Brothers of the Grandfather and their Descendants. *Hale's Hist.* 242.

Example 2.

If the Father has no Brothers nor Sisters, the Grandfather's Brothers and their Descendants shall be preferred. *Hale's Hist.* 242.

Example 3.

For want of Grandfather's Brothers, his Sisters and their Descendants, shall be preferred before the Brothers of the Great Grandfather. *Hale's Hist.* 242.

Observation.

For altho' the Father or Grandfather cannot immediately inherit to the Son, yet the Direction of the Descent to the collateral ascending Line, is as much as if the Father or Grandfather had been by Law inheritable; and therefore, as in Case the Father had been inheritable, and should have inherited to the Son before the Grandfather, and the Grandfather before the Great Grandfather, and consequently, if the Father had inherited and died without Issue, his eldest Brother and his Descendants should have inherited before the younger Brother and his descendants; and if he had no Brothers but Sisters, the Sisters and their Descendants should have inherited before his Uncles or the Grandfather's Brother and their Descendants. So tho' the Father is excluded from inheriting, yet the Descent is directed as it should have been, had the Father inherited, viz. it lets in those first that are in the next Degree to him. *Hale's Hist.* 242, 243.

Rule 2.

The Line of the Part of the Mother shall never inherit as long as there are any, tho' never so remote, of the Line of the Part of the Father. *Hale's Hist.* 243.

Paternal Line preferable to the Maternal.

Example.

If the Mother has a Brother, yet if the *Atavus* or *Atavia patris*, (i. e. Great Great Grandfather, or Great Great Great Grandmother of the Father) has a Brother or Sister, he or she shall be preferred, and exclude the Mother's Brother, tho' he is much nearer. *Hale's Hist.* 243.

Rule 3.

The Male Line of the Part of the Father ascending, shall in æternum exclude the Female Line of the Part of the Father ascending. *Hale's Hist.* 243.

Paternal Male Line, before Female Line.

Example.

If a Son purchases Lands and dies without Issue, the Sister of the Father's Grandfather, or of his Great Grandfather, and so *in infinitum* shall be preferred before the Father's Mother's Brother, tho' the Father's Mother's Brother be a Male, and the Father's Grandfather or Great Grandfather's Sister be a Female, and more remote. *Hale's Hist.* 244.

Vide Rule 1.

Reason.

Because she is of the Male Line, which is more worthy than the Female Line, tho' the Female Line be also of the Blood of the Father. *Hale's Hist.* 244.

Rule 4.

As in the Male Line ascending, the more near is preferred before the more remote; so in the Female Line descending, if it be of the Blood of the Father, the more near is also preferred before the more remote. *Hale's Hist.* 244.

Female Line descending.

Example 1.

If a Son purchases Lands, and dies without Issue, and the Father, Grandfather, and Great Grandfather, and so upward, all the Male Line being dead, without any Brother or Sister, or any descending from them; but the Father's Mother has a Sister or Brother, and the Father's Grandmother has a Brother, and the Father's Great Grandmother has a Brother, tho' all these are of the Blood of the Father; and tho' the remotest of them shall exclude the Son's Mother's Brother; and tho' the Great Grandmother's Blood has passed thro' more Males of the Father's Blood, than the Blood of the Grandmother or Mother of the Father; yet the Father's Mother's Sister shall be preferred before the Father's Grandmother's Brother, or the Great Grandmother's Brother. *Hale's Hist.* 244, 245.

Reason.

For they are all in the Female Line, viz. *Cognati*, (and not *Agnati*), and the Father's Mother's Sister is the nearest; so she shall have the Preference as well as in the Male Line ascending; the Father's Brother or his Sister shall be preferred before the Grandfather's Brother. *Hale's Hist.* 245.

Ex-

Example 2.

But yet in the last Case, where the Son purchases Lands, and dies without Issue, and without any Heir on the Part of the Grandfather, the Lands descend to the Grandmother's Brother or Sister, as Heir on the Part of his Father. *Hale's Hist. 245.*

Example 3.

Yet if the Father had purchased this Land and died, and it descended to his Son, who died without Issue, the Lands should not have descended to the Father's Mother's Brother or Sister.

Reason.

For the Reasons before given upon the third Rule.

Example 4.

But for want of Brothers or Sisters of the Grandfather's Great Grandfather, and so upwards in the Male ascending Line, it should descend to the Father's Grandmother's Brother or Sister, which is his Heir of the Part of his Father, who should be preferred before the Father's Mother's Brother, who is the Heir of the Part of the Mother of the Purchaser, tho' the next Heir of the Part of the Father of him that last died seized. *Hale's Hist. 245.*

Example 5.

And therefore, as if the Father that was the Purchaser had died without Issue, the Heirs of the Part of the Father, whether of the Male or Female Line, should have been preferred before the Heirs of the Part of the Mother; so the Son, who stands now in the place of the Father, and inherits to him primarily in his Father's Line, dying without Issue, the same Devolution and Hereditary Succession should have been as if his Father had immediately died without Issue, which should have been to his Grandmother's Brother, as Heir of the Part of the Father, tho' by the Female Line, and not to his Mother's Brother who was only Heir of the Part of his Mother, and who is not to take 'till the Father's Line both Male and Female be spent. *Hale's Hist. 245, 246.*

Rule 5.

If the Son purchases Lands, and dies without Issue, and it descends to any Heir of the Part of the Father, and then if the Line of the Father (after Entry and Possession) fail; it shall never return to the Line of the Mother, tho' in the first Instance, or first Descent from the Son, it might have descended to the Heir of the Part of the Mother. *Hale's Hist. 246.*

Reason.

For now by this Descent and Seisin it is lodged in the Father's Line, to whom the Heir of the Part of the Mother can never derive a Title as Heir, but it shall rather escheat.

Observation.

But if the Heir of the Part of the Father had not entered, then that Line had failed, and it might have descended to the Heir of the Part of the Mother, as Heir to the Son, to whom immediately, for want of Heirs of the Part of the Father, it might have descended. *Hale's Hist. 246, 247.*

Rule 6.

And if it had once descended to the Heir of the Part of the Father of the Grandfather's Line, and the Heir had entered; it should never descend to the Heir of the Part of the Father of the Grandmother's Line. *Hale's Hist. 247.*

Reason.

Because the Line of the Grandmother was not of the Blood or Consanguinity of the Line of the Grandmother's Side. *Hale's Hist. 247.*

Rule 7.

If for Default of Heirs of the Purchaser of the Part of the Father, the Lands descend to the Line of the Mother, the Heirs of the Mother of the Part

Part of her Father's Side, shall be preferred in the Succession before her Heirs of the Part of her Mother's Side. Hale's Hist. 247.

Reason.

Because they are the more worthy. Hale's Hist. 247.

Thus Lands in Fee-simple will descend by the Common Law, if there is no Settlement to the Contrary by Deed or Will, &c.

(C) By Custom.

Descents of Estates in Fee-simple by Custom are in *Gavelkind* or *Borough-English*. *Gavelkind*, i. e. *Gave all kind*; for by this Custom every Male of equal Degree of Childhood, Brotherhood or Kindred shall inherit equally in like Manner as Daughters (by the Common Law) shall, being Parceners. Co. Lit. 140. a. Bac. L. Tracts 129.

This Signification of the Word *Gavelkind* is founded on the Nature of the Lands in Point of Descent, but its Derivation and Signification drawn from the Nature of the Services yielded by the Land is best supported by Reason and Authority, i. e. it is derived from the Saxon Word *Gafol*, or as it is otherwise written *Gavel*, which signifies *Rent*, or a Customary Performance of Husbandry Works; therefore they called the Land which yields this Kind of Service *Gavelkind*, that is, *Land of the Kind that yields Rent*. Vide Robinson's Common Law of Kent, p. 1, 2, 3, &c.

All the Lands in England were in Nature of *Gavelkind* before the Norman Conquest, but as the Normans did not conquer Kent this Custom is still preserv'd in some Places there. (Wood's Inst. B. 2. c. 3.) And in divers other Parts of England, within divers Manors and Seignories the like Custom is in Force. Co. Lit. 140. a. (Lit. §. 265.) And also such Custom is in North Wales, &c. (Lit. §. 265.) And agreeing with Lit. in this Point see Stat. Wallia, An. 12 E. 1. *Aliter usitatum est in Wallia, quam in Anglia, quoad successionem hereditatis, eo quod hereditas partibilis est inter heredes masculos, a tempore cujus non extitit memoria partibilis extitit, Dominus Rex non vult quod consuetudo illa abrogetur, sed quod hereditates remaneant partibiles inter consimiles heredes sicut fieri consuevit, Et fiat partitio illius sicut fieri consuevit*. Co. Lit. 176. a. And the like Custom is in Ireland; for there the Lands also were in the Nature of *Gavelkind*; but where by their *Brehon* Law the Bastards inherited with their legitimate Sons, as to the Bastard that Custom was abolished. Co. Lit. 175. b. 176. a. But this Custom of *Gavelkind* is in some Places taken away by Statute.

Borough (or **Burgh**) **English** is a Custom in many Borough-Towns of England, where the youngest Son, eldest Daughter or youngest, &c. shall inherit. Bac. L. Tracts 129. Wood's Inst. B. 3. c. 3.

If the King purchases *Gavelkind* Lands, and dies seised, leaving several Sons, the eldest only shall inherit; for the Crown, and the Lands whereof the King is seised *Jure Coronæ*, are *concomitantia*. Co. Lit. 15. b. T. Raym. 77. the Opinion in Pl. Com. to the contrary is denied by Twissden; 1 Sid. 138. the Custom is suspended.

A special Custom that Lands in Fee should descend to the younger Son, but Lands in Tail to the Elder, is good; per Cur. March 54, 55. So that it shall descend to the youngest Son, if not of the half Blood, and if he be, then to the Eldest. Co. Lit. 140. b.

If the Custom of a Copyhold be, That the eldest Daughter shall have the Land, the eldest Aunt shall not have it by the Custom, for she is not within the Custom. Per Cur. Pasch. 8 Jac. C. B. Ratcliffe and Chapman, Godb. 166. 4 Leon. 242. 2 Danv. 548.

The youngest Brother shall not have *Borough-English* Land, for he is not within the Custom, Pasch. 8 Jac. C. B. 2 Danv. 548. and Godb. 166. Same Case, &c. per Cur. if the Custom be that the youngest Son shall inherit, the youngest Brother shall not inherit by the Custom; and so adjudged in Denton's Case. 4 Leon. 242.

Yet by some Customs the youngest Brother shall inherit, but *Consuetudo loci est observanda*. Co. Lit. 100. b.

And so the general Custom of *Gavelkind* Lands extends to Sons only; but by special Custom, when one Brother dies without Issue, all his Brothers may inherit. Co. Lit. 140. a. b.

If a Custom be, that if a Man dies without Heir Male, that his eldest Daughter shall have the Land, and if he has no Daughter, that the eldest Sister shall have the

Land, and if he has not a Sister, the eldest Cousin; but if he has an Heir Male, that he shall have it before any of them; and the Tenant of the Land hath several Daughters, but no Heir Male, and the eldest Daughter dies in the Life of the Tenant of the Land, having Issue a Daughter; this Grandchild is within the Custom, and shall have the Land by Descent upon the Death of the Grandfather. *Per Cur. Mich. 10 Jac. between Godfrey and Bullock, 2 Danv. 549.*

If *Borough-Englisch* Lands be let to a Man and his Heirs during the Life of *I. S.* and the Lessee dies, the youngest Son shall enjoy it; *Co. Lit. 110. b.* for the Heir taking it as a descendable Freehold, the Custom that runs with the Land guides the Descent to the younger Son. Adjudged in *Baxter and Dowdswell*, upon a special Verdict; though it was objected, the Heir took only by special Limitation to prevent an Occu-
pancy. *2 Lev. 138.*

If the Rent is granted out of *Gavelkind* Lands, it is of the Nature thereof, and shall descend to all equally. Adjudged *Trin. 24 Car. Randall and Writtle, 2 Lev. 87.* because the Rent is Part of the Profits of the Land, and issues out thereof. *1 Mod. 96.* but adjudged *con. in Randal and Roberts, Noy 15.* A Trust shall descend accordingly. *2 Roll. Abr. 780. pl. 6.*

If *A.* be seised of Copyhold Lands in Fee of the Nature of *Borough-Englisch* Land, and surrenders it into the Hands of the Lord, *ea Intentione* that he should re-grant it to him and his Wife, and to the Heirs of himself, and the Lord re-grants it accordingly, and there is a Custom, that if any Person be seised in Fee of any such customary Land, and dies so seised, that the Land shall descend after his Death *Filio juni-ori hujusmodi Tenentis customar' sic obiuntis seifiti secundum naturam* of *Borough-Englisch* Land; and after *A.* having Issue three Sons, dies so seised, and after ten Years after his Death, the youngest Son dies in the Life of his Wife without Issue, it seems the eldest Son shall have this Land as Heir to the youngest, and not the middle Son; for the Custom cannot extend to a Collateral Descent, *scilicet*, to direct the Descent between Brothers; for this is out of the Custom, and the Custom was once satisfied by the Descent to the youngest, and the Custom fixed the Land in the youngest, and there is an End of the Custom; and when the Custom fails, the Common Law shall guide the Descent; and by this special Custom, this Son, which was the youngest at the Time of the Death of his Father, ought to have the Land, and not any other who should come to be the younger after. *Trin. 11 Car. B. R. between Reeve and Malster*, it was argued by the Court, and *Brampston* and *Barkley* inclined, that the middle Son should have the Land; and *Jones* and *Croke contra*: But they all agreed, if this had not been customary Land, that the eldest would have it as Heir to the Father, inasmuch as this was a Reversion expectant upon an Estate for Life, and no actual Seisin in the youngest: And they differed only in this, whether the Custom should guide in the Descent in the same Manner as in the Course of a Descent at Common Law. And *Croke* and *Jones* held, that upon this special Custom, if the Copyholder died seised, having a Son, and his Wife *enseint* of another Son, who is born after, that he should not have the Land; but *Brampston* and *Barkley contra. Intratur Hill. 9 Car. Rot. 583. 2 Danv. 549. Cro. Car. 411. W. Jon. 361, &c.*

If the Custom be, that the youngest Son shall inherit, and a Man has Issue two Sons, and the eldest has Issue two Sons, and dies, and after the Lands descend to the youngest Son, who dies without Issue, the eldest Son of the eldest Brother shall have the Land, because the Custom holds not in the transversal Line, but only in the lineal Descent. *M. 24 & 25 El. at Hertford Term, resolved per Curiam. Cited, M. 10 Jac. 2 Danv. 550.*

If there be a Custom within the Manor of *T.* That if the Father dies, leaving no Son, but two or more Daughters, that the eldest Daughter shall have his Land for her Life only, and after her Death it shall descend to the next Heir Male that can derive by Males, and for want of such, that it shall escheat to the Lord; and there is another Custom, that if the Tenant dies, and leaves a Wife, that she shall have it for Life; and a Copyholder of the Manor dies, leaving a Wife, and two Daughters, and no Son, and his Wife enters, and the eldest Daughter dies, and after the Wife dies, the second Daughter shall have the Land for Life within the Custom; for though she was not the eldest at the Death of her Father, yet she was so at the Death of her Mother, whose Estate was a Continuance of the Father's Estate, as in Case of Free Bench adjudged, and that the Custom was good. *Trin. 15 Car. 2. Newton and Shaf-
toe, 1 Lev. 172. & Vide 1 Keb. 925. 2 Keb. 111, &c. 2 Sid. 167, 268. 1 Lev. 293. Co. Lit. 140. b.*

(D) *By Statute.*

THESE Descents are of Estates in Tail, by Force of the Stat. of *Westm. 2. De Donis Conditionalibus* made in the thirteenth Year of the Reign of King Edward the First.

In the Preamble of the first Chapter of the said Stat. it is observed, as follows, Stat. De Donis Conditionalibus.
 "Concerning Lands given upon Condition," that "where any gives his Land to a Man and his Wife, and the Heirs begotten of the Body of the same Man and his Wife, with such Condition expressed, that if the same Man and his Wife die without Heirs of their Bodies between them begotten, the Land so given, should revert to the Giver and his Heirs. In Case also where one gives Lands in Free Marriage, which Gift has a Condition annexed, though it be not expressed in the Deed of Gift, which is this, that if the Husband and Wife die without Heirs of their Bodies begotten, the Land so given shall revert to the Giver or his Heirs. In Case also where one gives Land to another, and the Heirs of his Body issuing, it seems very hard, and yet seems to the Givers and their Heirs, that their Will being expressed in the Gift, was heretofore nor yet is observed. In all the Cases aforesaid, after Issue begotten and born between them (to whom the Lands were given, under such Condition) heretofore such Feoffees had Power to alien the Land so given, and to disinherit their Issue of the Land, contrary to the Minds of the Givers, and contrary to the Form expressed in the Gift. And further, when the Issue of such Feoffee is failing, the Land so given ought to return to the Giver or his Heir, by Form of the Gift expressed in the Deed, tho' the Issue (if any were) had died, yet by the Deed and Feoffment of them, to whom the Land was so given upon Condition, the Donors have heretofore been barred of their Reversion, which was directly repugnant to the Form of the Gift."

And by the same Chapter thus Enacted,

"Wherefore our Lord the King perceiving how necessary and expedient it should be to provide Remedy in the aforesaid Cases, has ordained, that the Will of the Giver according to the Form in the Deed of Gift, manifestly enpressed, shall be from henceforth observed. So that they to whom the Land was given under such Condition shall have no Power to alien the Land so given, but that it shall remain unto the Issue of them to whom it was given after their Death, or shall revert to the Giver or his Heirs, if Issue fail, (whereas there is no Issue at all) or if any Issue be, and fail by Death, or Heir of the Body of such Issue failing: Neither shall the second Husband of any such Woman from henceforth have any Thing in the Land so given upon Condition after the Death of his Wife, by the Law of *England*, nor the Issue of the second Husband and Wife shall succeed in the Inheritance; but immediately after the Death of the Husband and Wife to whom the Land was so given, it shall come to their Issue, or return to the Giver or his Heir, as before is said."

"And if a Fine be levied hereafter upon such Lands, it shall be void in Law: Neither shall the Heirs or such as the Reversion belongs unto, tho' they be of full Age within *England*, and out of Prison, need to make their Claim."

Littleton (§. 13.) says, that before this Statute all Inheritances were *Fee-simple*; for all the Gifts which are specified in the Statute were *Fee-simple* conditional at the Common Law. The Nature of Lands before the Stat.

And *Coke* (on *Lit. p. 19. a.*) says, that *Fee-simple* here is taken in a large Sense, including as well conditional or qualified as absolute, to distinguish them from Estates-Tail since the said Statute.

Before which, if Land had been given to a Man, and to the Heir's Male of his Body, the having of an Issue Female had been no Performance of the Condition. *Co. Lit. 19. a.*

But if he had Issue Male and died, and the Issue Male had inherited, yet he had not a *Fee-simple* absolute, for if he had died without Issue Male, the Donor should have entred as in his Reverter. *Co. Lit. 19. a.*

By having Issue, the Condition was performed for three Purposes, (1) To alien (2) To forfeit. (3.) To charge with Rent, Common, or the like. *Co. Lit. 19. a.*

But the Course of Descent was not altered by having Issue, for if the Donee had Issue and died, and the Land had descended to his Issue, yet if that Issue had died (without any Alienation made) without Issue, his collateral Heir should not have inherited

herited, because he was not within the Form of the Gift, viz. Heir of the Body of the Donee. *Co. Lit. 19. a.*

Lands were given before the Statute in Frank-marriage, and the Donees had Issue and died, and after the Issue died without Issue; it was adjudged that his collateral Issue shall not inherit, but the Donor shall re-enter. So Note, that the Heir in Tail had no Fee-simple absolute, at the Common Law, tho' there were divers Descents. *Co. Lit. 19. a.*

If Lands had been given to a Man and to his Heirs Male of his Body, and he had Issue two Sons, and the Eldest had Issue a Daughter, the Daughter was not inheritable to the Fee-simple, but the Younger Son *per formam Doni*. And so if Land had been given at the Common Law to a Man and the Heirs Female of his Body, and he had Issue a Son and a Daughter, and died, the Daughter should have inherited this Fee-simple at the Common Law; for the said Statute creates no Estate-tail, but of such an Estate as was Fee-simple at the Common Law, and is descendible in such Form as it was at the Common Law. If the Donee in Tail had Issue before the Statute, and the Issue had died without Issue, the Alienation of the Donee at the Common Law, having no Issue at the Time, had not barred the Donor. *Co. Lit. 19. a.*

If Donee in Tail at the Common Law had aliened before any Issue had, and after had Issue, this Alienation had barred the Issue, because he claimed a Fee-simple; yet if that Issue died without Issue, the Donor might re-enter, for that he aliened before any Issue, at which Time he had no Power to alien to bar the Possibility of the Donor. But if Feme Tenant in Tail had taken Husband, and had Issue, and the Husband and Wife had aliened in Fee by Deed before the Statute, yet the Issue might have had a *Formedon* in Descender, for the Alienation was not lawful; but otherwise it is, if it had been by Fine. And these Things, tho' they seem ancient, are necessary to be known, as well for the Knowledge of the Common Law, as for Annuities and such like Inheritances as cannot be intailed within the said Statute, and therefore remain at the Common Law. *Co. Lit. 19. a.*

If the King before the said Statute had made a Gift to a Man, and to the Heirs of his Body begotten, the Donee, *post prolem suscitatum*, might have aliened as well as in the Case of a common Person. *Co. Lit. 19. a.*

But if the Donee had no Issue, and before the Statute had aliened with Warranty, and died, and the Warranty had descended upon the King, this should not have bound the King of his Reversion without Assets; but otherwise it was in the Case of a common Person. Of the other Side, if Lands had been given to the King and to the Heirs of his Body, he could not before Issue have aliened in Fee, but only to have barred his Issue as a common Person might have done, but not have barred the Reversion, for that should have been wrong in the Case of a Subject, and the King's Prerogative cannot alter his Case, nor make it greater than the Donor gave unto him: And it is a Maxim in Law, That the King can do no wrong. *Co. Lit. 19. a. b.*

Cause of
making the
Statute De
Donis.

The Cause of making the said Statute, was to preserve the Inheritance in the Blood of them to whom the Gift was made, notwithstanding Attainders of Treason or Felony. *Co. Lit. 19. a. 392. b.* But see, *Of Acquests by Means of Forfeitures*, §. 7. of this Chapter. And this Act in History is called *Gentilitium municipale*, because thereby the Families of many Noblemen and Gentlemen were continued and preserved to their Posterities. *Co. Lit. 393.*

Inconve-
niences of it.

But again *Coke* observes, (*Co. Lit. 19. b.*) that when all Estates were Fee-simple, then were Purchasers sure of their Purchases, Farmers of their Leases, Creditors of their Debts, the King and Lords had their Escheats, Forfeitures, Wardships and other Profits of their Seigniories: And for these and other like Cases, by the Wisdom of the Common Law, all Estates of Inheritance were Fee-simple, and what Contentions and Mischiefs have crept into the Quiet of the Law by these fetter'd Inheritances, daily Experience teaches us.

But some of these Inconveniences since the Stat. *De Donis* have been remedied. As to Leases by Tenants in Fee, by Stat. 32 H. 8. c. 27. see concerning *Leases post*. And as to the King's Debts, &c. by Stat. 33 H. 8. c. 39. & 13 El. c. 4. See more hereafter concerning *Fines* and *Recoveries*.

But notwithstanding the many Mischiefs and Inconveniences of intailed Estates, and the Statutes before mentioned, and Fines and Recoveries to dock Intails; there are Methods found out to limit Estates by Settlements, that no Law nor Statutes can reach

reach or alter them, except a particular Act of Parliament is made for that Purpose.

Wood's Inst. B. 2. c. 1.

Tenements, is the only Word which the said Statute of *Westminster 2.* that created Estates-tail, uses, and it includes not only all corporate Inheritances, but also all Inheritances issuing out of any of those Inheritances, or concerning or annexed to, or exercisable within the same, tho' they lie not in Tenure; therefore all these may be intailed, as Rents, Estovers, Commons, or other Profits whatsoever granted out of Land; or Uses, Offices, Dignities which concern Lands or certain Places, may be intailed within the said Statute, because all these favour of the Realty. *Co. Lit. 19. b. Realiter.*

20. a.

But Examples will illustrate and make this Learning clear.

The Writ of Assise was *De libero tenemento*, and made his Plaint of the Office of the fourth Part of the Serjeant of the Common Place, and the Writ adjudged good. And seeing that a Man has a Freehold, *Liberum tenementum*, in it, by consequence it may be intailed. *Co. Lit. 20. a.*

The Office of the Keeping of the Church of our Lady of *Lincoln* was intailed, and a *Formedon* there brought upon that Gift of the Office by the Issue in Tail. *Co. Lit. 20. a.*

The Office of the Marshal of *England* intailed. *Co. Lit. 20. a.*

The Office of one of the Chamberlains of the Exchequer. *Co. Lit. 20. a.*

The Office of a Fostership intailed. *Co. Lit. 20. a.*

Charters intailed. *Co. Lit. 20. a.*

An Use intailed. *Co. Lit. 20. a.*

A Nomination to a Benefice intailed. *Co. Lit. 20. a.*

Also a Name or Dignity may be intailed within the Statute, as Dukes, Marquisses, Earls, Viscounts and Barons, because they are named of some County, Manor, Town or Place. *Co. Lit. 20. a.*

If Lands be given in Tail, upon Condition, that the Tenant in Tail nor his Heirs shall not alien in Fee, nor in Tail, nor for Term of another's Life, but only for their own Lives, &c. such Condition is good. And the Reason is, for that when he makes such Alienation and Discontinuance of the Intail, he does contrary to the Intent of the Donor, for which the Stat. of *Westm. 2. c. 1.* was made. *Lit. §. 362.*

And therefore, if a Gift in Tail be made upon Condition, that the Donee, &c. shall not alien, this Condition is good to some Intents, and void to some: For as to all those Alienations which amount to any Discontinuance of the Estate-tail, (as *Lit.* here speaks) or is against the Stat. of *Westm. 2.* the Condition is good without Question. But as to a Common Recovery the Condition is void, because this is no Discontinuance, but a Bar, and this Common Recovery is not restrained by the said Statute; and therefore such a Condition is repugnant to the Estate-tail, for it is to be observed that to this Estate-tail there are divers Incidents: First, To be dispunished of Waste. Secondly, That the Wife of the Donee in Tail shall be endowed. Thirdly, That the Husband of a Feme Donee after Issue shall be Tenant by the Curtesy. Fourthly, That the Tenant in Tail may suffer a Common Recovery: And therefore if a Man makes a Gift in Tail, upon Condition to restrain him of any of these Incidents, the Condition is repugnant and void in Law. And it is to be observed, that a Collateral Warranty or a Lineal with Assets, in Respect of the Recompence, is not restrained by the said Statute; no more is the Common Recovery in Respect of the intended Recompence. And *Lit.* with an Intent to exclude a Common Recovery, says, Such Alienation and Discontinuance, joining them together. *Co. Lit. 223. b. 224. a.*

If a Man before the said Statute had made a Gift to a Man and the Heirs of his Body, upon Condition, that after Issue he should not have Power to sell, that Condition would have been repugnant and void. *Pari ratione*, after the Statute a Man makes a Gift in Tail, the Law tacite gives him Power to suffer a Common Recovery; therefore to add a Condition that he shall have no Power to suffer a Common Recovery, is repugnant and void. *Co. Lit. 224. a.*

If a Man makes a Feoffment to a Baron and Feme in Fee, upon Condition that they shall not alien, to some Intent this is good, and to some Intent it is void: For to restrain an Alienation by Feoffment, or Alienation by Deed, it is good, because such an Alienation is tortious and voidable: But to restrain their Alienation by Fine is repugnant and void, because it is lawful and unavoidable. *Co. Lit. 224. a.*

It is said, that if a Man infeoff an Infant in Fee, upon Condition, that he shall not alien, this is good to restrain Alienations during his Minority, but not after his full Age. *Co. Lit. 224. a.*

It is likewise said, that a Man by Licence may give Land to a Bishop and his Successors, or to an Abbot and his Successors; and add a Condition to it, that they shall not alien without the Consent of their Chapter or Convent, because it was intended a Mortmain, that is, that it should for ever continue in that See or House, for that they had it *en autre droit*, for religious and good Uses. *Co. Lit. 224. a.*

Littleton in the before-mentioned Section (362) says, (*inter alia*) that if Lands be given in Tail, upon Condition, that neither the Tenant in Tail nor his Heirs shall alien for Term of another's Life, but only for their own Lives, &c. such Condition is good.

Upon which *Coke* remarks, (*p. 223. b.*) That yet if a Man makes a Gift in Tail upon Condition that he shall not make a Lease for his own Life, altho' the Estate be lawful, yet the Condition is good, because the Reversion is in the Donor.

As if a Man makes a Lease for Life or Years, upon Condition, that they shall not grant over their Estate or let the Land to others, this is good, and yet the Grant or Lease should be lawful. *Co. Lit. 223. b.*

If a Man makes a Gift in Tail, upon Condition that he shall not make a Lease for three Lives or twenty-one Years, according to the Statute of 32 H. 8. the Condition is good, for the Statute gives him Power to make such Leases which may be restrained by Condition, and by his own Agreement; for this Power is not incident to the Estate, but given to him collaterally by the Act, according to that Rule of Law, *Quilibet potest renunciare juri pro se introducto*. *Co. Lit. 223. b.*

As to what Remedy the Issue in Tail has, if the Tenant in Tail aliens, *vid. Co. Lit. 327. a. b.*

Personalities.

But if the Grant of the Inheritance be merely *Personal*, or to be exercised with Chattels, it cannot be intailed. *Wood's Inst. B. 2. c. 1.*

So a Grant of an Annuity to a Man and the Heirs of his Body is void as to the Limitation only. *Wood's Inst. B. 2. c. 1.*

And so is a Lease for Years to a Man and the Heirs of his Body. *Wood's Inst. B. 2. c. 1. cites 10 Rep. 87. 4 Inst. 87.*

For the Chattel cannot be turned into an Inheritance; yet it is commonly assigned in Trust, that the Trustees should permit the Issue in Tail, &c. and to receive the Profits, which is an Intail in Effect. *Wood's Inst. B. 2. c. 1.* — But if a Lease for Years comes then to be limited in Tail, the Law allows not a *present* Remainder to be limited thereon: It will allow a future Estate arising upon a Contingency, and to wear out in a short Time. *Duke of Norfolk's Case, 3 Chan. Ca. 27.*

Copyholds.

Copyholds cannot be intailed by the Statute, yet Custom co-operating with the Statute, will make an Estate-tail, if not Custom only; for the Custom might have been before the Statute. *Wood's Inst. B. 2. c. 1. cites 1 Inst. 60. a. b. Coke's Compl. Cop. §. 47, 48, 53. 3 Rep. 8. contra. Cro. Car. 42. 2 Saind. 422. 3 Lev. 327.*

It is not sufficient Proof of such Custom, that Lands have been granted to many and the Heirs of their Bodies; for that may be a Fee conditional, as it was at Common Law: But if a Remainder has been limited and enjoyed, or if the Issues in Tail have avoided the Alienation of the Ancestor, &c. such are good Proofs of an Estate-tail. *Wood's Inst. B. 2. c. 1. p. 122.*

As Copyholds by Custom may be intailed, they may by like Custom be cut off by Surrender. *Wood's Inst. B. 2. c. 1. p. 122.*

(E) By the Jus Coronæ.

Understand, that concerning Descents there is a Law, Parcel of the Laws of England, called *Jus Coronæ*, which differs in many Things from the general Law concerning the Subject: As for Example, The King in any Suit for any Thing that pertains to the Crown shall not shew in certain his Consage as a Subject shall do, or as he himself shall do for Things touching his Duchy. *Co. Lit. 15. b.*

And in the Case of the King, if he has Issue a Son and a Daughter by one Venter, and a Son by another Venter, and purchases Lands, and dies, and the Eldest Son enters and dies without Issue, the Daughter shall not inherit these Lands, nor any other

other Fee-simple Lands of the Crown, but the Younger Brother shall have them. *Co. Lit. 15. b.*

Note, That neither *possessio fratris* does hold of Lands of the Possessions of the Crown, nor half Blood is no Impediment to the Descent of the Lands of the Crown, as it fell out in Experience after the Decease of King *Edward* the Sixth to Queen *Mary*, and from Queen *Mary* to Queen *Elizabeth*, both which were of the half Blood, and yet inherited not only the Lands which King *Edward* or Queen *Mary* purchased, but the ancient Lands, Parcel of the Crown also. *Co. Lit. 15. b.*

If a Man who is King by Descent of the Part of his Mother, purchases Lands to him and his Heirs, and dies without Issue, this Land shall descend to the Heir of the Part of the Mother; but in the Case of a Subject, the Heir of the Part of the Father shall have them. *Co. Lit. 15. b.*

So King *Henry* the Eighth purchased Lands to him and his Heirs, and died, having Issue two Daughters, the Lady *Mary* and the Lady *Elizabeth*; after the Decease of King *Edward*, the Eldest Daughter Queen *Mary* did inherit only, all his Lands in Fee-simple; for the Eldest Daughter or Sister of a King shall inherit all his Fee-simple Lands. *Co. Lit. 15. b.*

So it is if the King purchases Lands of the Custom of Gavelkind, and dies, having Issue divers Sons, the Eldest Son only shall inherit these Lands. *Co. Lit. 15. b.*

And the Reason of all these Cases is, for that the Quality of the Person does in these and many other like Cases alter the Descent, so as all the Lands and Possessions whereof the King is seised *in Jure Coronæ*, shall *secundum jus Coronæ*, attend upon and follow the Crown; and therefore to whomsoever the Crown descends, those Lands and Possessions descend also; for the Crown and the Lands whereof the King is seised *in jure Coronæ*, are *concomitantia*. *Co. Lit. 15. b.*

If the right Heir of the Crown be attainted of Treason, yet shall the Crown descend to him, and *eo instante* (without any other Reversal) the Attainder is utterly avoided, as it fell out in the Case of *Henry* the Seventh. *Co. Lit. 16. a.*

And if the King purchases Lands to him and his Heirs, he is seised thereof *in Jure Coronæ*; *a fortiori*, when he purchases Land to him, his Heirs and Successors. *Co. Lit. 16. a.*

(F) *By what Seisin Descents to the half Blood shall be defeated.*

AN Estate-tail may descend to the half Blood, notwithstanding an actual Seisin in the half Blood before, for there he comes in by the Statute *De Donis*, and so as Heir to the Donee. 37 *Aff. 15.* adjudged. 32 *E. 3.* *Discent 8.* adjudged. 19 *E. 2.* *Quare Impedit 177.* 2 *Danv. 560.*

But an Estate in Fee shall not descend from him that is actually seised in Demesne Fee. of the Estate to his Brother, Sister, or Cousin of the half Blood. 37 *Aff. 15.* admitted. 40 *Aff. 6.* adjudged. 2 *Danv. 560.*

If *J.* hath Issue two Sons by several Venters, and dies seised of Socage Land, and the Lord seises the Land to know who shall be his Tenant, and for the Safety of his Rent, and leases it for seven Years for the Sustenance of the Daughters of *J.* saving his Rent; this shall not make such a Seisin in the Eldest, but that after his Death the second Son shall have the Land. 34 *Aff. 10.* adjudged. 2 *Danv. 558, 559.*

So if the Eldest Son, being an Infant, releases to the Abator after the Death of his Father, this does not make such a Seisin in him, but that it shall descend to the Youngest Son. 34 *Aff. 10.* adjudged. 2 *Danv. 559.*

But if the Eldest Son, being an Infant, enters upon the Abator, and makes a Feoffment, this shall bar the Youngest of the half Blood; for the Entry made a Seisin in him. 34 *Aff. 10.* 2 *Danv. 559.*

If a Man leases for Life, rendring Rent, and dies, having Issue two Sons by several Venters, and the Eldest Son dies before the Rent-Day, the second Son shall have it as Heir to his Father, because the Eldest had not the actual Possession. 35 *Aff. 2.* 2 *Danv. 559.*

But otherways it would have been if the Rent-Day had incurred in the Life of the Eldest, and if he had received the Rent; for this would have made an actual Seisin in him. 35 *Aff. 2.* 2 *Danv. 559.*

If the Father makes a Lease for Years, and the Lessee enters and dies, the Eldest Son dies during the Term before Entry or Receipt of Rent, the Younger Son of the

the half Blood shall not inherit, but the Sister of the whole Blood, because the Possession of the Lessee for Years, is the Possession of the eldest Son, so as he is actually seised of the Fee-simple, and consequently the Sister of the whole Blood is to be Heir. *Co. Lit. 15. a.*

If there be a Gift to the Baron and Feme in special Tail, the Remainder to the right Heirs of the Baron, and they have Issue, and the Feme dies, and the Baron takes another Feme, and hath Issue and dies, and the eldest Son enters, and dies without Issue; the second Son of the half Blood shall have the Remainder, because the eldest was not seised thereof in his Demesne. *37 Aff. 14. adjudged*, but there the Reason is given because the Remainder did not commence 'till after the Gift. *24 Ed. 3. 30. b. 31. 2 Danv. 559.*

If Land be given to *I.* for Life, the Remainder to *R.* his Son in Tail, the Remainder to the right Heirs of *I.* and *I.* dies, and *R.* enters as Tenant in Tail, and dies without Issue, *T.* the Son and Heir of *I.* of the half Blood to *R.* shall have the Land by Descent, and not the Heirs of *R.* because *R.* was never seised of the Fee in Demesne. *39 E. 3. Discents. 2 Danv. 559.*

So if a Gift be to another in Tail, the Remainder to his own right Heirs, and after the Donee dies, having Issue a Son by one Venter, and a Son by another, and the eldest Son enters, and dies without Issue, his Brother of the half Blood shall have the Land by Force of the Remainder as Heir to his Father, because his Brother was not seised of this Estate in Demesne. *2 Danv. 559.*

So if the eldest Son be seised in Tail, with a Remainder or Reversion by Descent to him from his Father in Fee, and dies without Issue, his Brother of the half Blood shall have this Remainder or Reversion by Descent, because his Brother was never seised thereof in Demesne. *32 E. 3. Discent 9. adjudged. 5 E. 3. Discent 14. adjudged. 2 Danv. 559.*

If a Man seised of an Advowson in Gros hath Issue a Son and a Daughter by one Venter, and a Son by another, and dies, and the eldest Son dies before any Presentation, the youngest Brother shall have the Advowson, because the elder never had any Seisin thereof. *3 H. 7. 5. 2 Danv. 559. Co. Lit. 15. b. S. P.*

But if the eldest had presented, and died without Issue, the younger Brother should not have had the Advowson, because this Presentation put the Seisin in him. *F. N. B. 36. eontra 19 E. 2. Quare Impedit 177. adjudged. 2 Danv. 559.*

If two Daughters by several Venters made Partition of an Advowson in Gros, to present by Turns, and after one dies without Issue, before any Presentation, the other shall have the Advowson, because there was no Seisin thereof. *F. N. B. 24. E. 2 Danv. 560.*

But otherwise it would have been if she that had died had presented after the Partition. *F. N. B. 34 E. 2. 2 Danv. 560.*

If Lands descend to two Coparceners, and they make Partition, being of the half Blood, and after one dies without Issue, the other shall not have it, because she ought to have it as Heir to her, and not as Heir to the Ancestor. *Contra 19 E. 2. Quare Impedit 177. 2 Danv. 560.*

If after the Entry of the eldest Son, the Wife of the Father is endowed of a third Part, and then the eldest dies, the younger of the half Blood shall have the Reversion of the third Part; because the actual Seisin which the elder Brother got, was by the Endowment defeated. *Co. Lit. 15. a.*

Otherwise if the eldest Son, had made a Lease for Life, and the Lessee had endowed the Wife of the Father. *Co. Lit. 15. a.*

If the eldest Son has a Reversion expectant upon a Freehold, and he grants it for Life, it shall cause a *Possessio fratris*. *Co. Lit. 191. b.*

(a) This must be intended without Issue. *Dyer 48. pl. 16. Hob. 334. Cro. Car. 435. W. Jon. 34. Vide 1 Sid. 200. and 1 Vent. 415, 416, &c. Hale's Argument.*

(G) *What shall be an Impediment of a Descent.*

IF a Man hath Issue two Sons, and the elder is attainted of Felony, and dies (a) in the Life of the Father, and after the Father dies seised of Lands, this shall descend to the second Son, or to the Daughters of the Father, if he hath no Son, for the Attainder of the elder Son did not corrupt the Blood between the younger Son and the Father. *Co. Lit. 8. dubitatur. 27 E. 3. 77. b. 2 Danv. 554.*

But if the eldest Son being attainted of Felony, survives the Father, he shall be an Impediment to his Brother or next Heir to have the Land by Descent from the Father. *26 Aff. 2. adjudged. 2 Danv. 555. And the Land shall escheat. Co. Lit. 13. a.*

1 H. 4. Rotulo Parliamenti, Numero 132. a Petition was preferred, that where the eldest Son during the Life of his Father is attainted, the next Brother might notwithstanding succeed as Heir to his Father; and to which it was answered by the King, *Let the Common Law run.* 2 Danv. 555.

If a Man dies seised in Fee leaving Issue only two Daughters, one whereof was attainted of Felony in his Life-time, one Moiety shall descend to the one Daughter and the other Moiety shall escheat. Co. Lit. 163. b.

If a Man hath Issue an eldest Son, born out of the Allegiance of the King, and after hath Issue a younger Son born in the Realm, the youngest Son shall be Heir to the Father, and the eldest shall not be any Impediment to him, because the eldest never had any inheritable Blood in him. Co. Lit. 8. a.

If a Man has Issue a Son, and is after attainted of Treason or Felony, and then obtains his Pardon, and has Issue another Son, if the elder Son die, leaving the Father, the younger shall inherit, for the Pardon restored the Blood as to all Issue begotten afterwards. Co. Lit. 8. a. 392. a.

But if the eldest Son survives the Father, the younger cannot be Heir, because he hath an elder Brother, which by Possibility might have inherited. Co. Lit. 8. a. 392. a.

If the Heir of the Crown be attainted of Treason, yet shall the Crown descend to him, and *eo instante*, without other Reversal, the Attainder is utterly avoided, as it fell out in the Case of Hen. 7. Co. Lit. 16. a. 7 Co. 12. a.

But if there be Grandfather, Father and Son, and the Father is attainted of Treason or Felony, and after is pardoned, and dies, the Son shall not demand the Land as Heir of the Grandfather, (a) for the Bridge is broke, and as the Father himself was barred, so is the Son. Per Bromley and Portman, 2 Danv. 555.

And so if the Father had been an Alien, because the Son could only inherit *Jure Representationis*. 1 Sid. 195, 413. 1 Vent. 416, 417, 418, 423.

But if the Grandfather be Tenant in Tail, the Land in such Case will descend to the Son, for the Attainder is no Corruption of Blood as to the Lands intailed. 3 Co. 10. b. 8 Co. 166. a. Per Forman Doni.

(a) Nor as Heir of his Father's Brother. Dyer 274. pl. 40. Cro. Car. 543. 1 Vent. 416, 425.

(H) *In what Cases a Man shall be said to be in by Descent, or by Purchase.*

IF a Man devises Lands to one that is his Heir, this is void, and it shall operate by Descent; Hob. Rep. 29. Counden's Case, for where there is not any Alteration of the Estate, by the Devise of the Estate which the Law gives to him, he shall be in by Descent, which by Intendment is more for his Advantage, as to take away an Entry, and for a Warranty, and is the more antient Title. 2 Danv. 556.

If a Man devises Lands to his Wife for Life, (so for Years. 2 Leon. 101. 3 Leon. 118. Hob. 30.) the Remainder to I. S. who is his next Heir, in Fee, this is a void Devise to I. S. and he shall be in after the Death of the Devisor by Descent; for the Alteration of the Estate in Reversion, which the Law gives him to a Remainder, which is given by the Devise, is not any Alteration of the Estate in Point of Estate, and therefore he shall be said to be in by Descent, which is the more antient and better Estate, and not by Purchase by way of Remainder. Mich. 24 Car. B. R. between Preston and Holmes, adjudged upon a Special Verdict. Intratur Trin. 23 Car. Rot. 252. 2 Danv. 556. Styl. 148, 149.

If a Man devises Lands held by Knights-Service to his Wife till I. S. who is his next Heir, comes to the Age of twenty-four Years, and at that Age he devises all to the said I. S. in Fee, and when he comes to the said Age of twenty-four Years, that his Wife shall have the third Part for her Life, and if I. S. dies before the Age of twenty-four Years, then the Land shall remain to the Wife during her Life, and after her Decease, (if I. S. have no Issue) the Remainder to his Daughter in Tail, the Remainder to the right Heirs of the Devisor; the Wife dies after the Heir comes to the Age of twenty-four Years. In this Case no Intail is made by the Will, but I. S. shall have it by Descent in Fee. 2 Danv. 556.

If A. be seised of a Copyhold in Fee, and surrenders it to the Use of his Will, and after by his Will devises it to B. his Cousin for his Life, and after his Decease to the Heir of his Body begotten, for ever: In this Case the Word *Heir* being limited to the Body of B. *est nomen collectivum*, and all one with the Word *Heirs*; and the Words *for ever*, in Case of a Devise, make a Fee, and are only put to shew his Intention, as is usual, when Land is given to another and his Heirs for ever; and therefore in this Case this is a Fee executed in B. and his Heir is in by Descent, and not by Purchase;

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and

and it is not like to *Archer's Case*, Co. 1. where the Devise is to one for Life, and after to his Heir Male, and to the Heirs Male of such Heir Male; for there the Inheritance is limited to the Heir of the Body of the Heir Male. *Paf.* 1651. adjudged in a Writ of Error upon a Judgment *in Banco*, upon a special Verdict between *Pawsey* and *Lawdall*, and the Judgment given *in Banco contra* reversed for this Error. *Intratur Paf.* 1650. Rot. 279. This reversed by the Opinion of the Court, *prater* Justice *Fermyn*, who was of the contrary Opinion. 2 *Danv.* 557. *Styl.* 249, 273.

If a Man leases to one for Life, the Remainder to the right Heirs of *I. S.*; *I. S.* being dead at the Time, his right Heir hath the Remainder by Purchase. 27 *Ed.* 3. 87. 2 *Danv.* 557.

So the right Heir shall have the Remainder by Purchase, though *I. S.* was living at the Time of the Grant. 27 *E.* 3. 87. 2 *Danv.* 557.

When the Ancestor by any Gift or Conveyance takes an Estate of Freehold, and in the same Gift or Conveyance an Estate is limited immediately to his Heirs in Fee or in Tail, there the Words, *his Heirs*, are Words of Limitation, and not of Purchase, for his Heir shall be in by Descent. Co. 1. *Shelley*, 104. 40 *E.* 3. 9. b. 45 *E.* 3. 19. 17 *E.* 3. 43. b. 64. *Contra*, 7 *H.* 4. 23. b. 2 *Danv.* 557.

So it will be if an Estate in Fee or in Tail to his right Heirs, be limited immediately. Co. 1. *Shelley*, 104. 40 *E.* 3. 10. *Adjudged* 11 *H.* 4. 74. 24 *E.* 3. 36. 27 *E.* 3. 87. b. 2 *Danv.* 557.

But if a Lease is made to *A.* and *B.* and if *A.* dies before *B.* the Remainder to the Heirs of *A.* the Heirs of *A.* can take only by Purchase, for there was no Possibility that the Freehold and Fee could be conjoined in *A.* *Lit. Rep.* 258.

If a Copyholder of Inheritance surrenders it to the Use of another and his Heirs, and he to whom the Surrender is made dies before Admittance; and after the Lord admits his Heir, he shall be said in by Purchase, and not by Descent; for he is in by the Lord, for nothing was in his Father by the Surrender before Admittance. *Trin.* 40 *El.* b. *Moore's Case*. 2 *Danv.* 557.

If *A.* bargains and sells Land to *B.* in Fee for Money, and after dies before Inrolment of the Deed, and after the Deed is inrolled, his Heir shall be in by Descent; and if it be held in *Capite*, shall sue Livery if he be of full Age, and shall be in Ward if within Age; for upon the Inrolment it settles in the Bargainee, between the Bargainor and him, *ab initio* by the Statute of Uses; and the Statute of Inrolments says, that nothing shall pass except it be inrolled; so that if it is inroll'd, it vests not by the Statute of Inrolments, but by the Statute of Uses. *Hob. Rep.* 136. *Dimmock's Case*. *Cra. Jac.* 408. *Ow.* 149, 150.

If *A.* being Tenant in Tail, has Issue two Sons, and the eldest having Issue a Daughter, dies, leaving his Wife *priviment enseint* of a Son; and after *A.* covenants to suffer a Recovery to the Use of himself for Life, the Remainder to *C.* and *D.* for twenty-four Years, the Remainder to the Heirs Male of the Body of *A.* and dies at five in the Morning, and the Recovery passes the same Day, and an *Habere facias seisinam* is immediately awarded, and in a few Days after executed, and the youngest Son enters, and after the Wife of the eldest is delivered of a Son; he may enter upon the youngest; for the youngest taking what his Ancestor would have done if he had lived, he shall take it by Descent, and not by Purchase. *Trin.* 23 *Eliz.* *Shelley's Case*, 1 Co. 93, 94, &c. adjudged 98. Several Cases put upon the same Reason. And *Moor* 136. pl. 281. the same Case adjudged; for when the Heir takes that which his Ancestor would have taken if living, he shall take it by Descent, and not by Purchase. 1 *And.* 69. *S. C.* adjudged.

If a Man having only two Daughters his Heirs, devises his Lands to them and their Heirs; they take as Jointenants, and not as Coparceners, for the Devise giveth it them in another Degree than the Common Law would have given it them, and for the Benefit of the Survivorship between them. *Mich.* 37 *Eliz.* 431. *per tot.* *Cur.* 2 *Danv.* 558. 3 *Lev.* 127, 128. *Owen* 65.

But if the Devise had been to one of them, and her Heirs, she should have taken the whole by Devise, and nothing by Descent, for her Title was intire. *Per Dodderidge*, *Palm.* 373. 2 *Roll. Rep.* 352. and *Vide* 2 *Sid.* 79.

If the Devise be to them and their Heirs, equally to be divided between them, Share and Share alike, they are Tenants in Common. 2 *Sid.* 53, 78, 79. *Et vide* *Godb.* 362, 363. 3 *Leon.* 25, 26. *Goulf.* 88.

And if a Man devises Land to his Son and Heir apparent, and a Stranger, they are Jointenants for the Benefit of the Stranger. *Per Cur. Godb.* 94. *Owen* 65.

If a Man devises Lands to his eldest Son, and his Heirs, paying 20*l.* a-piece to his younger Children, at their Ages of twenty-one Years, and upon Non-payment of the Legacies, devises the Lands to his younger Children, and their Heirs; the eldest Son is in by Descent, and there is no Limitation or Condition annexed to his Estate. *Adjudged Hill. 41 Eliz. Hamsworth and Pretty, Moor 644. pl. 891.* The first Devise to the eldest Son and his Heirs in Fee being no more than the Law gave him, was void; but the Devise to the younger upon his Non-payment was good by way of future or executory Devise. *Same Case Cro. El. 833, 919, 920.*

If a Man devises Lands to his eldest Son and Heir, and his Heirs, upon Condition that he shall pay his Debts within a Year, and if he fails, that his Executors shall sell the Lands, and pay his Debts, and dies; the Son hath it as a Purchaser, being tied with a Condition. *Adjudged Mich. 5 Car. Gilpin's Case, Cro. Car. 161.*

If a Man being seised of Lands on the Part of his Mother, devises them to his Executors for sixteen Years, and after to one who is his Heir *a Parte materna*, he shall take by Descent, for the Descent to the Heir *a Parte paterna* or *materna* is but a Consequent dependant upon the Nature of the Estate. *Trin. 35 Car. 2. between Hedger and Row, 3 Lev. 127. adjudged; tho' it was objected it was better for him to take by Purchase, for then the Heirs of the Part of the Father might inherit before the Heirs of the Part of the Mother, and so both Heirs would be inheritable.*

(1) *Of Descents which take away Entries.*

DESCENTS which toll Entries are in two Manners, to wit, where the Descent is in Fee, or in Fee-Tail. *Lit. §. 385.*

Descents in Fee which toll Entries are, as if a Man seised of certain Lands or (a) Tenements is by (b) another disseised, and the Disseisor has Issue, and (c) dies seised of such Estate; now the Lands descend to the Issue of the Disseisor by Course of Law. And because the Law casts the Lands or Tenements upon the Issue by Force of the Descent, so as the Issue comes to the Lands by Course of Law, and not by his own Act, the Entry of the Disseisee is taken away, and he is put to sue a Writ of Entry *sur Disseisin* against the Heir of the Disseisor, to recover the Land. *Lit. §. 385. But vide the Stat. 32 H. 8. c. 33. post.*

(a) That is of such Tenements as be corporeal, and lie in Livery; and not of Inheritances which lie in Grant, for Descents of

them do not put him who has Right, to an Action: And the Reason of this Diversity is, for that Houses serve for the Habitation of Men, and Lands to be manured for their Sustainance, and therefore the Heir after a Descent shall not be molested or disturbed in them by Entry. *Co. Lit. 237. b.* (b) The like Law is of an Abatement or Intrusion, and of their Feoffees or Donees, &c. *Co. Lit. 237. b.* (c) A dying seised is necessary. *Co. Lit. 237. b.*

Descents in Tail which take away Entries are, as if a Man be disseised, and the Disseisor gives the same Land to another in Tail, and the Tenant in Tail has Issue, and dies of such Estate seised, and the Issue enters, in this Case the Entry of the Disseisee is taken away, and he is put to sue against the Issue of the Tenant in Tail, a Writ of Entry *sur Disseisin*. *Lit. §. 386.*

In ancient Time, if the Disseisor had been in long Possession, the Disseisee could not have entred upon him. Likewise the Disseisee could not have entred upon the Feoffee of the Disseisor, if he had continued a Year and a Day in quiet Possession. But the Law is changed in both these Cases, only the dying seised being an Act in Law, does hold at this Day; and this seems to be very ancient, for this was the Law before the Conquest. *Co. Lit. 237. b.*

One of the Reasons of this ancient Law may be, that the Heir cannot suddenly, by Intendment of Law, know the true State of his Title; and for that many Advantages follow the Possession and Tenant, the Law takes away the Entry of him who would not enter upon the Ancestor, who is presumed to know his Title, and drives him to his Action against the Heir who may be ignorant thereof. *Ibid.*

At the Common Law, if the Disseisor, Abator or Intruder, had died seised soon after the Wrong done, the Disseisee and his Heirs had been barred of his and their Entry without any Time limited by Law. *Co. Lit. 238. a.*

But now by *Stat. 32 H. 8. c. 33.* Reciting, that whereas divers have entred by Strength, and without Title, &c. it is enacted, that except such Disseisor has been in the peaceable Possession of such Manors, Lands, &c. whereof he shall die seised by the space of five Years next after such Disseisin, &c. without Entry or continual Claim, &c. that there such dying seised, &c. shall not take away the Entry of such Person or Persons, &c.

But

But after the five Years the Disseisee must make continual Claim. *Co. Lit. 238. a.*

And it is said that Abators and Intrudors are out of this Statute, because the Statute is Penal, and extends only to a Disseisor, and that was the most common Mischief. *Et ad ea quæ frequentius accidunt jura adaptantur. Co. Lit. 238. a.*

The Feoffee of a Disseisor is out of the said Statute, and remains as at the Common Law. *Co. Lit. 238. a.*

But to a Disseisor the Statute is taken favourably for Advancement of ancient Right; for whether the Disseisin be without Force or with Force, it is within the Statute. *Co. Lit. 238. a.*

And altho' the Statute speaks of him that at the Time of such Descent had Title of Entry, &c. or his Heirs, yet the Successors of Bodies Politick or Corporate, so you hold yourself to a Disseisin, are within the Remedy of this Statute; for the Statute extends clearly to the Predecessor, being disseised, and consequently, without naming of his Successor, extends to him, for he is the Person at the Time of such Descent had Title of Entry. *Co. Lit. 238. a.*

If a Lessee for Life is disseised, and the Disseisor dies seised within five Years, the Lessee for Life may enter; but if he dies before he enters, it is said that the Entry of him in Reversion is not lawful, because his Entry was not lawful upon the Disseisor at the Time of the Descent, as the Statute speaks. But if the Lessee for Life had died first, and then the Disseisor had died seised, he in the Reversion had been within the Remedy of the Statute, because he had Title of Entry at the Time of the Descent, as the Statute speaks, and so within the express Letter of the Statute, altho' the Disseisin was not immediate to him; and the like is to be said of a Remainder, &c. *Co. Lit. 238. a.*

In what Cases. If a Disseisor make a Gift in Tail, and the Donee discontinues, and disseises the Discontinuee, and dies seised, the Entry of the Disseisee is not taken away, for the Descent of the Fee-simple is vanished and gone by the Remitter, and the Issue is in by Force of the Estate-Tail, of which the Donee did not die seised. *Co. Lit. 238. b.*

If a Man be disseised in Time of Peace, and a Descent cast in the Time of War, this will not take away the Entry of the Disseisee. *Co. Lit. 249. b.*

Where the Descent is immediate. If a Disseisore's takes Husband, has Issue, and dies seised, and after the Husband dies, and the Issue enters, &c. the Disseisee may enter, for that the Issue came not to the Land immediately by Descent after the Death of his Mother, but by the Death of his Father. *Lit. §. 394.* And the Estate of the Tenant by Curtesy commenced by having Issue, and was consummate by the Death of the Wife, so as the Fee and Freehold did not after the Death of the Wife immediately descend to the Heir. *Co. Lit. 241. b.*

If the Disseisor dies without Heir, his Wife being *enfeint*, and after the Issue is born, and enters into the Land, though he has it by Descent, yet the Entry of the Disseisee is not taken away, because the Issue came not to the Land immediately by Descent. *Co. Lit. 241.*

Where the Entry is given by Record. If a Man recovers against another that is seised in Fee, and after the Recoveree dies seised, and it descends to his Heir, yet this Descent shall not take away the Entry of the Recoveror, because he had but a Title of Entry, and the Entry is to execute the Judgment, and so relates to it, being executory against the Heir that is privy to the Judgment, that it binds the Blood. *2 Danv. 560. Co. Lit. 238. a. Contra, Fitz. Entry cong. 35. 49 E. 3. 23. b. 7 H. 7. 14. b. 16 H. 7. 8. b. Agreed clearly per Curiam. 3 E. 4. 7. Br. Descent 37. Fitz. Mortdanc. 3. 6 E. 4. 11. b. 3 H. 7. 3. per Browne. 5 H. 7. 31. b. Br. Bar. 26. 21 H. 8. 6. 17. b.*

So if the Recovery be against Tenant in Tail that dies seised, this Descent to the Issue shall not take away the Entry of the Recoveror, for the Cause aforesaid. *33 E. 3. Entry congeable 51. 2 Danv. 561.*

So if I acknowledge the Right to another by Fine, and he grants and renders it to me again, and after dies seised, this Descent shall not take away my Entry, because the Fine was executory; (*it seems 33 E. 3. Entry congeable 51. is intended of a Fine come ceo which is executed.*) *2 Danv. 561.*

If a Man recovers against *A.* who after dies, having Issue *Bastard eigne* and *Mulier puisne*, and the Bastard enters and dies seised, and this descends to his Issue, this Descent shall not take away the Entry of the Recoveror, for the Continuance of the Bastard hath made him as Heir, and so privy to the Recovery. *5 H. 7. 2.* But *Quere*, the Issue himself cannot bastardize his Father. *2 Danv. 561.*

If a Man recovers Land, and after a Stranger to the Recovery dies seised, yet this shall not take away the Entry of the Recoveror, because it was but a Title, and the Title relates to execute the Recovery of the Judgment. 2 *Danv.* 561.

If a Man recovers against another, and enters and sues Execution, and after the Recoveree disseises him, and dies seised, this Descent shall take away the Entry of the Recoveror, for the Recovery was executed, and cannot be returned again; and this is a puisne Title. 2 *Danv.* 561. *Co. Lit.* 238. 3 *E.* 4. 7. *contra.* 10 *H.* 7. 5. *b.* *Fitz. Title* 36. *Quere* 7 *H.* 7. 15. 5 *H.* 7. 31. *b.* *Vide Kelw.* 46, 170. *a. b.*

If after Recovery against Tenant for Life he dies, and he in Remainder enters before Execution, and dies seised, the Entry of the Recoveror is not taken away, because he is privy in Estate. *Co. Lit.* 238. *a.*

If a Copyholder in Fee *in facto* upon an Admittance dies seised of a Copyhold, and it descends to his Heir, yet it shall not take away the Entry of another that has Right to the Copyhold. *Mich.* 15 *Jac.* B. R. between *Lee* and *Browne*, agreed *per Curiam*, upon Evidence at the Bar, 2 *Danv.* 561. Same Point adjudged in *Gravenor* and *Ted*, 4 *Co.* 23. *Poph.* 35. because coming in by Admittance of the Lord, his Occupation can be no Tort to him; and the Estate of which he died seised, by the Common Law, was only an Occupation at Will. *Et vide* 4 *Co.* 22. *a.* *Cro. Jac.* 36. *March* 6.

Of what Things a Descent shall take away an Entry.

A Descent of such Things as lie in Grant, as Advowsons, Rents, Commons in Gross, &c. puts not him that has Right, to an Action. *Co. Lit.* 237. *b.*

Descents which take away Entries, may be of Estates in Fee or in Tail. *Lit.* §. 385, 386, 388. *See before*, p. 39.

Of what Estates.

A dying seised for Term of Life, or for Term of another's Life, does never take away an Entry. *Lit.* §. 387.

If a Disseisor leases to *A.* and his Heirs during the Life of *J. S.* and *A.* dies, living *J. S.* this takes not away the Entry of the Disseisee, because the Dying seised was of a Freehold only, and Heirs were added to prevent an Occupancy. *Co. Lit.* 239. *a.*

But if the Reversioner disseises the Tenant for Life, and dies seised, this Descent shall take away the Entry of the Tenant for Life. *Co. Lit.* 239. But not of a Stranger. *Hob.* 323.

If the Disseisor of the King's Tenant for Life dies seised, this takes not away the Entry of the Tenant for Life, because the Disseisor had but an Estate of Freehold during the Life of the Lessee.

If the Disseisor of an Infant dies seised, and after the Infant comes of Age, and the Heir of the Disseisor dies before Entry, tho' he died not seised of an actual Seisin, but of a Seisin in Law, and in Pleading the second Heir must make himself Heir to the Disseisor, yet this dying seised takes away the Entry of the Disseisee.

If a Disseisor leases for Years, and dies seised of the Reversion, the Entry of the Disseisee is taken away, because he died seised of the Fee and Freehold.

Otherways if he had leased for Life, &c.

If a Disseisor leases for his own Life, and dies, the Entry of the Disseisee is not taken away, for tho' the Fee and Freehold descends to the Heir of the Disseisor, yet the Disseisor died not seised of the Fee and Freehold. *Co. Lit.* 239. *a. b.*

A Descent shall not take away the Entry of an Infant. *Lit.* §. 402.

Who shall be bound thereby.

Nor of a Feme Covert, where the Wrong was done to her during the Coverture. *Lit.* §. 403.

But if a Feme Sole is disseised, and then takes Husband, and the Disseisor dies seised, and her Husband dies, she cannot enter, for it shall be accounted her Folly to take such a Husband as would not enter before a Descent.

Otherways if the Woman was under Age when she took Husband. *Co. Lit.* 246. *a. b.*

It shall not take away the Entry of one that is *Non compos.* *Lit.* §. 405.

Nor of him that is disseised, and a Descent cast while he is in Prison. *Lit.* §. 436.

So if out of the Realm. *Lit.* §. 440.

But if disseised while at large, and a Descent is cast during his Imprisonment, it will bind him. *Co. Lit.* 259. *a.* *Lit. Rep.* 88.

So if disseised, being in the Realm, and a Descent is cast while he is out of the Realm. *Co. Lit.* 261. *b.*

If being disseised when out of the Realm, he returns into the Realm, and after goes out of the Realm, and then the Disseisor dies, &c. *vide Dyer* 143. *pl.* 57. *Quere.* *Et vide* 1 *And.* 311.

If the Lord of a Manor leases it to one for Life, and a Tenant of the Manor dies without Heir, and a Stranger enters, and dies seised, and the Tenant for Life dies, &c. the Descent binds the Lord; for it was his Folly that he would lease the Manor to one that would not enter. *Kelw. 144. per Keble*, who said he might have a Writ of Escheat. 2 *Danv. 564.*

Where such Lessor might make continual Claim, and consequently for want thereof shall be bound by the Descent, *vide Co. Lit. 250. b. Et vide W. Jones 324. and of Continual Claim, post. 43.*

In respect of
his Right or
Estate.

If *A.* enfeoffs *B.* upon Condition, and *B.* is disseised, and the Disseisor dies seised, and the Condition is broke either before or after the Descent, the Entry of *A.* is not taken away, for the Estate is subject to the Condition into whose Hands soever it comes. *Lit. §. 391, 392.* The Title of Entry in the Feoffor or Donor, that hath but a Condition (so of a Title of Entry upon a Limitation. *Cro. El. 920. Noy 51.* Or Power given by Will to sell Lands. *Kelw. 40. b.*) cannot be taken away by any Descent, because he has no Remedy by Action to recover the Land; and if a Descent should take away his Entry, it should bar him for ever. *Co. Lit. 240. a.* And the Condition remains in the same Essence it was at the Time of the Creation, and cannot be devested and put out of Possession as Lands, &c. *Co. Lit. 240. b.*

So he that has Title to enter upon a Mortmain shall not be barr'd by a Descent, because then he should be without Remedy. *Co. Lit. 240. b. 1 Leon. 210.*

And if *A.* devises Lands to *B.* and dies, and the Heir of *A.* enters, and dies seised before any Entry made by *B.* this Descent shall not take away the Entry of *B.* for if it should take away his Entry, it should bar him of his Right, and leave him utterly without Remedy.

So of him that has Title to enter for Consent to a Ravishment of the Patentee of the King, &c. *Co. Lit. 240. b.*

But where Lands were devisable by Custom, a Man might have a Writ of *Ex gravi querela*, without any particular Usage, as incident to the Custom; and a Descent in such Case should have bound the Devisee. *Co. Lit. 111. a.*

If a Man dies seised of Lands, his Wife being *privement enseint* of a Son, and a Stranger abates, and dies seised, and after the Son is born, he shall not be bound by the Descent, because at that Time he had no Right to enter. *Co. Lit. 245. b.*

The Entry of Tenant for Years, Tenant by Statute-Merchant, &c. that have but Chattel, is not taken away by any Descent, for by their Entry upon the Heir they take no Freehold from him. *Co. Lit. 249. a.*

In respect of
several claim-
ing by the
same Title.

If a Man having Issue two Sons, dies seised of Lands in Fee-simple, and the Younger Son enters by Abatement, hath Issue, and dies seised, the Entry of the Elder or his Issue is not taken away, for it shall be presumed the Younger entered claiming by the same Title, *viz.* as Heirs to his Father. *Lit. §. 396.* So tho' many Descents are cast in his Line, yet may the Eldest or his Heirs enter. *Co. Lit. 242. b.*

And admit that the Youngest Son be of the half Blood to his Brother, yet he is of the whole Blood to his Father, and therefore if he enters by Abatement, and dies seised, it shall not bar his Elder Brother of his Entry.

But if the Youngest Son makes a Feoffment in Fee, and the Feoffee dies seised, that Descent shall take away the Entry of the Elder, because the Privy of Blood fails. *Co. Lit. 242. b.*

But if the Elder Son enters after the Death of his Father, and the Younger disseises him, has Issue, and dies seised, the Entry of the Elder is taken away, for entering by Disseisin upon his Brother, it cannot be intended he claimed as Heir to his Father, any more than if a Stranger had disseised the Elder Brother. *Lit. §. 397.*

So if a Stranger abates, and the Younger disseises him, and dies seised, &c.

But if Lands are given to Husband and Wife and the Heirs of their two Bodies, and they have Issue a Daughter, and the Wife dies, and the Husband has Issue a Son by another Wife, and dies, and the Son abates, and dies seised; this Descent takes away the Entry of the Daughter, because they claimed not by one Title. *Co. Lit. 242. b.*

So if the Father leases for Life, and dies, and the Tenant for Life dies, and the Younger Son intrudes, and dies seised, the Entry of the Elder is not taken away.

If for Years, &c. the Possession of the Lessee makes an actual Freehold in the Eldest. *Co. Lit. 243.*

(K) *Where an Entry taken away by Descent shall be revived.*

IF a Disseisor makes a Gift in Tail, and the Donee hath Issue, and dies seised without Issue, so as the Estate-tail which descended is spent, the Entry of the Disseisee is revived. *Co. Lit. 238. b.* But if the Disseisor dies seised, and the Heir of the Disseisor dies without Heir, the Disseisee cannot enter upon the Land by Escheat. *Co. Lit. 240. a.*

So if the Son disseises one, and enfeoffs the Grandfather, who dies seised, and the Lands descend to the Father, now is the Entry of the Disseisee taken away; but if the Father after dies seised, and the Lands descend to the Son, the Entry of the Disseisee is revived. *Co. Lit. 238. b.*

So if after such Descent cast, the Disseisor (a) takes back an Estate for Life or in Fee, the Disseisee may enter upon him. *Co. Lit. 238. b.*

Tho' he takes back but an Estate for Life, yet when the Disseisee enters upon him, he shall devest the Reversion; for the Estate of Freehold is that whereupon a *Præcipe* lies, and the Entry of the Disseisee is as available in Law as if he had recovered in a *Præcipe*. *Co. Lit. 241. a.*

(a) Comes to the Land again either by Descent or Purchase. *Co. Lit. 242. a.*

If a Disseisor leases to an Infant for Life, and he is disseised, and a Descent cast, and the Infant enters, the Disseisee may enter upon him. *Co. Lit. 238. b.*

If after a Descent cast, the Heir of the Disseisor, &c. endows the Wife of the Disseisor of a third Part, the Disseisee may enter into this third Part, for the Wife shall not be in by the Heir, but immediately by her Husband by Title paramount the Descent; and therefore, in Judgment of Law, the Freehold and Possession which the Heir had by the Descent, is taken away by the Endowment. *Co. Lit. 241. a.*

If after the dying seised of the Disseisor the Disseisee abates, and the Wife of the Disseisor recovers Dower against him by Confession in a Writ of Dower, tho' the Descent be avoided, yet the Disseisee cannot enter upon the Tenant in Dower, because the Recovery was against himself. *Co. Lit. 241. a.* But if he had assigned her Dower *in pais*, some say he should have entred upon her.

If an Infant being a Disseisor aliens in Fee, and the Alienee dies seised, and the Infant enters upon the Heir of the Alienee, the Disseisee may enter upon him; for by the Entry of the Infant the Descent is defeated. *Lit. §. 407, 408.*

If the Disseisor makes a Feoffment upon Condition, and the Feoffee dies seised, and the Feoffor enters upon the Heir for Breach of the Condition, the Disseisee may enter upon him, because by the Entry of the Disseisor he is utterly defeated. *Lit. §. 409.*

(L) *How a Descent to take away an Entry may be prevented, viz. By continual Claim.*

Continual Claim is where a Man has (a) *Right and Title to enter into Lands or Tenements* whereof another is seised in Fee, or in Fee-tail, if he who has Title to enter makes continual Claim to the Lands or Tenements, before the dying seised of him who holds the Tenements, then altho' such Tenant dies thereof seised, and the Lands or Tenements descend to his Heirs, (b) *yet may he who has made such continual Claim, or his Heir, enter into the Lands or Tenements so descended by reason of the continual Claim made, notwithstanding the Descent.* As in Case a Man be disseised, and the Disseisee makes continual Claim to the Tenements in the Life of the Disseisor, altho' the Disseisor dies seised in Fee, and the Land descend to his Heir, yet the Disseisee may enter upon the Possession of the Heir notwithstanding the Descent. *Lit. §. 414.*

Continual Claim, what. (a) And yet in some Cases it may be made by him who has Right, and cannot enter. *Co. Lit. 250. b.* (b) This is to be understood in this Manner: That if

the Father makes Claim, and the Disseisor dies, and then the Father dies, that his Heir may enter, because the Descent was cast in the Father's Time, and the Right of Entry which the Father gained by his Claim, shall descend to his Heir. But if the Father makes continual Claim, and dies, and the Son makes no continual Claim, and within the Year and Day after the Claim made by the Father, the Disseisor dies, this shall take away the Entry of the Son, for the Descent was cast in his Time, and the Claim made by the Father shall not avail him, who might have claimed himself. *Co. Lit. 250. b.*

Where an Entry into Part shall be an Entry into the Whole, *vide p. 7.*

Where to be made.

If

How. If a Man has Title to enter and dares not, for (a) fear of being beat, maimed, or killed, then he may go as near as he dares to the Lands, and by Word claim the same to be his; presently by such Claim he has a Possession and Seisin in the Lands, as well as if he had (b) entred indeed, altho' he never had Possession or Seisin thereof before. *Lit. §. 419.*

(a) Every fear is not sufficient, it must concern the Safety of the Person, and not Houses or Goods, for he may recover Damages for them; and it must not be a vain Fear, but such as may befall a constant Man, as if the adverse Party lie in wait in the Way with Weapons or by Words menace, to beat, mayhem or kill him that would enter. *Co. Lit. 253. b.* (b) This is an Entry in Law, and shall vest the Possession and Seisin in him for his Advantage, but not for his Disadvantage. *Co. Lit. 253. b.*

When. If he who Occupies the Land die seised in Fee or in Fee-Tail within a (a) Year and a Day after such Claim, whereby the Lands descend to his Son as Heir to him, yet he who made the Claim may enter upon the Possession of the Heir, &c. *Lit. §. 422.*

(a) The Day on which the Claim is made is to be accounted one. *Co. Lit. 255. a.*

But if the Father died seised after the Year and the Day, then he who made the Claim could not enter; therefore if he would be sure his Entry should not be taken away by such Descent, &c. he should have made another Claim within a Year and a Day after the making the first Claim, and in like Manner a third Claim, and so on, making a Claim within every Year and Day next after every Claim made, during the Life of his Adversary, and then at what Time soever his Adversary died seised, his Entry should not be taken away by Descent. *Lit. §. 423.*

But this Time of a Year and Day is, since *Littleton* wrote, altered by the *Statute of 32 H. 8. c. 33.* before mentioned *p. 39.*

Who may make it. The Lessor upon a Lease for Life or Years may enter to make Claim. *Co. Lit. 250. b.*

If the Disseisee made continual Claim, and the Disseisor died seised within the Year, his Heir being within Age, and the King by Office was intitled to the Wardship, though the Entry of the Disseisee was not lawful, yet might he make continual Claim to avoid a Descent. *Co. Lit. 250. b.*

In what Cases the Claim made by one, shall serve for another. If there be Tenant for Life, the Remainder over, and Tenant for Life makes a Claim, and after the Disseisor, or he that is seised, &c. dies seised within the Year, and after the Lessee dies before Entry, yet he in Remainder shall have Advantage of this Claim, because he himself could not have made a Claim, and the Descent shall not bind the Lessee; and therefore shall not bind the Remainder. *Lit. §. 416.*

So in Case of a Reversion. *Co. Lit. 252. a.*

But it seems in this Case, that if the Lessee for Life makes a Claim, and dies, and after the Disseisor dies seised within the Year, that this Descent shall bind the Remainder, because he might have made a Claim after the Death of the Lessee, and he is not privy to the Claim of the Lessee not coming under him, and the Claim ought to be continuing 'till the Death, which it is not here; *Ergo,*

If two Jointenants are disseised, and one makes Claim, and after the Disseisor dies seised within the Year, it seems this shall not take away the Entry of the other Jointenant, but that this Claim by one shall serve for both, because the Entry of one is the Entry of both, and otherwise there would be a Severance of the Jointure, which cannot be by such an Act. *Co. Lit. 252. a. 2 Danv. 562.*

But it seems in this Case, that if that Jointenant that made a Claim dies, and after the Disseisor dies seised within the Year after the Claim made, that this Descent shall take away the Entry of the Survivor for the whole; for that though the Claim of one should serve for both during their Lives, by a Consequence to avoid the Severance of the Jointure, yet this Mischief is not in this Case, and the Survivor comes paramount the Claim, and so not privy to it, and so the Claim is determined before the death of the Disseisor, and as it seems the Claim ought to continue 'till the dying seised. But *Quere* this, for it hath been argued for a Point. *2 Danv. 562.*

If the Tenant be disseised, and make continual Claim, and dies without Heir, and after the Disseisor dies seised within the Year, this shall bind the Lord by Escheat, because he comes paramount the Claim, and not in Privy thereof; and he might have made a Claim after the Escheat. *2 Danv. 562.*

If the Baron makes a continual Claim, and dies, and after the Disseisor dies seised within the Year after the Claim, yet it seems the Wife shall be bound, because she is not privy to the Claim, nor comes under it, and she herself might have made a Claim: But *quere* this. *2 Danv. 562.*

If the Father be disseised, and makes continual Claim, and dies, and after the Disseisor dies seised within the Year after the Claim, yet this shall not bind the Heir of the Father, because he comes in under the Father, and in Privy of Blood and Estate, and therefore he shall have Advantage of the Claim of the Father, without any new Claim by himself. 9 H. 4. 5. Curia. Br. Continual Claim 1. Lit. §. 421. Admit the Claim shall serve for him and his Heirs. Contra, 15 E. 4. 22. 2 Danv. 562, 563.

The Claim made by the Father shall never avail him who might have made Claim himself.

Where the Descent is cast in the Time of the Father, the Right of Entry which the Father gained by his Claim descends to his Son. Co. Lit. 250. b.

(M) *What Things shall descend to the Heir or Executor.*

IF a Nobleman, Knight, Esquire, &c. be buried in a Church, and have his Coat of Armour and Pennons, with his Arms and such other Ensigns of Honour as belong to his Degree or Order, set up in the Church, or if a Gravestone or Tomb be laid or made, &c. for a Monument of him; in this Case altho' the Freehold of the Church be in the Parson, and these are annexed to the Freehold, yet Parson or any other cannot take them or deface them, but he is subject to an Action to the Heir, and his Heirs, in Honour and Memory of whose Ancestor they were set up. Mich. 10 Jac. B. Pym's Case. Per Cur. 2 Danv. 552. Co. Lit. 18. b. (Godb. 199, 200. S. C. and S. P. cited. 12 Co. 104. S. C. and S. P. cited.) For being put there for the Honour of his Ancestor, they are in nature of Heirlooms.

And some hold that the Wife or Executor, that first set them up, may have an Action against those that deface them in their Time. Co. Lit. 18. b. In Moor 878. pl. 1232. a Case cited by the Chief Justice where the Widow brought such Action against the Parson. 12 Co. 104, 105. cited. Godb. 200. cited.

In some places Chattels, as Heirlooms (as the best Bed, Table, Pot, Pan, Cart, and other dead Chattels moveable) go to the Heir, and he may have an Action for them at Common Law, and shall not sue for them in the Ecclesiastical Court, but the Heirloom is due by Custom, and not by the Common Law. And the ancient Jewels of the Crown are Heirlooms and shall descend to the next Successor, and are not devisable by Testament. Co. Lit. 18. b.

An Heirloom is called *Principalium* or *Hereditarium*. Co. Lit. 18. b.

Consuetudo hundredi de Stretford in Com. Oxon est, quod Heredes ten'orum infra Hundredum prædictum existen' post mortem antecessorum suorum habebunt, &c. Principalium, Anglice an Heirloom, viz. De quodam genere catallor', utensilium, &c. Optimum plaustrum, optimam carucam, optimum ciphum, &c. Co. Lit. 18. b. cited in the Margin, Int. adjudicata coram Rege, Trin. 41 E. 3. lib. 2. fo. 104. in Thesaur.

(N) *What Person may or may not, be Heir to another; and to whom.*

A Bastard cannot be an Heir, for *est nullius Filius*. Co. Lit. 8. a. 123. a. 1 Sid. 1. In General. 200. 2 Sid. 52. Noy 162.

Bastard Brothers cannot be Heir one to another. 43 E. 3. 2. b. 2 Danv. 552.

A Monster which has not the Shape of Mankind, cannot be Heir or inherit any Land, tho' it be brought forth in Marriage, but altho' he be deformed in any Part, yet if he has human Shape he may be Heir. *Hii qui contra formam humani generis converso more procreantur, ut si mulier monstrosus, vel prodigiosus enixa, inter liberos non computentur, partus tamen cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos, vel nisi quatuor habuerit) bene debet inter liberos communerari. Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus Monstrosus.* Another saith *ampliatio seu diminutio Membrorum non nocet*. Co. Lit. 7. b. 8. a.

A Man seised of Lands in Fee has Issue an Alien born out of the King's Legiance, he cannot be Heir, *propter defectum subjectionis*, altho' he be born within lawful Marriage.

If made a Denizen by the King's Letters Patent, yet he cannot inherit to his Father or any other. Co. Lit. 8. a.

But it is otherwise if he be naturalized by Act of Parliament, for then he is not accounted in Law *alienigena*, but *indigena*. Co. Lit. 8. a.

The Denization of two Brothers cannot make them inheritable the one to the other. 1 Sid. 195. Vide 1 Vent. 418, 419.

If a Man be attainted of Treason or Felony, altho' he be born within Wedlock, he can be Heir to no Man, nor any Man Heir to him, *propter delictum*; for by the Attainder his Blood is corrupted. And this Corruption of Blood is so high, as it cannot absolutely be salved and restored but by Act of Parliament. Co. Lit. 8. a.

If the Issue in Tail be attainted of Felony, and after his Father dies, he cannot enter into the Lands, in respect of the Corruption of Blood upon the Attainder of himself. Co. Lit. 391. b. 392. a.

But if one attainted is pardoned, the Blood is restored, as to such Issue as are born afterwards. Co. Lit. 8. a. 392. a. But having Respect to those whose Blood was corrupted at the Time of the Attainder, the Pardon removes not the Corruption of Blood either upward or downward. Co. Lit. 392. a.

Ideots, Lepers, Madmen, Outlaws in Debt, Trespas, or the like, Persons excommunicated, Men attainted in a *Premunire*, or convicted of Heresy may be Heirs. Co. Lit. 8. a.

2. By Matter
subsequent.

A Bastard may be Heir against a Stranger by Continuance. 43 E. 3. 32. 2 Danv. 553. Otherwise where the Continuance of the Possession is interrupted by the *Mulier*. Co. Lit. 245. a.

The Issue of a *Bastard Eigne* may be Heir against the *Mulier* or Stranger, by his Father's Continuance of the Possession to his Death. Co. Lit. 243. b. 244. a.

And though the Issue of the Bastard endows the Wife of the Bastard, yet is not the Entry of the *Mulier* lawful upon Tenant in Dower, for his Right was barred by the Descent. Co. Lit. 244. 8 Co. 101. b.

An Hermaphrodite that is as well Male as Female, shall be Heir either as Male or Female.

If an Alien be made a Denizen, the Issue which he has after shall inherit him, but not the Issue that he has before. Co. Lit. 8. a.

If an Alien has Issue in *England* two Sons, these Sons are Denizens, and yet the one of them cannot be Heir to the other of them, because there never was any inheritable Blood between the Father and them, and where the Sons could by no Possibility be Heir to the Father, the one of them shall not be Heir to the other. Co. Lit. 8. a. Vide Palm. 18. Same Point *arguendo*, con. 2 Sid. 150. Same Point *per Glynn C. J. con.* In *Collingwood* and *Pais's Case*, 1 Lev. 60. same Point cited; and the same Point was in the Exchequer Chamber agreed by seven Judges against three to be otherwise, for that in a *Mortdaucesfor* he might make Title as Heir to his Brother, without mentioning his Father. 1 Sid. 198. same Point adjudged by all the Judges in the Exchequer Chamber, except three, this being said to be the same as the principal Point there, *viz.* where two Sons of an Alien were naturalized, &c.

If a Man has Issue two Sons, and after is attainted of Treason or Felony, and one of the Sons purchases Lands and dies without Issue, the other Brother shall be his Heir, for the Attainder of the Father corrupts the lineal Blood only, and not the collateral Blood between the Brethren, which was vested in them before the Attainder, and each of them by Possibility might have been Heir to the Father. Adjudged Mich. 40 & 41 Eliz. *Hobby's Case in Scaccario*. Co. Lit. 8. a. 4 Leon. 5. Palm. 19. Vide Noy 158, &c. 2 Roll. Rep. 93. Cro. Car. 543. Lit. Rep. 28. 2 Sid. 25, 27. Cro. Jac. 539. 1 Vent. 425.

But some have holden, that if a Man be attainted of Treason or Felony, and after has Issue two Sons, they cannot be Heir one to the other, because they never could be Heir to their Father, nor ever had any inheritable Blood in them. Co. Lit. 8. a. Contra, 1 Sid. 201. and in 2 Sid. 248. the same Point is cited by *Newdigate J.* and denied, and said, that my Lord *Coke* confutes himself, fo. 84. where he says, that if Feme Tenant in Chivalry marries an Alien, by whom she has Issue, is inheritable; and yet such Issue cannot have two Bloods in him, his Mother being an Alien. Vide Co. Lit. 84. b. where it is admitted such Issue shall be in Ward to the Lord; which could not be, if not capable of taking by Descent. And in Co. Lit. 12. it is said, that ancient Authors have said, that if a Man be seised of Lands in the Right of his Wife, and attainted of Felony, and after has Issue, this Issue shall not inherit. But for this Vide 3 Co. 41. a. b. Noy 159, 166, 168. Lit. Rep. 28. 1 Sid. 200. 1 Vent. 422.

He who is born deaf and dumb, may be Heir to another.

So may he who is born deaf, dumb and blind. *Co. Lit. 8. a.*

If an Alien has Issue *A.* born in *Flanders*, and comes into *England*, and is made a Denizen, and after has Issue *B.* and dies, and *A.* is naturalized by Act of Parliament, and it is thereby enacted, (a) that *A.* shall be enabled to purchase, inherit and enjoy, as Heir to any Ancestor lineal or collateral, and (b) shall be adjudged a natural Subject of *England* in every Respect to all Intents and Purposes, and *A.* after purchases Copyhold Lands, and dies without Issue, *B.* shall inherit. Adjudged, tho' objected that it was enacted, that *A.* should be Heirs to his Ancestors lineal or collateral; but that it was not said, that they should be Heirs to him; and at the Death of his Father, *A.* had no inheritable Blood in him. And it was answered, that the Blood was not the Cause of the Disability, but the Place of his Birth, for the Law respects not the Blood where there is no Allegiance. *Trin. 17 Jac. Godfry and Dixon, Cro. Jac. 539.* and in *Palm. 13, & 14, &c. 2 Roll. Rep. 92, &c. 113. S. C. adjudged Godb. 275. S. C. adjournatur. 1 Sid. 201. 1 Vent. 428. cited.*

(a) Vide
1 Vent. 420;
421.
(b) 2 Sid. 24.

If an Alien has Issue *A. B. and C.* Aliens, and *B. and C.* are naturalized, and *B.* purchases Lands in Fee and dies without Issue, *C.* may inherit these Lands, for he may make his Title thereto without mentioning his Father. Adjudged *per tot. Cur. Hill. 1657. Foster and Ramsey, 2 Sid. 23, 51, 148.*

And the same Point was adjudged (seven Judges against three) in *Collingwood and Pais*, in the Exchequer-Chamber, *1 Lev. 55, 59.* the Words of the Naturalization being, *That they should inherit to any Ancestor lineal or collateral as fully to all Intents and Purposes as if they had been natural-born Subjects*; for the Descent between them is immediate, and he may make his Title in a *Mordancestor* as Heir to his Brother without mentioning his Father. And the Words of the Act of Parliament, which say *he shall be inheritable* to any Ancestor, lineal or collateral, are vain; if being descended from an Alien, he cannot have any Ancestor. *1 Sid. 193, 198.* Same Case adjudged by all the Judges except three, because the Descent between the Brothers is an immediate Descent, and in Case of an immediate Descent, there can be no Impediment but what is between the Parties themselves; tho' it was argued by the three Judges that held the contrary, that the Blood between the Brothers is communicated by the Parents, and the Impediment arises from the Failure of inheritable Blood in the Fountain. *Vide 1 Vent. 413, &c.* the Lord Chief Justice *Hale's* Argument in this Case; and 424, he says, that in a Descent between Brothers the Law only respects the mediate Relation of the Brothers, and not in Respect of their Father; for if the Law took Notice of the Father as a *Medium* thereof, a Brother by a second Venter might succeed the other Brother, because he is Heir to his Father. *1 Vent. 424. Hard. 224.*

If a Bastard enters after the Death of the Father and continues seised for a Year, and after aliens to another, and the Alienee dies seised without any Interruption, yet this dying seised of the Alienee shall not bind the Right of the *Mulier*, for this is not within the Maxim. *2 Danv. 550.* Where the *Mulier* shall be barred.

If *Bastard Eigne* dies seised without Issue, and the Lord by Escheat enters, this shall not bar the *Mulier*, because there is no Descent.

If the Bastard enters, and the *Mulier* dies, his Wife *privement enseint* with a Son, the Bastard has Issue and dies seised, the Son is born, his Right is bound for ever. But if the Bastard dies seised, his Wife *enseint* with a Son, the *Mulier* enters, the Son is born, the Issue of the Bastard is barred, for there must not only be a dying seised, but also a Descent to his Issue. *Co. Lit. 244. a.*

If *Bastard Eigne* in the Life of his Father has Issue, and dies, and then the Father dies seised, and the Son of the Bastard enters as Heir to his Grandfather, and dies seised, this Descent shall bind the *Mulier*. *Co. Lit. 244. b. 8 Co. 101. b.*

If a Man has Issue such a Bastard as aforesaid, and dies, and the Bastard enters and dies seised, and the Land descends to his Issue, the Collateral Heir of the Father is bound, as well as where there are two Sons. *Co. Lit. 244. a.*

If Tenant in Tail has Issue *Bastard Eigne* and *Mulier Puisne* and dies, and the Bastard enters, and continues peaceably for his Life, and dies, and this descends to his Issue, this shall bind the *Mulier*, tho' this be an Estate-tail.

But it seems the Issue of the *Mulier* shall not be bound by such Descent; for then this should be a Bar of the Tail by the Act of his Father, which is against the Statute. *2 Danv. 551.*

If there be Tenant in Tail, the Remainder over to another, and the Tenant in Tail dies, having Issue *Bastard Eigne* and *Mulier Puisne*, and the Bastard enters, and dies seised having Issue, the Descent from the Bastard shall not bind the Right of him in Remainder, but he shall have his Action; for the Continuance of the Possession by the Bastard shall not be prejudicial to him. 2 *Danv.* 551.

If the Bastard dies seised, the *Mulier* being within Age, it shall bind him. 2 *Danv.* 551. *Co. Lit.* 244. For the Issue of the Bastard, in Judgment of Law, is become lawful Heir, and the Law prefers Legitimation before the Privilege of Infancy. *Contra, Bro. Descent* 29. & vide 8 *Co.* 100. b. 101. a. where it is said, that as to an Infant, *Non compos*, &c. being bound by such Descent, the Opinions have been both ways; but concludes it the better Opinion, that they shall be bound. *Vide Plowd. Com.* 372.

But *Coke (on Lit.)* says, the Reason of this Case is, for that *Iustum non est aliquem post mortem facere Bastardum, qui toto tempore vitæ suæ pro legitimo habebatur*. And so it seems to be, that if a Man has Issue a Son being *Bastard Eigne*, and a Daughter, and the Daughter is married, the Father dies, the Son enters and dies seised, this shall bar the Feme Covert: And the Descent in this Case of Services, Rents, Reversions, expectant upon Estates-tail, or for Life, whereupon Rents are reserved, &c. shall bind the Right of the *Mulier*, but a Descent of these shall not drive them that have Right to an Action.

So if the Bastard dies seised, and his Issue endows the Wife of the Bastard, yet this is not the Entry of the *Mulier* lawful upon the Tenant in Dower, for his Right was barred by the Descent. *Co. Lit.* 244. a.

If the Father leases for Life, or makes a Gift in Tail, rendring Rent, and dies, this shall bar the *Mulier*. *Co. Lit.* 15. a.

If a Man has Issue two Daughters, the Eldest being a Bastard, and they enter and occupy peaceably as Heirs; now the Law in Favour of Legitimation shall not adjudge the whole Possession in the *Mulier*, (who then had the only Right) but in both, so as if the Bastard has Issue and dies, her Issue shall inherit. *Co. Lit.* 244. a.

If a *Bastard Eigne* enters, and is ousted by the *Mulier*, and after the Bastard disfeises the *Mulier*, and dies seised, and his Issue enters, the Right of the *Mulier* is not bound, but he may have a Writ of *Entry sur Disseisin*, &c. against the Issue of the Bastard, &c. *Lit.* §. 401.

But if the *Mulier* enters upon the Bastard, and the Bastard after recovers the Land in an Affise against the *Mulier*, and after the Bastard dies seised, this shall bar the *Mulier*, for the Interruption was avoided. *Co. Lit.* 245. b.

(O) *How far the Heir is chargeable for the Act of the Ancestor.*

THIS is to be observed in Fee-simple Inheritance, that every Heir having Fee-simple Land or Inheritance, be it by Common Law or by Custom, of either *Gavelkind* or *Borough-English*, is chargeable so far forth as the Value thereof extends, with the binding Acts of the Ancestors from whom the Inheritance descended; and these Acts are collateral Incumbrances, and the Reason of this Charge is, *Qui sentit commodum, sentire debet & incommodum sive onus*. As for Example, if a Man bind himself and his Heirs in an Obligation, or do covenant by Writing for him and his Heirs, or do grant an Annuity for him and his Heirs, or do make a Warranty of Land, binding him and his Heirs to Warranty: In all these Cases the Law chargeth the Heir after the Death of the Ancestor with this Obligation, Covenant, Annuity and Warranty; yet with these three Cautions: First, that the Party must by Special Name bind himself and his Heirs, or Covenant, Grant and Warranty for himself and his Heirs; otherwise the Heir is not to be touched. Secondly, that same Action must be brought against the Heir, whilst the Land or other Inheritance resteth in him unaliened away; for if the Ancestor die, and the Heir, before an Action be brought against him upon those Bonds, Covenants, or Warranties, do alien away the Land, then the Heir is clear discharged of the Burden; except the Land was by Fraud conveyed away of Purpose to prevent the Suit intended against him. Thirdly, that no Heir is farther to be charged than the Value of the Land descended unto him from the same Ancestor that made the Instrument of Charge, and that Land also not to be sold outright for the Debt, but to be kept in Extent, and at a yearly Value, until the Debt or Damage be run out. Nevertheless, if an

Heir that is sued upon such a Debt of his Ancestor do not deal clearly with the Court when he is sued, that is, if he come not in immediately, and by way of Confession set down the true Quantity of his Inheritance descended, and so submit himself therefore, as the Law requireth, then that Heir that otherwise demeaneth himself shall be charged of his own Lands or Goods, and of his Money, for this Deed of his Ancestor. As for Example; If a Man bind himself and his Heirs in an Obligation of one hundred Pounds, and dieth, leaving but ten Acres of Land to his Heir; if his Heir be sued upon the Bond, and cometh in, and denieth that he hath any Lands by Descent, and it is found against him by the Verdict that he hath ten Acres, this Heir shall be now charged by his false Plea, of his own Lands, Goods and Body, to pay the hundred Pounds, altho' the ten Acres be not worth ten Pounds. *Bar. L. Tracts* 129.

S E C T. III.

Of acquiring real Estates by Purchase.

(A) Purchase, what.

Purchase in Latin is either *Acquisitum* of the Verb *Acquiro*, for so it is in the Original Register 243. *In Terris vel Tenementis quæ viri & mulieres conjunctim acquiserunt, &c.* Bracton (*lib. 2. fo. 65.*) calls it *Perquisitum*, which is from the Verb *Perquirere*; and by Glanvil (*lib. 7. c. 1.*) it is called *Questus* or *Perquisitum*. *Co. Lit. 3. b. 18. a. b.* Purchase, Derivation.

A Purchase is the legal Acquisition of an Estate by Deed or Agreement for a valuable Consideration, or by Gift. It is when one comes to Lands, &c. by Deed or Agreement of the Parties, and cannot be by Descent, because a Descent is an Act in Law, and so is an Escheat, and it is an Attainment to Lands by Right, for such as attain to Lands by Wrong, as Disseisin, Abatement, Intrusion, Usurpation, &c. which are not in Law Purchases, but Injury and Oppression. *Co. Lit. 3. b. 18. b.* Definition. Description.

A Purchase is always intended by Title either for some Consideration, or by Gift, for a Gift is in Law a Purchase. *Co. Lit. 18. b.*

All Contracts are comprehended under this Word Purchase. *Dr. & Stud. Dial. 2. c. 24.* For it is not much argued in the Laws of England (as in the Civil Law) what Difference there is betwixt a Contract, Promise, Gift, Loan, or a Pledge, a Bargain, a Covenant, &c. since the Intent of the Law is to have the Effect of the Matters argued, and not the Terms. *Wood's Inst. B. 2. c. 3.*

(B) Who are capable or incapable of purchasing or conveying Lands, &c. and what are good Names of Purchase.

Persons capable of purchasing are of two Sorts, (1) *Persons natural* created by God, as *J. S. J. N. &c.* (2) And *Persons incorporate* or Politick created by the Policy of Man, (and therefore they are called *Bodies Politick*) and these are of two Sorts, *viz.* Either *Sole*, or *Aggregate* of many: Again Aggregate of many, either of all Persons capable or of one Person capable, and the Rest incapable or dead in Law. *Co. Lit. 2. a.* Persons natural. Incorporates.

The King may purchase Lands to him and his Heirs, but he is seised thereof in *Jure Coronæ*. *Co. Lit. 15. b. 16. a. 51. a.* Vide of Descents by *Jus Coronæ* in the last Section, p. 34.

Some Men have Capacity to purchase, but not Ability to hold. Some Capacity to purchase, and Ability to hold or not to hold, at the Election of them or others. Some Capacity to take and to hold. Some neither Capacity to take nor to hold, and some specially disabled to take some particular Thing. *Co. Lit. 2. a.*

If an *Alien* Christian or Infidel purchase Houses, Lands, Tenements or Hereditaments to him and his Heirs, altho' he can have no Heirs, yet he is of a Capacity to take a Fee-simple but not to hold: For upon an Office found, the King shall have it by his Prerogative, of whomsoever the Land is holden. *Co. Lit. 2. a. b.* Aliens.

And so it is if the *Alien* purchases Land and dies, the Law casts the Freehold and Inheritance upon the King. *Co. Lit. 2. b.*

If an *Alien* purchases an Estate of Freehold in Houses, Lands, Tenements or Hereditaments, the King upon Office found shall have them. *Co. Lit. 2. b.*

If an *Alien* be made Denizen, and purchases Lands, and dies without Issue, the Lord of the Fee shall have the Escheat, and not the King. *Co. Lit. 2. b.*

Aliens Merchants.

But as to a Lease for Years, there is a Diversity between a Lease for Years of a House for the Habitation of a Merchant Stranger being an Alien, whose King is in League with ours, and a Lease for Years of Lands, Meadows, Pastures, Woods, and the like; for if he takes a Lease for Years of Lands, Meadows, &c. upon Office found, the King shall have it: But of a House for Habitation he may take a Lease for Years as incident to Commercery, for without Habitation he cannot merchandize or trade; but if he departs or relinquishes the Realm, the King shall have the Lease; so it is if he dies possessed thereof, neither his Executors or Administrators shall have it, but the King, for he had it only for Habitation as necessary to his Trade or Traffick, and not for the Benefit of his Executors or Administrators. *Co. Lit. 2. b.*

But if the *Alien* be no Merchant, then the King shall have the Lease for Years, altho' it were for his Habitation; and so it is if he be an Alien Enemy. *Co. Lit. 2. b.*

Felons.

Also if a Man commit *Felony*, and after purchases Lands, and after is attainted, he has Capacity to purchase but not to hold it, for in that Case the Lord of the Fee shall have the Escheat. *Co. Lit. 2. b.*

And if a Man be *attainted of Felony*, yet he has Capacity to purchase to him and his Heirs, altho' he can have no Heir; but he cannot hold it; for in that Case the King shall have it by his Prerogative, and not the Lord of the Fee; for a Man attainted has no Capacity to purchase (being a Man *civilliter mortuus*) but only for the Benefit of the King, no more than an Alienee has. *Co. Lit. 2. b.*

Bodies Corporate.

If any *sole Corporation* or Aggregate of many, either Ecclesiastical or Temporal, (for the Words of the Statute are, *Si quis religiosus vel alius*) purchase Lands or Tenements in Fee, they have Capacity to take, but not to retain (unless they have a sufficient Licence in that Behalf) for within the Year after the Alienation the next Lord of the Fee may enter, and if he does not, then the next immediate Lord from Time to Time to have Half a Year; and for Default of all the mesne Lands, then the King to have the Land so aliened for ever, which is to be understood of such Inheritance as may be holden: But of such Inheritances as are not holden, as Villeins, Rent-charges, Commons, and the like, the King shall have them presently by a favourable Interpretation of the Statute. *Co. Lit. 2. b.*

An Annuity granted to them is not *Mortmain*, because it chargeth the Person only. *Co. Lit. 2. b.*

Infants.

An *Infant*, without Consent of any other, has Capacity to purchase, for it is intended for his Benefit, and at his full Age he may either agree thereunto, and perfect it, or without any Cause to be alledged, waive or disagree to the Purchase, and so may his Heirs after him, if he agreed not thereunto after his full Age. *Co. Lit. 2. b.*

Ideots and Lunatics.

A Man of *Non-sane* Memory may purchase Lands without the Consent of any other, but he himself cannot waive it; but if he dies in his Madness, or after his Memory recovered, without Agreement thereunto, his Heir may waive and disagree to the State, without any Cause shewed. And so of an *Idiot*. But if a Man of *Non-sane* Memory recovers his Memory, and agrees to it, it is unavoidable. *Co. Lit. 2. b.*

Hermaphrodite.

An *Hermaphrodite* may purchase according to the Sex which prevails. *Co. Lit. 3. a.*

Feme Covert.

A *Feme Covert* cannot take any Thing of the Gift of her Husband, but is of Capacity to purchase of others without the Consent of her Husband, but her Husband may disagree thereto, and devert the whole Estate, but if he neither agrees nor disagrees, the Purchase is good; but after his Death, although her Husband agreed thereto, yet she may, without any Cause to be alledged, waive the same, and so may her Heirs also, if after the Decease of her Husband she herself agreed not thereunto. *Co. Lit. 3. a.*

A Wife (*Uxor*) is a good Name of Purchase, without a Christian Name; and so it is, if a Christian Name be added and mistaken, as *Em* for *Emelyn*, &c. for *utile per inutile non vitiatur*. *Co. Lit. 3. a.*

Queen Consort.

But the Queen, the Consort of the King, is an exempt Person from the King by the Common Law, and is of Ability and Capacity to purchase and grant without the King. *Co. Lit. 3. a. 133. a.* And is capable of taking Lands or Tenements of the Gift of the King. *Co. Lit. 133. a.*

The

The *Parishioners* or *Inhabitants*, or *probi Homines* of *Dale*, or the Churchwardens, are not capable to purchase Lands, but Goods they are, unless it were in ancient Time when such Grants were allowed. *Co. Lit. 3. a.*

An antient Grant by the Lord to the Commoners in such a Waste, that a Way leading to their Common should not be streightened, was good; but it is otherwise of such a Grant at this Day. *Co. Lit. 3. a.*

And so in ancient Time a Grant made to a Lord, & *hominibus suis tam liberis quam nativis*, or the like, was good, but they are not of Capacity to purchase by such a Name at this Day. *Co. Lit. 3. a.*

But yet at this Day, if the King grant to a Man to have the Goods and Chattels *de hominibus suis*, or *de tenentibus suis* or *de residentibus infra feodum*, &c. it is good, for there they are not Names as Purchasors or Takers but for another Man's Benefit, who has Capacity to purchase or take. *Co. Lit. 3. a.*

And regularly it is requisite, that the Purchaser be named by the Name of Baptism and his Surname, and that special heed be taken to the Name of Baptism, for that a Man cannot have two Names of Baptism as he may have divers Surnames. And yet in some Cases, though the Name of Baptism be mistaken (as in the Case before put of the Wife) the Grant is good. *Co. Lit. 3. a.*

So it is if Lands be given to *Robert Earl of Pembroke* where his Name is *John*, and so of an Abbot, &c. for in these and the like Cases there can be but one of that Dignity or Name; and therefore such a Grant is good, altho' the Name of Baptism be mistaken. *Co. Lit. 3. a.*

If by Licence Lands are given to the Dean and Chapter of the Holy and individed Trinity of *Norwich*, this is good, altho' the Dean be not named by his proper Name, if there were a Dean at the Time of the Grant, but in pleading he must shew his proper Name. *Co. Lit. 3. a.*

And so on the other Side, if the Dean and Chapter make a Lease without naming the Dean by his proper Name, the Lease is good, if there were a Dean at the Time of the Lease; but in pleading the proper Name of the Dean must be shewed; and a Grant to a Mayor, Aldermen and Commonalty is good, altho' the Mayor be not named by his proper Name, but in pleading it must be shewed. *Co. Lit. 3. a.*

If a Man be baptized by the Name of *Thomas*, and after at his Confirmation by the Bishop he is named *John*, he may purchase by the Name of his Confirmation; and this was the Case of *Sir Francis Gawdye*, C. J. of the Common Pleas, whose Name of Baptism was *Thomas*, and his name of Confirmation *Francis*, and that Name of *Francis*, by the Advice of all the Judges Anno 36 H. 8. he did bear, and after used in all his Purchases and Grants. And this agrees with our ancient Books, where it is holden that a Man may have divers Names at divers Times, but not divers Christian Names. And the Court said, that it may be that a Woman was baptized by the Name of *Anable*; and forty Years after she was confirmed by the Name of *Douce*; and then her Name was changed, and after she was to be named *Douce*, and that all Purchases, &c. made by her by the Name of Baptism before her Confirmation remain good, a Matter not much in Use, nor requisite to be put in Use, but yet necessary to be known. *Co. Lit. 3. a.*

But Purchases are good in many Cases by a *known Name*, or by a certain *Description of the Person* without either Surname, or Name of Baptism, as *Uxori I. S.* as has been said, or *primogenito filio*, or *secundo genito filio*, &c. or *Natu minimo I. S.* or *seniori puero*, or *omnibus filiis* or *filiabus I. S.* or *omnibus liberis seu exitibus* of *I. S.* or the right Heirs of *I. S.* *Co. Lit. 3. a.*

A *Bastard* having gotten a Name by Reputation may purchase, by his reputed or known Name, to him and his Heirs, altho' he can have no Heir but of his Body. *Co. Lit. 3. b.*

A Man makes a Lease to *B.* for Life, Remainder to the eldest Issue Male of *B.* and the Heirs Male of his Body. *B.* has Issue a *Bastard* Son, he shall not take the Remainder, because in Law he is not his Issue, for *qui ex damnato coitu nascuntur inter liberos non computantur*. And as *Littleton* says, a *Bastard* is *quasi nullius filius*, and can have no Name of Reputation as soon as he is born. *Co. Lit. 3. b.*

So it is if a Man makes a Lease for Life to *B.* the Remainder to the eldest Issue Male of *B.* to be begotten of the Body of *Jane S.* whether the same Issue be legitimate or illegitimate. *B.* has Issue a *Bastard* on the Body of *Jane S.* this Son or Issue shall not take the Remainder, for (as it has been said) by the Name of Issue, if there had been no other Words he could not take, and (as it has been also said) a *Bastard* cannot

Parishioners,
Inhabitants,
probi Homi-
nes, Church-
wardens.
Lord and
Commoners,
&c.

King, &c.

Name and
Surname.

Titles,
Earl, &c.

Dean and
Chapter.

Name chan-
ged.

Known
Name or De-
scription of
the Person.

not

not take but after he has gained a Name by Reputation, that he is the Son of *B. &c.* And therefore he can take no Remainder limited before he is born; but after he is born, and that he has gained by Time and Reputation to be known by the Name of a Son, then a Remainder limited to him by the Name of the Son of his reputed Father is good. But if he cannot take the Remainder by the Name of Issue at the Time when he is born, he shall never take it. And so it seems, and for the same Cause, if after the Birth of the Issue, *B.* had married *Jane S.* so as he became *Bastard eigne*, and had a Possibility to inherit, yet he shall not take the Remainder. *Co. Lit. 3. b.*

Persons de-
formed, Ide-
ots, &c. Mi-
nors and other
reasonable
Creatures.
Persons dis-
abled in some
particular
Things.
Offices.

Persons deformed, having human Shape, *Ideots*, *Madmen*, *Lepers*, *Deaf*, *Dumb*, and *Blind*, *Minors* and all other *reasonable Creatures* have Power to purchase and retain Lands or Tenements. *Co. Lit. 3. b.*

But the Common Law disables some Men to take any Estate in some particular Things: As if an Office either of the Grant of the King or Subject, which concerns the Administration, Proceeding, or Execution of Justice, or the King's Revenue, or the Commonwealth, or the Interest, Benefit, or Safety of the Subject, or the like, if these, or any of them be granted to a Man that is unexpert, and has no Skill and Science to exercise or execute the same, the Grant is merely void, and the Party disabled by Law, and incapable to take the same, *pro commodo regis & populi*; for only Men of Skill, Knowledge, and Ability to exercise the same are capable of the same to serve the King and his People. *Co. Lit. 3. b.*

An *Infant* or *Minor* is not capable of an Office of Stewardship of the Court of a Manor either in Possession or Reversion. *Co. Lit. 3. b.*

No Man, tho' never so skilful and expert, is capable of a judicial Office in Reversion, but must expect until it falls in Possession. *Co. Lit. 3. b.*

By Stat. 3 *H. 7. c. 12.* 7 *E. 6. c. 1.* 5 *E. 6. c. 16.* If any Officers touching the Administration or Execution of Justice, or Clerkship in any Court of Record, or concerning the King's Treasure, Revenue, Account, Customs, Afnage, Auditorship, King's Surveyor, or Keeper of any of his Majesty's Castles, Forts, &c. bargain or sell their Offices or any Deputation of the same, or take any Money or Profit, or any Promise, Covenant, Bond or Assurance, to have any Money or Reward for the same, the Person so bargaining or selling, or who shall take any such Promise, Covenant, Bond or Assurance, shall not only forfeit his Estate, but also every Person so buying, giving or assuring, be adjudged a disabled Person to have or enjoy the same Office or Offices, Deputation or Deputations, &c. and that all such Bargains, Sales, Promises, Covenants and Assurances, as be before specified, shall be void, except as in the said Acts is excepted.

Sir Robert Vernon Knight, being Cofferer of the King's House of the King's Gift, and having the Receipt of a great Sum of Money yearly of the King's Revenue, for a certain Sum of Money bargained and sold the said Office to Sir *A. J.* and agreed to surrender the same to the King, to the Intent a Grant might be made to Sir *A.* who surrendered it accordingly; and thereupon Sir *A.* was by the King's Appointment admitted and sworn Cofferer; and it was resolved by Sir Thomas Egerton Lord Chancellor, the Chief Justice, and others to whom the King referred the same, that the said Office was void by the said Statute, and that Sir *A.* was disabled to have or take the said Office, and that no *Non Obstante* could dispense with this Act to enable the said Sir *A.* for the Reason and Cause before-mentioned; and thereupon Sir *A.* was removed, and Sir Marmaduke Dorrell sworn (by the King's Commandment) in his Place. And Note, that all Promises, Bonds and Assurances, as well on the Part of the Bargainor, as of the Bargainee, are void by the same Act. (*Co. Lit. 234. a.*) *Nulla alia re magis Romana respublica interit, quam quod Magistratus officia venalia erant.* *Aerod. fo. 353.*

Jugurtha going from Rome, said to the City, *Vade venalis Civitas, mox peritura si emptorem invenias.* *Salust. Co. Lit. 234. a.*

Therefore by the Law of *England* it is further provided, that no Officer or Minister of the King shall be ordained or made for any Gift or Brokage, Favour or Affection, nor that any which pursueth by him or any other, privily or openly to be in any Manner of Office, shall be put in the same Office or in any other, but that all such Officers shall be made of the best and most lawful Men, and sufficient. A Law worthy to be written in Letters of Gold, but more worthy to be put in due Execution. For certainly never shall Justice be duly administered, but when the Officers and Ministers of Justice be of such Quality, and come to their Places in such Manner, as by this Law is required. *Co. Lit. 234. a.*

Some are capable of certain Things for some special Purpose, but not to use or exercise such Things themselves; as the *King* is capable of an *Office*, not to use but to grant, &c. *Co. Lit.* 3. b.

A *Monster* born within lawful Matrimony, who has not human Shape cannot purchase, much less retain any Thing. *Co. Lit.* 3. b.

There are several Statutes relating to Estates conveyed by or to *Papists*, and the Disabilities they are under to take by Purchase, &c. which follow.

By the 11 & 12 W. 3. c. 4. it is enacted, "That from and after the 29th Day of September, which shall be in the Year of our Lord 1700. if any Person educated in the Popish Religion, or professing the same, shall not, within Six Months after he or she shall attain the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and also subscribe the Declaration set down and expressed in an Act of Parliament made 30 Car. 2. intituled, *An Act for the more effectual preserving the Kings Person and Government, by disabling Papists from sitting in either House of Parliament*, to be by him or her made, repeated or subscribed in the Courts of Chancery or King's Bench, or Quarter-Sessions in the County where such Person shall reside; every such Person shall in Respect of him or herself only, and not to or in Respect of any of his or her Heirs or Posterity, be disabled or made incapable to inherit or take by Descent, Devise or Limitation in Possession, Reversion or Remainder, any Lands, Tenements or Hereditaments within the Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed; and that during the Life of such Person, or until he or she do take the said Oaths, and make, repeat and subscribe the said Declaration in Manner as aforesaid, the next of his or her Kindred, which shall be a Protestant, shall have and enjoy the said Lands, Tenements and Hereditaments, without being accountable for the Profits by him or her received during such Enjoyment thereof, as aforesaid; but in Case of any wilful Waste committed on the said Lands, Tenements or Hereditaments by the Person so having or enjoying the same, or any other, by his or her Licence or Authority, the Party disabled, his or her Executors and Administrators, shall and may recover treble Damages for the same against the Person committing such Waste, his or her Executors or Administrators, by Action of Debt in any of his Majesty's Courts of Record at Westminster; and that from and after the 10th Day of April 1700. every Papist, or Person making Profession of the Popish Religion, shall be disabled and is hereby made incapable to Purchase, either in his or her own Name, or in the Name of any other Person or Persons to his or her Use, or in Trust for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, within the Kingdom of England, Dominion of Wales and Town of Berwick upon Tweed; and that all and singular Estates, Terms, and any other Interests or Profits whatsoever out of Lands, from and after the said 10th Day of April, to be made, suffered or done, to or for the Use or Behoof of any such Person or Persons, or upon any Trust or Confidence mediately or immediately, to or for the Benefit or Relief of any such Person or Persons, shall be utterly void and of none Effect, to all Intents, Constructions and Purposes whatsoever."

Persons capable of certain Things to special Purposes.

Who can't purchase nor retain any Thing.

How far Papists are disabled from purchasing or conveying Estates.

11 & 12 W. 3. c. 4.

By the 3 Geo. 1. cap. 18. Reciting, that some Doubts have arisen upon the Act therein recited, (to wit, An Act passed the Sessions before, intituled, *An Act to oblige Papists to register their Names and Real Estates*) as also upon one other Act made and passed in the Parliament held in the 11 & 12 W. 3. intituled, *An Act for the further preventing the Growth of Popery*, and upon another Act made in the 1 Jac. 1. for the due Execution of the Statutes against Jesuits, Seminary Priests, Recusants, and other Acts made against Papists and Popish Recusants touching the Sale of the Real Estates of Persons professing the Popish Religion, or incurring the Disabilities and Incapacities in the said Acts mentioned, it is enacted, "That no Sale for a full and valuable Consideration of any Manors, Messuages, Lands, Tenements or Hereditaments, or of any Interest therein by any Person or Persons, being reputed Owner or Owners, or in the Possession or Receipt of the Rents or Profits thereof heretofore made, or hereafter to be made, to or for any Protestant Purchaser and Purchasers, and meerly and only for the Benefit of Protestants, shall be avoided or impeached for or by Reason or upon Pretence of any the Disabilities or Incapacities in the said Acts, or any of them contained, incurred, or supposed to be incurred, by any of the Persons making or joining in such Sale, or by any other Person or Persons, from or through whom the Title to such Manors, &c. is or shall be derived, or supposed to be derived, unless before such Sale the Person intituled to take Advantage of such

“ Disability or Incapacity shall have recovered such Manors, Messuages, Lands, Tenements and Hereditaments, by Reason of such Disability or Incapacity, and have entered such Claim in open Court at the General Sessions of the Peace for the County, City, Riding or Division, wherein such Manors, Messuages, Lands, Tenements or Hereditaments lie or arise, and *bona fide*, and with due Diligence, pursued his Remedy in a proper Course of Justice for the Recovery thereof.

“ Provided nevertheless, that whereas it was amongst other Things enacted by the said 11 & 12 W. 3. that from and after the tenth Day of April, which should be in the Year 1700. every Papist, or Person making Profession of the Popish Religion, should be disabled, and was thereby made incapable to purchase, either in his or her own Name, or in the Name of any other Person or Persons to his or her Use, or in Trust for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, within the Kingdom of England, Dominion of Wales and Town of Berwick upon Tweed; and that all and singular Estates, Terms, and other Interests or Profits whatsoever out of Lands, from and after the said 10th Day of April to be made, suffered or done, to or for the Use or Behoof of any such Person or Persons, or upon any Trust or Confidence mediately or immediately, to or for the Benefit or Relief of any such Person or Persons, should be utterly void and of no Effect, to all Intents, Constructions and Purposes whatsoever: It is hereby declared and enacted, that the said recited Part of the said Act of Parliament shall not be hereby altered or repealed, but the same shall be and remain in full Force as if this Act had never been made.

“ And it is further enacted by the Authority aforesaid, That from and after the 29th of September 1717. no Manner of Lands, Tenements, Hereditaments or any Interest therein, or Rent or Profit thereout, shall pass, alter or change from any Papist, or Person professing the Popish Religion, by any Deed or Will, except such Deed within six Months after the Date, and such Will within six Months after the Death of the Testator, be inrolled in one of the King's Courts of Record at Westminster, or else within the same County or Counties wherein the Manors, Lands and Tenements lie, by the *Custos Rotulorum* and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at the least, whereof the Clerk of the Peace to be one.

By the 11 Geo. 2. after reciting, “ That whereas Persons professing or educated in the Popish Religion are by divers Acts of Parliament subjected to several Disabilities and Incapacities, which may effect Persons conforming from the Popish to the Protestant Religion, and whereas many Persons have already conformed to the Protestant Religion, and are willing to submit to his Majesty's Government in as full and ample Manner as any other of his Majesty's Subjects, and others are likely so to do,” it is enacted, “ That all and every Person or Persons, being reputed Owner or Owners, or in Possession or Receipt of the Rents and Profits of any Manors, Messuages, Lands, Tenements or Hereditaments, or of any Interest therein, who having been or reputed to be a Papist or Papists, or educated in the Popish Religion, hath or have conformed to, or hereafter shall conform to and profess the Protestant Religion, and hath or have taken or shall take the Oaths of Allegiance, Supremacy and Abjuration, and also subscribed or shall subscribe the Declaration set down and expressed in an Act of Parliament made the 30 Car. 2. intituled, *An Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament*, to be by him her or them, repeated and subscribed in the Courts of Chancery or King's Bench, or Quarter-Sessions of the County where such Person or Persons shall reside, (all which shall be recorded in one of his Majesty's Courts of Record at Westminster, or such Quarter-Sessions as aforesaid,) and all and every Person and Persons, being Protestants claiming under such Person or Persons conforming, and performing the Requisites as aforesaid, for their own Benefit, or for the Benefit of any other Protestant or Protestants, and not for the Benefit of any Papist or Papists, shall hold, possess and enjoy all such Manors, Messuages, Lands, Tenements and Hereditaments, freed and discharged of and from the Disabilities and Incapacities in the said Acts or any of them contained, incurred or supposed to be incurred by such Person or Persons so reputed Owner or Owners, or in Possession or Receipt of the Rents and Profits as aforesaid, or by any other Person or Persons by, from or thro' whom the Title to such Manors, Messuages, Lands, Tenements or Hereditaments, or any Interest therein, was or shall be derived or supposed to be derived for such Estate, Right,

“ Title

“ Title or Interest, as he, she or they had or would have, if no such Disability or Incapacity had been incurred ; unless the Person or Persons intitled to take Advantage of such Disability, Incapacity or Defect of Title, hath or have actually and bona fide recovered, or shall hereafter recover such Manors, Messuages, Lands, Tenements and Hereditaments, by Judgment or Decree in some Action or Suit already commenced, or hereafter to be commenced, six Kalendar Months at least before the making of such Record, and to be prosecuted with due Diligence.”

“ Provided nevertheless that this Act, or any Thing herein contained, shall not take away or prejudice the Right of any Person or Persons intitled to take Advantage of such Disability or Incapacity, who now is or are in the actual Possession of, or shall have, precedent to the making of such Record, been in quiet Possession of any such Manors, Messuages, Lands, Tenements or Hereditaments, by the Space of two Kalendar Months.”

“ Provided always, and it is further enacted, that if any Person or Persons, so conforming, as aforesaid, shall after such Conformity return to or again profess the Popish Religion, every such Person and Persons shall for ever afterwards be disabled from, and be incapable of having or enjoying any Benefit, Privilege or Advantage of this Act, and shall from thenceforth be liable to the same Disabilities, Incapacities and Forfeitures, as if he, she or they had not taken the said Oaths and subscribed the Declaration as aforesaid.

“ Provided always, that nothing in this Act contained, shall extend to take away or Prejudice the Right of any Person intitled to any Remainder or Reversion in any such Manors, Messuages, Lands, Tenements or Hereditaments, in Case such Person shall pursue his or her said Right by some Action or Suit, to be commenced within the Space of twelve Kalendar Months next after the precedent Estate or Estates, on which such Remainder or Reversion depends and is expectant, shall be determined; or within twelve Kalendar Months from and after the 29th of September 1738. if such precedent Estate or Estates be already determined by the Death or Deaths of any Person or Persons whose Deaths have been concealed from or not known to the Person intitled to such Remainder or Reversion, by Reason of their having been buried beyond the Seas, or in a private and clandestine Manner at Home, and shall prosecute such Action or Suit with due Diligence.

On the first of these Statutes there have been the following Cases and Resolutions.

Roper v. Radcliffe, Hill. 1713. in Canc. John Roper Esq; being seised in Fee of several Manors, Lands, &c. by the Indentures of Lease and Release, bearing Date respectively the 17th and 18th of January 1708. granted and conveyed the same to *William Constable, Richard Snow* and *Daniel Hickman*, and their Heirs, in Trust to sell the same, and out of the Purchase Money and Rents 'till Sale to pay a Debt of 4000 l. due to *E. and H. W.* by Mortgage of the Premises, with Interest, and after Satisfaction thereof, then in Trust for Payment of the Debts mentioned in a Schedule annexed to the Indenture of Release, and the Overplus of the Money so to be raised, to be paid as the said *John Roper* by any attested Writing or by his Will should appoint; and for want of such Appointment, in Trust for the Benefit of the said *John Roper* and his Heirs. The fifth of March 1708. the said *John Roper* made his Will, and after reciting the said Lease and Release, and the Power reserved to him over the Surplus of the said Estate, he bequeathed several pecuniary Legacies to his Relations, and the Residue of all his real and Personal Estate he gave to *William Constable* and *Thomas Radcliffe*, and to *Robert Hewett* and *Daniel Hickman*, and to their Heirs and Assigns for ever, and appointed them joint Executors; the first of April 1709. he added a Codicil to his Will, and thereby gave the further several Legacies therein mentioned, and all the Remainder, whether in Lands or Personal Estate, he gave to his Executors *Mr. Radcliffe* and *Mr. Constable*. The said *John Roper* died soon after; and *Mr. Radcliffe* and *Mr. Constable* brought their Bill in Chancery against *Edward Roper Esq;* the Heir at Law of the said *John Roper*, and also against *Hickman, Hewett, Snow* and others, to have the Trust-Estate sold, and for an Account of the Profits, and after the Debts and Legacies paid, to have the Surplus Money arising by Sale equally divided between the Plaintiffs, according to the said Codicil. The said *Edward Roper* by his answer insisted, that as Heir at Law to the Testator he was intitled to all such real Estate as was undisposed of by him, and that *Mr. Radcliffe* and *Mr. Constable* were then, and at the Testator's Decease, Papists, and as such, by 11 & 12 W. 3. were incapable of purchasing any Manors, Lands, Profits out of Lands, &c. The said *Hewett* and *Hickman* by their answer insisted, that the real Estate deviled

by

by the said Will ought to be considered as the remaining Part of the Testator's Lands, (after a sufficient Part sold for Payment of Debts and Legacies,) and not as a Personal Estate, and that as so much only ought to be sold as would be sufficient to pay the Debts; and that in Case Mr. *Radcliffe* and Mr. *Constable* were incapable of taking them, they as Protestants claimed the said real Estate, as being the only Devisees capable to take the same; they also insisted, that the Codicil, with Reference to the Devise of the Remainder of the Testator's Lands, did not controul the Devise thereof mentioned in the Will; for that if the Plaintiffs were incapable to take the Lands as Purchasers by the Devise, they were to be esteemed as Persons not in *esse*, and that the Codicil as to the Lands was void; but if the Plaintiffs were capable, yet such Devise did not give the Remainder of the Premises to them but for their Lives, and that the Reversion in Fee belonged to them the said *Hewett* and *Hickman*; and they brought a Cross Bill insisting thereby on the same Matters; and the Legatees brought a Bill for Payment of the Legacies. The 27th of June 1712. the said Causes came on to be heard before the Lord Chancellor *Harcourt*, who desired to have the Assistance of the Judges; and a Case was made and argued before my Lord Chancellor *Parker*, *Trevor* Chief Justice of C. B. Justice *Powel* and the Master of the Rolls, and after Time taken to consider of the Case, my Lord Chancellor, *Trevor* Chief Justice, the Master of the Rolls and Justice *Powel* were of Opinion, that the Devise of the Surplus of the Purchase Money (after Debts and Legacies paid) to Mr. *Radcliffe* and Mr. *Constable* was good, notwithstanding the said disabling Act; the Surplus Money being a Personal Interest in them, and not made void either by the Words or Intention of that Statute; and as to *Hewett* and *Hickman*, my Lord Chancellor was of Opinion, that the first Codicil was a Revocation of the Will, as to the Residue of the real and personal Estate. Mr. *Roper* appealed to the House of Lords, and it was there ordered, before the Appeal was determined, that the Estate should be sold, and all Debts and Legacies paid, which was accordingly done; where afterwards the Lords reversed the Decree, principally for this Reason; that (a) if the Devise of the Residue to the Plaintiffs was good, they would in Equity be intitled to pay off the antecedent Debts and Legacies, and when that was done, keep the Estate; which would be a Means of evading the Statute, and enabling a Papist to take an Estate contrary to the Intention of it. It was also resolved in this Case, that a Devise is a Purchase within the Meaning of this Act. 3 Bac. Abr. 795, 796.

(a) But it seems, that where Lands are devised to or vested in Trustees, to be sold for Payment of

particular Sums to several People, some of whom happen to be Papists, that this Act does not prevent such Papists, from taking the particular Sums or Legacies intended for them; because they cannot insist upon paying of the other Incumbrances and holding the Estate, as a Person can do to whom the Residue of the Purchase Money is devised. 3 Bac. Abr. 796.

Lord Derwentwater's Case, upon an Appeal to the Lords Delegates from the Judgment of the Commissioners for forfeited Estates, 6 G. 1.

The Earl of *Derwentwater* was Tenant in Tail, with Remainder in Fee to himself, and intending to marry Sir *John Webb's* Daughter, he by Advice of Counsel suffered a common Recovery without declaring any Uses, it being intended that he should thereby become Tenant in Fee, and be enabled to make a proper Settlement; accordingly by Indentures of Lease and Release he settled his Estate to the Use of himself for Life, Remainder to Trustees for preserving contingent Uses, Remainder in Tail successively to the first and other Sons of the intended Marriage, with Remainders over: The Marriage took Effect, and there was Issue a Son and Daughter. The said Earl was attainted of High Treason on Account of the *Preston* Rebellion, and was executed; and by an Act made thereupon, all the forfeiting Persons Lands were vested in the Commissioners for the Use of the Publick; and it was expressly provided, that where the forfeiting Person was seised of an Estate tail at the Time of the Forfeitures, the same should be vested in the Commissioners as an absolute Fee, discharged of all Remainders and Reversions. The Commissioners of Forfeitures, on a Claim exhibited before them in the Name of the said Earl's Son, determined that the whole Estate was in them on this Foundation, that the Earl continued Tenant in Tail notwithstanding the Recovery, and consequently nothing more than Estate for his own Life past by the Lease and Release; and the Reason they went upon was, that if by suffering a common Recovery he could turn his Estate-tail into a Fee, then he would gain a new Estate by Purchase, which they apprehended he, being a Papist, was disabled to do by the Statute 11 & 12 W. 3. But the Majority of the Judges, upon an Appeal from the Decree of the Commissioners, were of a contrary Opinion, and

and held, that this was only a new modelling of the Estate, and not a Purchase or Acquisition within the Act; and that the Earl was capable of taking a new Fee at least for the Benefit of his Heirs and Posterity, and that he was capable of settling the same by Lease and Release; and therefore allowed of the Son's Claim.

It was likewise resolved by the Delegates appointed to hear Appeals from the Determinations of the Commissioners for the Estates forfeited in the Year 1716. that a Papist may be a Trustee for a Protestant, notwithstanding the Statute 11 & 12 W. 3. 3 *Bac. Abr.* 797. 2 *Mod. Ca. in L. and Eq.* 172.

Hill v. Filkins, Trin. 11 G. 1. *Anne Stephenson* had two Grandchildren, one the Plaintiff *Hill*, the other *Frances* the Wife of the Defendant *Filkins*, who was educated by her in the Popish Religion; the Grandmother by her Will made in the Year 1716, devised the Lands in Question to Trustees, in Trust to be sold for the Payment of her Debts and Legacies, and the Residue of the Money arising by such Sale she devised to her said Granddaughter *Frances*, when she should attain her Age of twenty-one Years, or be married, with the Consent of the said Trustees, and soon after died. The said *Frances*, at the Age of fifteen, was married to *Filkins* according to the Ceremony and Usage of the Church of Rome, and a Week afterwards by a Minister of the Church of England; at the Age of eighteen she conformed according to the Directions of the Statute; it was held that she was within the first Clause, and that a Devise to a Papist under the Age of eighteen is good, if he conforms within six Months after he comes to that Age; and the Age of eighteen was a proper Period for them to make their Election, whether they would conform or not; and the Bill exhibited by the Protestant Heir was dismissed with Costs. 3 *Bac. Abr.* 797. S. C. 2 *Mod. Ca.* 154. *Lucas* 481, 536.

Carrick v. Errington, Trin. 9 Geo. 1. in Canc. J. S. a Papist made a Settlement of his Estate to Trustees, to the Use of the Trustees and their Heirs, in Trust for A. for Life, Remainders to the said Trustees to preserve contingent Remainders, Remainder to the first and every other Son of A. and for Default of such Issue, then in Trust for B. and his Issue; A. was a Papist, and B. a Protestant; B. exhibited his Bill in Chancery, suggesting that A. was a Papist, and had no Son, and that therefore the Trustees might account to him for the Rents and Profits; he also made the Heir at Law Defendant; and on hearing this Cause before the Lord *Macclesfield*, and afterwards by the Lord *King*, they both held, that tho' the Trust to A. was void, he being a Papist, yet that notwithstanding the legal Estate was still in the Trustees, because they were Trustees not only for the Papist, but also for B. the Protestant, and for the Sons of A. who were yet unborn; and as they were Trustees to preserve contingent Remainders for such Sons who might be Protestants, they thought that the Estate should remain in the Trustees for that Purpose; and they held, that the Heir at Law was intitled to receive the Profits during the Life of A. as a Trust undisposed, but that B. the Remainder-Man could have no Right till the Death of A. without a Son capable of taking; and this Decree was affirmed in the House of Lords. *Ibid.* S. C. 2 *Mod. Ca.* 33.

Marwood v. Dorrel, Hill. 8 Geo. 2. B. R. The Case upon a special Verdict in Ejectment was, *Thomas Dorrel* had one Brother and four Sisters, and being seised in Fee by Will, 4 December 1703. devised the Lands in Question to Trustees, to the Use of them and their Heirs, in Trust for his first and every other Son in Tail Male; and for want of such Issue, Remainder to his Brother *Arthur* for Life, Remainder to his first and every other Son in Tail Male; and for want of such Issue, that then the Trustees shall stand and be seised for the sole and proper Use and Benefit of such eldest and first Son lawfully begotten or to be begotten of *John Dorrel*, and shall not be Heir at Law and Inheritor to the said *John Dorrel*, and the Heirs of his Body; and for Default of such Issue by him, Remainder to the third, fourth and fifth, and every other Son of the said *John Dorrel*, and the Heirs of their respective Bodies. The Trustees, by a Clause in the Will, were impowered by the Rents and Profits of the Estate, or by Mortgage and Sale, to raise so much Money as would satisfy the Testator's Debts: *Thomas* and *Arthur* both died without Issue, *John Dorrel* is living and has seven Sons; *George* the Defendant is the second Son; all the Sons of *John* are Papists, and educated in the Popish Religion, except his younger Son, who is too young to be said, as yet, to be of any Religion; *George Dorrel* was under eighteen Years of Age when the Limitation by the Devise fell upon him, but is now above eighteen Years, and has not taken the Oaths directed by 11 & 12 W. 3. and is married, and has now two Sons very young, for whom, as well as for his Wife, he has

made a Settlement of these Lands; the four Sisters of *Thomas Dorrel* are Lessors of the Plaintiff, as Heirs at Law; and the Question is, whether *George* the Son of *Arthur*, or the Heirs at Law, be intitled to the Lands. For the Plaintiffs, the Heirs at Law, it was urged, First, That *George* is a Papist, and that Papists who shall refuse, above six Months after they arrive at the Age of eighteen, to take the Oaths of Allegiance, &c. are by the said Statute expressly disabled from purchasing; and therefore as a Devise is a Purchase, and so held *Co. Lit.* 18. and by the Lords, in the Case of *Roper* and *Radcliffe*, consequently *George Dorrel* takes nothing by it. Secondly, That the Devise was void for Uncertainty, being to such eldest and first Son of *J. D.* as shall not be Heir at Law to him; but as no one can say who will be Heir to *J. D.* so it is impossible to say who will not, for *Nemo est hæres viventis*; and he who is to be Heir is not to take, so that none but a Son who will not be Heir can take, for both Descriptions must coincide. *Hob.* 29. *Hardres* Chief Justice, in breaking the Case said, Two Objections have been made to the Defendant's Title; First, that the Limitation, under which he claims, is void for the Uncertainty of the Description. Secondly, That supposing the Description to be certain enough, yet by the 11 & 12 *W.* 3. the Defendant is disabled from taking the Estate, as being a Papist. There seems at present to be a good deal of Weight in the first Objection, and yet it may possibly be reduced to a Certainty, and if so, may be made good; and it seems natural to imagine, that by the Words of the Will the Testator intended the second Son of *John Dorrel* should take, and the rather, as the Testator has made the next Limitation to the third, fourth and fifth Sons, &c. of the said *John Dorrel*; but if the second Son cannot take, yet if the third, &c. Sons are well described, the Daughters of *Thomas* cannot recover, and at present they seem to be certainly described. As to the second Objection, I think myself bound by the Determination of the House of Lords in the Case of *Roper* and *Radcliffe*, that the Word *Purchase* extends to a Devise, and therefore that a Papist is incapable of taking an Estate by Will; but yet, be the Defendant's Title as it will, the Plaintiff must recover on his own Strength, and not on the Weakness of the Defendant's Title; and my greatest Doubt is this, the Devise here is to Trustees to the Use of them and their Heirs, &c. I think this would clearly be a Devise to the Use of the Trustees, tho' the Clause of raising Money by Rents and Profits was omitted; so here is a Devise to Trustees, in Trust not only for the second Son of *John Dorrel*, but for all other his Sons now living, one of which is not found to be a Papist; it has been said indeed, that this Devise being for the Benefit of Papists, the Trust itself is void; but the Question is, if the intire Trust should not be for the Benefit of Papists, in the present Case, the youngest Son of *John Dorrel* may be able to take for ought appears to the contrary; and therefore I think that this latter Part of the Trust being lawful will support the legal Estate in the Trustees; and here he put the Case *supra* of *Carrick v. Errington*, and said, that according to the Resolution in this Case, the Lands in Question cannot be in the Heirs at Law, but in the Trustees; because here is a Trust for a Son of *John Dorrel*, who was not a Papist, as well as for other Children yet unborn, so that the Plaintiffs have no Title to recover in this Action, but have mistaken their Remedy; for if they have any, it seems to be by Bill in Equity against the Trustees for an Account of the Profits; and it is certain, in the above-mentioned Case, that the Estate could not vest in the Remainder-Man, because he being then in by Purchase, it could never be afterwards divested for the Benefit of such Child as *A.* should happen to have; but he said, that he did not give this as his absolute Opinion, but only to point out the Difficulties which stuck with the Court. It was adjourned, and no farther Proceedings was had therein. 3 *Bac. Abr.* 798, 799.

Pelham v. Fletcher, *Mic.* 1729. A Mortgage was made to a Papist, who assigned to a Protestant for a full Consideration; an Ejectment was brought against the Assignee by a subsequent Mortgagee, who recovered by reason of the Disability of the first Mortgagee; all this appeared upon a Bill brought in Chancery; and my Lord Chancellor was of Opinion, that a Mortgage to a Papist is void; but in this Case the Assignment to the Protestant, and the Trial in Ejectment, were both before the 3 *Geo.* 1. which, were it otherwise, would it seems have made an Alteration. 3 *Bac. Abr.* 799.

On Lord *Dover's* Will. In a Case which came on before my Lord *King* in the Court of Chancery, it appeared that my Lord *Dover* was possessed of a long Term for Years, and made his Will, and his Lady, who was a Papist, Executrix thereof. It was resolved by my Lord Chancellor, that notwithstanding the disabling Act 11 &

12 W. 3. the Term vested absolutely in her, and that this was not a Purchase within that Act; and he said, that a Papist may be Tenant in Dower, or by the Curtesy; because in all these Cases it is by Operation of Law, and not by an Act of the Party, that the Estate comes to him. 3 Bac. Abr. 799.

Mallom v. Bringlee, Pas. 1738. in C. B. It hath been adjudged, that a Papist may devise to a Protestant; in which Case it was agreed, that where an Ancestor dies seized of an Estate of Inheritance, it descends upon and vests in his Heir (tho' a Papist) for the Benefit of his Heirs, and that the next Protestant a-kin has only a Right to the Perception of the Profits during the Nonconformity of the Heir. 3 Bac. Abr. 799.

Smith v. Read, Trin. 12 G. 2. Upon the Marriage of Mr. Paine with one Mrs. Gage, Lands in the County of Surry were settled and conveyed to the Use of the Husband and Wife for their Lives, and the Life of the Survivor of them; then to the Use of the first and every other Son in Tail, Remainder to the right Heirs of the Husband: The Marriage took Effect, but Mr. Paine the Husband died in the Lifetime of Mrs. Paine, without leaving Issue, having first devised all his Lands to his Wife and her Heirs. In 1730. Mrs. Paine, the Wife, devised all her real Estate to the Defendant, subject to a few Legacies mentioned in her Will, but lived and died a Papist; but that being difficult to prove at Law, the Plaintiff Mr. Smith, who had married Elizabeth Paine, Heir at Law to Mr. Paine, he and his Wife filed their Bill against the Defendant to set aside the Marriage-Settlement and Will of Mr. Paine the Husband, under which Mrs. Paine claimed; and in particular prayed, that the Defendant might discover whether Mrs. Paine the Wife, under whose Will he claimed, was a Papist or not. To which the Defendant pleaded the Statute of 11 & 12 W. 3. Upon arguing this Plea it was insisted upon for the Defendant, that it was a standing Rule in this Court, *That no Person was bound to discover what might subject him to the Penalty of an Act of Parliament*; that the Statute of 11 & 12 W. 3. was a penal Law, and the Party, who would take Advantage of such Law, would never be assisted in a Court of Equity, which never assists a Forfeiture; he who would claim any Thing forfeited, must make out the Forfeiture himself; for no Person shall be obliged to discover a Fact that would be a Forfeiture of his own Estate. If a Copyholder commits Waste, it is a Forfeiture of his Estate to the Lord of the Manor; but if the Lord of the Manor comes into this Court for a Discovery, whether the Copyholder has been guilty of Waste or not, the Copyholder is not bound to answer; for no Law in the World obliges a Man to accuse himself; if an Estate is given to a Woman *durante viduitate*, she is not bound to discover whether she is married or not, because the Discovery of that Fact might be the Loss of her Estate. That Disabilities and Forfeitures were of the same Nature; that a total Incapacity or Disability to hold at all (which is the Case of Papists) was certainly as much a Penalty, as a Forfeiture of an Estate which the Party before was capable of holding; that as Mrs. Paine would not have been obliged in her Life-time to discover whether she was a Papist or not, the Defendant who claims under her ought not to be obliged to discover it. On the other Hand it was insisted by the Counsel for the Plaintiff, that it was not their Business to examine, whether the Acts of Parliament made against Papists were hard Laws or not; they were Laws, and that was sufficient for their Purpose; that this was not the Case of a Forfeiture, but it was to discover a Fact, which if true, the Estate was never in Mrs. Paine, because the Act of Parliament makes all Papists absolutely incapable of being Purchasers; if she was a Papist, the Estate never vested in her; and as she was not capable of holding it, she could not give it away to the Defendant, therefore could never forfeit the Estate; for no Person can be said to forfeit an Estate he never had; an Alien is incapable of holding Lands at Common Law, yet he is obliged to discover whether he is an Alien or not, and his Discovery of that Fact, whether he is so or not, can never be a Forfeiture of his Estate, because he never had a Right to it; so in Case of a Bastard who is *nullius filius*, and incapable of claiming Lands by Descent, he shall discover whether he is so or not, for the same Reason; so a Person claiming under a Bankrupt, whose Goods are vested in the Assignees of the Commission of Bankruptcy for the Benefit of Creditors, must discover whether the Person, under whom he claims, was a Bankrupt or not at the Time of the Conveyance: That all these Cases depend upon the same Reason, and were no Forfeitures, because the Estates were never in them; so if Mrs. Paine was a Papist, she was incapable of having the Estate herself, and could not give it away; and therefore the Defendant could never forfeit it, because the Estate was never in him. But my

Lord

Lord *Hardwicke* was of Opinion, that the Defendant was not obliged to discover whether *Mrs. Paine* was a Papist or not; that there is no Rule better established in this Court, than that a Man should not be obliged to answer to what may subject him to the Penalty of an Act of Parliament; no Person can doubt whether this Act is not a Penal Law, and whether the Clauses relating to Papists are not Disabilities or Incapacities, imposed by way of Penalty upon all Persons exercising that Religion. It is objected, that this is not the Case of a Forfeiture, because the Estate was never vested, and therefore can never be divested; yet it all falls under the same Reason, and an Incapacity or Disability to hold at all by Act of Parliament, is certainly as much a Penalty as the Forfeiture of an Estate by a Person who had a Right to enjoy it before the Forfeiture. That if a Bill is brought against the Person for a Discovery, whether he is a Papist or not, he is not bound to discover; and where is the Difference between him and the Person claiming under him. Here is a Disability imposed by Parliament, by way of Penalty, upon a particular set of Men upon the Account of their Religion; the Discovery of that Fact subjects them to a Penalty; and this is not like the Case of an Alien or Bastard, who are incapable by the general Laws of the Land to inherit; besides, what sways with me much is the great Inconvenience that would follow, should this Plea be disallowed; we should have nothing in this Court but Bills of Discovery, whether such and such Persons were Papists or not, and no Body knows what Confusion would follow; therefore the Plea must be allowed.

3 *Bac. Abr.* 799, 800, 801.

Indemnity of
Protestant
Purchasers of
Papists Estates.

There are many Statutes concerning the Inrolment of Deeds and Wills made by Papists, and for the Indemnity and Relief of Protestant Purchasers, Devisees and Lessees. But the last made 16 *Geo. 2. c. 32.* enacts that every Deed and Will made since the 29th September 1717. in Order to pass, alter, or change any Manors, Lands, Tenements or Hereditaments, or any Interest therein, or any Rent or Profit thereout, from any Papist, though not inrolled, or not inrolled in due Time, shall be as good in Law, as if inrolled in the Times limited by former Acts, provided they be inrolled on or before 28th November 1743. Nothing herein shall extend to make good any such Deed, &c. made, and not inrolled, of which Advantage has been taken on or before 2d Feb. 1742.

And that no Purchase made for valuable Considerations of any Manors, Messuages, Lands, Tenements, or Hereditaments, or of any Interest therein by any Protestant, meerly and only for the Benefit of Protestants, shall be impeached or avoided, for or by reason that any Deed or Will thro' which the Title thereto is derived, has not been inrolled as required by former Acts, so as no Advantage was taken of the want of Inrollment thereof, before such Purchase was made, and so as such Purchaser had not Notice before such Purchase, that the Person who made such Deed or Will was a Papist, and so as no Decree or Judgment has been obtained for want of the Inrollment of such Deeds or Wills.

Persons natu-
ralized or
made Deni-
zens, when in-
capable to
take Grants.

By Statute 12 & 13 *W. 3. c. 2.* No Person born out of *England, Scotland or Ireland*, or the Dominions thereto belonging, altho' he be naturalized or made a Denizen (except such as are born of *English* Parents) shall be capable to have any Grants of Lands, Tenements or Hereditaments from the Crown to himself, or to any other in Trust for him.

But by Statute 1 *Geo. 1. c. 4.* The said Statute of *W. 3.* shall not extend to disabie any Person, who before his Majesty's Accession to the Crown, was naturalized.

Where Arti-
ficers going
beyond Sea
are incapable
of taking by
Purchase, &c.

By Statute 5 *Geo. 1. c. 27.* If any of the King's Subjects, being Artificers in Wool, Iron, Steel, Brass or other Metal, Clockmaker, Watchmaker or other Artificer of *Great Britain* shall go into any Country out of his Majesty's Dominions, to Exercise or teach the said Trades to Foreigners; and if any of the King's Subjects in any such foreign Country, exercising any of the said Trades, shall not return into this Realm within six Months after Warning given by the Ambassador, Minister or Consul of *Great Britain*, in the Country where such Artificers shall be, or by any Person authorized by such Ambassador, &c. or by one of the Secretaries of State, and from thenceforth inhabit within this Realm, such Person shall be incapable of taking any Legacy, or of being an Executor or Administrator; and of taking any Lands, &c. within this Kingdom by Descent, Devise or Purchase, and shall forfeit all Lands, Goods, &c. within this Kingdom to his Majesty's Use, and shall be deemed an Alien, and out of his Majesty's Protection.

(C) *Who are deemed Purchasers, or not.*

THOSE are deemed Purchasers at Law who come to the Possession of Lands or At Law. Tenements by Deed or Agreement, and not by Descent, (*Lit. §. 12.*) nor by Escheat, nor by Wrong. *Co. Lit. 3. b. 18. b.*

And in Equity a Purchaser is considered as a Person, who innocently without Fraud In Equity; or Surprise, for a valuable Consideration acquires a Right or Interest, and is therefore so far favoured and protected, that his Title shall not be impeached in Equity; no Planks that he can lay hold on, and by which he can secure himself at Law, shall be taken from him, neither shall he be compelled to discover any Thing that will weaken his Title, &c. *Abr. Ca. Eq. 353.*

Every Lessee is a Purchaser. *2 Mod. Ca. 59.*

Lessee.

Lessee at Rack-Rent, tho' he paid no Fine, is a Purchaser, and shall avoid a voluntary Conveyance. *2 Vern. 327.*

A. enters into Partnership in Fifths, with three others, for twenty-one Years, in digging for Mines in *A.*'s Lands, *A.* to have two Fifths, and in Consideration of his Ownership of the Land, to have a tenth more out of the Share of the other Partners. Pursuant to the Articles, they searched for the Mines, and after two Years Time, and the Expence of about 120*l.* they discovered a valuable Mine, and worked for about three Months; and then *A.* dies, and his Widow sets up a voluntary Settlement, made after Marriage. The Court of Chancery inclined that the Partners were as Purchasers, and that the voluntary Settlement should not stand against them. *2 Vern. 326. Ca. Eq. Abr. 353. pl. 2.*

Partnership
in digging
Mines.

If a Man in Consideration of a Marriage-Portion settles a Jointure on his Wife, and makes a Provision for the Issue of that Marriage, the Wife and Children are to be considered as Purchasers for valuable Consideration; and tho' the Settlement was made after Marriage, yet if it was made pursuant to Articles entered into for that Purpose previous to the Marriage, it is the same Thing, and the Jointress in such Case shall avoid a prior voluntary Conveyance, and shall not be obliged to discover Writings, nor any Thing else that may prejudice her, unless she has her Jointure confirmed to her. *1 Chan. Ca. 99. 1 Vern. 440, 479. 2 Vern. 701. Abr. Ca. Eq. 354.*

Marriage
Settlement.

But if the Settlement was made after Marriage, and not pursuant to Marriage-Articles, it will be fraudulent against Creditors, but it will be good against a subsequent Purchaser with Notice, tho' not against one without, for the Wife and Children are to be considered more than mere Voluntaries; but if the Matter rests barely in Covenant or Agreement, it will never be carried into Execution against a subsequent Purchaser, without Notice, who has got a legal Title, nor against a second Jointress, without Notice, who brought in a Marriage-Portion. *Abr. Ca. Eq. 354.*

If a Wife joins with the Husband in letting in an Incumbrance on her Jointure Lands, and barring the Estate-Tail, and then limits the Uses to the Husband for Life, Remainder to the Wife for Life, Remainder to their Daughters. This does not make the Daughters Purchasers, so as to shut out a Judgment-Creditor of the Husband's antecedent to the barring of the Estate-Tail; it might have been a good Consideration for both, but it was not expressed in the Deed, to be any Consideration for settling the Estate upon the Daughters, but it was a voluntary Gift of the Wife to her Husband, and therefore the Daughter's Estate must be taken to be voluntary; and so a Judgment-Creditor ought to have the Assistance of this Court before them. *Prec. in Chanc. 114. Abr. Ca. Eq. 354.*

Baron and
Feme join in
incumbring
the Feme's
Jointure.

A. seised in Fee, settled his Estate in 1712. to the Use of himself for Life, Remainder to *B.* in Tail, but with Power of Revocation, by any Writing signed, &c. and attested by three, &c. Credible Witnesses. In 1715. *A.* by Deed, attested by two Witnesses only, reciting that he was indebted, as in a Schedule annexed, conveyed his Estate to *W. R.* and *W. S.* and their Heirs, in Trust to pay his said Debts by Profits, Mortgage, or Sale, and after Payment thereof, to pay the Overplus, and reconvey such Part as should be unfold, to *A.* or such other Person, &c. and for such Uses, &c. as he, by any Writing signed and sealed by him, and attested by two, &c. Witnesses, should direct. *A.* died without Issue, but left the said *B.* and *C.* the Daughters of two Sisters, his Heirs at Law. The Deed of 1715. was kept private 'till after the Death of *W. S.* the surviving Trustee in 1724. and was then laid before Mr. Pigot who directed, that the Heir of *W. S.* should assign the legal Estates to the Trustees

Settlement on
B. revocable,
and afterwards
a Settlement
made to pay
Debts, the
Remainder
to be as di-
rected, &c.

in the Deed 1712. which was done. Afterwards in 1726. upon a Treaty of Marriage between Lord *Fauconbridge* and *B.* a Marriage-Settlement was prepared by the same Counsel, as Counsel for the Lord *Fauconbridge*, who made a Settlement on *B.* in Consideration of the great Estate in Land which he was to have with her. The surviving Trustee in the Deed of 1712 joined in this Marriage Settlement. *C.* brought a Bill claiming a Moiety of the Estate of *A.* as Co-heiress with *B.* For that the Deed in 1715 was a Revocation of the Deed in 1712. Lord *Fauconbridge* pleaded, that he was a *Purchaser* under the Deed of 1712, without Notice of that in 1715, and that the Settlement made by him on *B.* was in Contemplation of that Settlement in 1712, and that the surviving Trustee in that Settlement was Party to the Marriage-Settlement; and that tho' the Purchase was not of the legal Estate, but the Trust only, that will make no Difference, according to *Wilker* and *Bodington's Case*, 2 *Vern.* 599. and that neither will it differ the Case, tho' there was no actual Conveyance; for as the Trustees in the Deed of 1712 always acted under that Deed for *B.* that Trust shall subsist as to himself, who is a *fair Purchaser*; and that he shall not be affected by constructive Notice to his Counsel, as having been advised with on these two Deeds in 1724; for that it must be intended, that at the Time of the Counsel's being concerned for him, which was in 1726, he had forgot that he had ever seen this Deed of 1715, there being an Interval of two Years between his first seeing it, and his being Counsel for this Defendant. And for these Reasons, the Court held, that this could not be Notice to his Lordship. Lord Chief Baron *Reynolds*, who assisted the Lord Chancellor, held, that the Lord *F.* could be a *Purchaser* of no more than *B.* had, as no actual Conveyance was made to him. The *Master of the Rolls* said, that to be a *Purchaser* in the Notion of Equity, there must be an actual Contract, and a Consideration paid; and therefore, if at any Time of the Marriage the Deed of 1712 stood revoked, the Trustees could be seised only of a Moiety for the Use of *B.* and consequently Lord *Fauconbridge* can be a *Purchaser* of no more. Lord Chancellor decreed a Moiety of the Estate, and an Account of the Rents and Profits taken since the Death of *A.* *Fitzgerald v. Lord Fauconbridge*, 12 June 1730. *Fitz-Gibb.* 207. and *Lilly's Prac. Conv.* 446 to 459.

(D) *In what Cases a Purchaser is favoured, or not.*

In Equity.

No Aid to
overthrow
Purchases
bona fide.

EQUITY will never assist against a Purchaser. *Vinor, Tit. Purchaser, (B) pl. 1.* The Plaintiff bought Land of one who had no Power to sell, and moved, that if the Defendant should be compelled to bring in the Leases, which might incumber the Plaintiff's Purchase, then the Plaintiff might bring in the ancient Evidences, which might discover that he who sold to the Plaintiff had no Power to sell. The Court of Chancery answered, that no Aid should be given to overthrow Purchases made *bona fide*. *Totb.* 223.

Execution.

If Execution be against the Heir, he shall not have Contribution against a *Purchaser*, tho' *in rei Veritate* the Purchaser came to the Land without any valuable Consideration; for the Consideration of the Purchase is not material in such Case. *Herbert's Case*, 3 *Rep.* 12. *b. Gawdie's Case, Moor* 169.

More Land
passed than
was intended.

The Plaintiff prefer'd a Bill in this Court against the Defendant, supposing that more Lands passed than was intended: But because the Defendant was a *Purchaser* upon valuable Consideration, no Relief was given. *Totb.* 83.

Bankrupt.

The Statute of 21 *Jac.* 1. *cap.* 19. enacts that no *Purchaser* shall be impeached, unless the Commission be sued out within five Years after he becomes a Bankrupt.

Consideration.

Bill to discover, &c. The Defendant pleaded he was a *Purchaser* for a valuable Consideration, and that he had paid the Purchase-Money: But because he did not set forth how much the Purchase-Money was, nor to whom he paid the same, this Plea was over-ruled, and the Defendant was ordered to answer those Particulars without Costs, but the Purchase not to be impeached. *Fin. Rep.* 219.

Purchase pen-
dente lite.

A *Purchaser* of a Reversion under a Decree in Chancery, shall not be drawn to take his Money again with Interest, if of the Life dying, notwithstanding the Pretence of the Purchase being made *pendente lite*. 1 *Chanc. Rep.* 76.

But a Purchase made *pendente lite*, and after full Notice of a Trust, will be set aside in Equity. *Fin. Rep.* 322.

Buying in In-
cumbrances.

A *Purchaser Bona fide*, without Notice of any Defect in his Title at the Time of making the Purchase, may lawfully buy in a Statute or Mortgage, or any other Incumbrances;

ces; and if he can defend himself at Law by any such Incumbrances bought in, his Adversary shall never be aided in a Court of Equity, by setting aside such Incumbrances; for Equity will not disarm a Purchaser, but assist him, and Precedents of this Nature are very ancient and numerous, viz. where the Court has refused to give any Assistance against a Purchaser, either to an Heir, or to a Widow, or to the Fatherless, or to Creditors, or even to one Purchaser against another. *Fin. Rep. 103. Comb. 90, 209. 3 Mod. Rep. 203. Salk. 592. 1 Show. 537. Prec. in Chan. 249.*

And this Rule is agreeable to the Wisdom of the Common Law, where the Maxims which refer to Descents, Discontinuances, Non-Claims, and Collateral Warranties, are only the wise Arts and Inventions of the Law, to protect the Possession and strengthen the Rights of Purchasers. *Per Finch Keeper. Fin. Rep. 104. Prec. in Chan. 249.*

Maxims of Law in a Court of Equity.

H. B. seised in Fee of a Manor, covenanted with L. D. for the Advancement of such Heirs Males, as well on the Body of M. then his Wife, to levy a Fine thereof to the Use of himself for Life, and afterwards to the Use of the Eldest Issue Male of the Bodies of him and his said Wife begotten, in Tail, &c. and so to three Issues of their Bodies, &c. with the Remainder to his right Heirs. Afterwards H. B. by Fraud and Covin, to defeat the said Covenant, made a Lease of the said Manor for a long Term to R. H. and afterwards levied the Fine accordingly: Resolved that tho' the Issue was a Purchaser, yet he was not a Purchaser in vulgar and common Intendment. *3 Co. 83. b. 1 And. 233.*

A Purchaser, but not by common Intendment.

A Purchaser relieved against a Statute sought to be extended by a second Agreement after the Purchase. *Totb. 257.*

Statute.

A Purchaser of a Lease, out of which a Rent is issuing, shall not be liable, but the Executor of the Will; this Rent was without a Clause of Distress, and the Executrix and her Trustee sold away the Lease. *Totb. 259.*

Lease.

Upon a Purchase made by M. of J. S. the Agreement was, that a Recovery should be suffered within three Years. M. paid his Money before the Recovery suffered, and took a Bond of J. S. that if the Recovery was not suffered in three Years, then M. re-conveying the Lands, should be repaid his Money; J. S. tenders a Recovery, but before it was suffered, a third Person makes a Title to the Lands, and thereupon M. exhibited his Bill to have his Money repaid; but the Lord Chancellor said he could give no Relief; for M. has parted with his Money, and taken a Bond for Re-payment, if the Recovery were not suffered in three Years, M. re-conveying his Estate; and here the Recovery being suffered, he has no Pretence by his own Agreement to have it re-paid; and the Court cannot help him, unless it should take upon it self, where any Man had a bad Bargain, and was cheated in his Title, to help him to his Money again; and here being no Manner of Fraud or Surprise in the Case, if he be not helped by his Covenants, he will not be helped in Equity; but for the Matter of Re-conveying, if M. should re-convey such Title as he had from them, be it more or less, or none at all, yet being a Relative to convey, it would have been well enough; but here the Recovery being suffered according to the Agreement, tho' nothing passed by it, the Party had well performed his Agreement, and so no Re-conveying nor Re-payment of the Money to be made. *Serjeant Maynard's Case, Pasf. 1676. 2 Freem. Rep. 1.*

Suit to have Consideration Money repaid on a bad Purchase, the Land not being the Vendor's.

Plaintiff bought several Manors of B. deceased, who (before the Plaintiff's Purchase) had conveyed the same by Fine and Recovery to the Defendant and his Heirs Males, which being done without Consideration, was adjudged and decreed to the Plaintiff. *Totb. 257.*

Purchaser relieved against a Deed of Intail.

If one sells another's Land, and covenants to discharge it of such particular Incumbrances, and before the Payment of the Money other Incumbrances are discovered, this will prevent any Suit for the Money, till all the Incumbrances are discharged. *Arg. and seems to be admitted in Serjeant Maynard's Case, Pasf. 1676. 2 Freem. Rep. 2.*

Incumbrances.

And if in a Conveyance of Lands there be no Covenants against any Incumbrances, yet if before Payment of the Money any are discovered, the Party may retain his Money till they are cleared. (Said by Mr. Keck, and agreed by Lord Chancellor.) But (it was said by Sir P. King, and not denied per Cur. that) those must be Incumbrances made by the Vendor himself, or otherwise the Party cannot detain the Money unless they be covenanted against. *Serjeant Maynard's Case, 2 Freem. Rep. 2.*

A Judgment was antedated on Purpose to over-reach a fair Purchaser, who had paid all the Purchase Money except 70 l. which he was to keep till an Incumbrance, of which Notice was given, should be discharged. Decreed that on Payment of the 70 l. to the Judgment-Creditor, with Interest from the Time it ought to have been paid

- to the Vendor, a perpetual Injunction be awarded, and that he either acknowledge Satisfaction, or assign it to the Purchaser. *Fin. Rep.* 394.
- Audita Querela.** A Purchaser for a valuable Consideration restrained from bringing an *Audita Querela* upon Pretence that a Purchaser had levied Monies upon other Securities. *Toth.* 259.
- Where the Heir of a Purchaser of Lands in Borough English, had his Title made good by the Younger.** A. purchased Land in *Borough English* of an elder Brother, supposing the younger to be dead, and took a Bond to indemnify; but the younger Brother afterwards appearing, he and the elder Brother came to an Agreement, by which the younger was to have an Annuity paid him by the Vendor, and so the Purchaser was permitted to enjoy whilst the elder Brother lived, but he being dead, and A. the Purchaser also, the younger Brother brought an Ejectment against the Plaintiff the Heir of A. But other *Compensations* also being proved to be made by the elder Brother to the younger, it was decreed that the Defendant, the younger Brother, should make good the Plaintiff's Title, and surrender and release the Lands to the Plaintiff and his Heirs. *1 Vern.* 325.
- Heir of a Vendor compelled to execute a Conveyance.** A Contract for the Purchase of an Estate on Payment of a certain Sum was made by an Agent of the Purchaser, and Part of the Money by him paid, which Agent died before the Purchase was compleated; and the Vendor likewise died; but his Heir was decreed to execute a Conveyance on paying the Remainder of the Purchase-Money, &c. *Fin. Rep.* 201, 202.
- Where a Purchaser may take Advantage tho' by undue Means.** *Purchasers* who have got an *Advantage* at Law, though by undue Means, have been permitted to profit by it; per Lord Rawlinson, and for that Purpose cited *Bucknell* and *Ellis's Case*, where *Ellis* had got the Deed of Rent-Charge into his own Hands; and Sir *John Fagg's Case*, who got the Deed of Intail into his Hands by a Trick; (which Case was cited by the Lord Chancellor in *Lord Huntingdon* and *Greenville*), and *Harcourt* and *Knowel* where a Release was obtained from a Grantee of a Rent-Charge, without any Condition and by Fraud; and Lord Rawlinson also cited the Case of *Lord Huntingdon* and *Greenville*, *2 Vern.* 49. first decreed to protect a Purchaser, and after that, a Release gained from an Administrator *de bonis non*. So where a Release was obtained from a Grantee of a Rent-Charge without any Consideration, and by Fraud, and yet a Purchaser was admitted to take an Advantage of it. *2 Vern.* 159.
- Partition.** A Purchaser came into a Man's Study, and there laid Hands on a Statute that would have fallen on his Estate, and put it up in his Pocket; and he having thereby obtained an Advantage in Law, tho' so unfairly, and by so ill a Practice, yet the Court would not take that Advantage from him. *Abr. Ca. Eq.* 354.
- Reversion.** A *Purchaser* brought a Bill for Writings and a Partition; Defendant insisted that there was an Entail, and the Plaintiff's Purchase not good. The Court on the first Hearing gave Plaintiff Time to try his Title. Ejectment was brought, and a Copy of a Deed of Intail produced in Evidence, but the Original was lost, and not proved to be executed; a Verdict was against the Intail: On the Cause coming on upon the Equity reserved, Defendant insisted he ought not to be bound by one Trial in a Matter of Right of Inheritance. *Sed non allocatur*, being a Decree only for Partition. *Tamen Q.* *2 Vern.* 232.
- Mortgage.** A. buys a Reversion expectant on an Estate for Life granted by Copy of Court-Roll to B. where in truth B. had no such Copy nor Grant of such Estate, yet decreed that B. shall enjoy it for Life against A. the Purchaser. *2 Vern.* 279.
- Time to Repurchase.** A. devised to B. for Life, Remainder to C. B.'s Son an Infant in Fee, and devised 400 l. to the Son to be paid at twenty-one, and made the Father Executor, and left 2000 l. Personal Assets, and B. having spent the personal Assets, mortgaged the Lands to F. S. and made Affidavit that they were free from Incumbrances, and that he was seised in Fee, and levied a Fine for corroborating the Mortgage, and also declared the Use thereof to him and his Heirs; the Son having entered for a Forfeiture, the Mortgagee brought his Bill to be relieved; and the Court decreed that the Mortgagee, notwithstanding the Forfeiture, should hold and enjoy the Lands against the Son during the Life of the Father. *Abr. Ca. Eq.* 257. pl. 2. *Prec. in Chan.* 108.
- S. S. Stock.** Where there is a Clause or Provision in a Conveyance for the Vendor to Repurchase, the Time limited for that Purpose ought to be precisely observed. *1 Vern.* 269.
- A Purchaser of S. S. Stock of an Agent that kept the Proprietor's Minutes, and who pretended a Power to sell, and got another to personate the Proprietor, and sign the Transfer, procured the same transferred, made Affidavit of the Sale, and had it entered into the Books, and then ran away, but before was a Man in good Credit for Substance,

stance, &c. The Purchaser sold the Stock again, tho' forbid by the Proprietor. In Trover at *Nisi Prius*, before Sir P. King, he directed the Jury to find for the Proprietor, which they did, but gave her no more Damages than the Value of the Stock at the Time of her buying. 1 Mod. Ca. 9.

A. entred into a Judgment to B. and C. which is defeasanced to the Use of D. and in the Defeazance A. covenants for himself, and his Heirs, to pay to D. the *Cestui que Trust*, and her Heirs; afterwards A. sells Part, and the other Part descended to the Heir, who married and had Children; B. one of the Trustees dies; C. the surviving Trustee makes A. the Conusor of the Judgment, Executor; D. the *Cestui que Trust*, brings a Bill against the Executors of A. the Heir at Law and the Purchaser, for Relief, not being able to recover at Law, the Conusor being made Executor; but no Relief. The Lord Chancellor said, tho' it be a meer Accident and Slip by the Conusor's being made Executor, yet Equity will not interpose or give any Assistance to affect a Purchaser; and bid them recover at Law, if they could. Sel. Ch. Cases in Lord King's Time 80. Judgment.

The Court of Chancery would not stay a Purchaser from felling of Woods, tho' the Vendor had an Estate for Life; and the Court would not bar him Remedy at Law upon any Evidence he could produce. Totb. 223. Of a Purchaser's felling Woods.

The Father makes a voluntary Conveyance in Tail of Lands, reserving an Estate for Life, after sells the Woods upon the Lands to a Stranger Decreed in Chancery; that the Vendees of the Woods shall have them notwithstanding the Conveyance of the Lands. Totb. 257, 258. Purchaser of Woods after a Conveyance in Tail.

A Purchaser for a valuable Consideration without Notice shall not be impeached, especially where a Settlement has since been made in his Favour. Vin. Tit. Purchaser, (C) pl. 1. Notice of Incumbrances.

A Purchaser that comes in without Notice of a Rent-Charge shall not be chargeable therewith, altho' given to a Charitable Use. Totb. 258.

Notice of an Incumbrance before the Conveyance is executed, shall bind the Purchaser. The Court said it had always been so ruled. More v. Maybow, Mich. 15 Car. 1 Chan. Cases 34. 2 Freem. Rep. 175. and it was so decreed by the Lord Chancellor in Sir William Wheeler and Tarraway and Nicholas.

A Purchaser shall not be affected by a Judgment in Equity, without express Notice of it before the Purchase; it is otherwise at Law. 1 Chan. Ca. 37. Nel. Chan. Rep. 91.

A Purchaser for a valuable Consideration without Notice, was decreed to pay Arrears of an Annuity charged on the Lands purchased, tho' the same was due thirty Years before, and no Demand in all that Time. Fin. Rep. 252.

A voluntary Conveyance decreed against a (Jointress) Purchaser for a valuable Consideration; (but it seems, that the not having Notice was the Laches of the Jointress, &c.) 1 Chan. Ca. 291, 292.

A Purchaser from J. S. who has a Decree against him in Chancery for Land, shall be bound by the Decree, tho' he had no Notice of it. 2 Chan. Ca. 48.

J. C. mortgaged Land to H. and (having two Sons J. and E.) devised the Equity of Redemption to E. H. and J. join in an Assignment of the Mortgage to E. Tho' E. pleaded want of Notice of the Will, and that J. was the visible Heir, yet decreed, that E. should have the Equity of Redemption, on the Foot of the first Mortgage. Nel. Chan. Rep. 153.

A. purchases, having Notice of a Settlement, whereby B. the Vendor was but Tenant for Life, Remainder to his first, &c. Son in Tail. Afterwards A. sells to C. who had no Notice; B. dies leaving a Son; the Bill was dismissed as to C. but decreed A. to account for the Consideration Money, which he sold the Estate for, with Interest from the Decease of B. thereout discounting what was due on a Mortgage prior to the Settlement which he had bought in. 2 Vern. 384.

A. sells to B. who has Notice of an Incumbrance; B. sells to C. who has no Notice. And he to D. who has Notice; the Master of the Rolls thought this revived the first Notice to B. But the Lord Keeper held the contrary. Pre. in Chan. 51.

Lord Chancellor said, he took it to be a Rule in Equity, that where a Man is a Purchaser without Notice he shall not be annoyed in Equity; not only where he has a prior legal Estate, but where he has a better Title or Right to call for the legal Estate than the other. A. purchases of B. who had done an Act of Bankruptcy, but without Notice of it; afterwards a Commission is taken out, and there being a Term standing out in Trustees, the Assignee brings a Bill against them and the Purchaser, to have the

the Term assigned to *him*. Bill dismissed. 2 Vern. 599. It makes no Difference whether the Party be a Purchaser of the *legal Estate*, or only of an *Equitable Interest*. *Lilly's Prac. Conv.* 393.

A. mortgaged an Estate for Years to *D.* who assigned the same to *H.* who made his Wife *W.* Executrix, and died. *A.* suggests that *D.* agreed to execute a Reconveyance. *W.* pleads that she was a Purchaser and Legatee, without any Notice of such Agreement, and that in Consideration of a Marriage between her and *J. Sc.* she assigned the original Lease in Trust that the Marriage took Effect, therefore *J.* and *W.* claim an absolute Estate, having no Notice of such Agreement. Decreed, that it appearing the Plea was true, *J.* and *W.* were in Nature of Purchasers without Notice, and therefore the Plea was allowed, but that they should give *A.* at his Charge, a Copy of the Deed of Trust, if required. *Fin. Rep.* 9.

A Jointure made, the Intail concealed, and the Land devised.

A. on his Marriage with *B.* settles Lands for her Jointure, which were subject to an Intail. *C.* Brother of *A.* was privy to the Intail, ingrossed the Jointure-Deed, had the Deed of Intail in his Custody, and concealed it. *A.* devised the Lands to *J. S.* and afterwards died without Issue, and *J. S.* married the Widow; *C.* sets up the Intail, brought an Ejectment, and recovered. *J. S.* and his Wife brought a Bill to be relieved. *C.* confessed that he was privy to the Marriage-Treaty, ingrossed the Jointure-Deed, and had the Deed of Intail in his Custody, but did not mention his Title, nor discover the Deed of Intail, because he apprehended his Brother would dock the Intail. Decreed the Wife to hold her Jointure, and a perpetual Injunction against the Judgment in Ejectment; but the Bill was dismissed as to the Husband's Claim of the Reversion and Inheritance by a voluntary Devise. And this Decree was afterwards affirmed in the House of Lords. 2 Vern. 239.

Settlement of the Reversion of a Term on the Issue of a Marriage decreed to be made good.

So where a Mother, who was absolute Owner of a Term, was present at a Treaty for her Son's Marriage, and heard her Son declare, that the Term was to come to him at his Mother's Death, and was a Witness to the Deed by which the Reversion of the Term was settled on the Issue of that Marriage; and on a Bill brought by the Issue of that Marriage she was compelled in Equity to make good the Settlement, and to settle the Reversion of the Term accordingly. 2 Vern. 150.

An Annuity charged on Lands by Will, decreed to be paid notwithstanding a prior Settlement.

So where a younger Brother, having an Annuity of 100*l.* per Ann. charged on Lands by his Father's Will, contracted with *A.* to sell him this Annuity; *A.* goes to *B.* the elder Brother, and tells him he was about to buy this Annuity of his younger Brother, and desired to know if his younger Brother had a good Title to it, and whether his Father was seised in Fee at the Time of making the Will, and whether the Will was ever revoked. *B.* told him he believed his Brother had a good Title to it, and that he had paid him his Annuity these twenty Years; but withal, told him, that he heard there was a Settlement made of his Father's Lands before the Will, and that the said Settlement was in the Hands of *J. S.* and that he had never seen it, and therefore could not tell him what the Contents of it were, but encouraged him to proceed in his Purchase, telling him, he had not only paid his Brother his Annuity to that Time, but had paid his Sisters 3000*l.* under the same Will; afterwards *B.* gets the Settlement in his Hands, by which the Land out of which the Annuity issued was intailed, and would thereby avoid this Annuity: But on a Bill by *A.* to have the Annuity paid, or the Purchase-Money back again, the Court decreed Payment of the Annuity, purely on the Incouragement given by the elder Brother. *Abr. Ca. Eq.* 356.

Bankruptcy.

A Purchaser for a valuable Consideration, without Notice, having as good Title to Equity as any other Person, the Court of Chancery will never take any Advantage from him, and consequently will not grant a Discovery against him of the only Equity he has to defend himself by, which if he should be obliged to discover, the other Party would immediately take Advantage of; and there certainly may be Cases where a Purchaser for a valuable Consideration, without Notice of an Act of Bankruptcy, shall not be obliged in the said Court to discover any Thing, (whether Incumbrances that he has got in, or any other Thing) but all Advantages shall be left him to defend himself by. Suppose two Purchasers without Notice, and the second by Chance gets hold of an old Term, he shall defend himself thereby against the first, who still is as much a Purchaser for a valuable Consideration as himself; therefore a Purchaser for a valuable Consideration, without Notice of the Bankruptcy, is to be relieved against it in Chancery, within 21 Jac. 1. *Cases in Lord Talbot's Time* 69.

A Debtor by Bond devised it should be paid out of his *personal Estate*, and if that was not sufficient, then to sell his *real Estate* and pay it, which accordingly was sold, and by several Conveyances came to the Defendant, who was sued for the Money as charged

charged on the Lands which he bought. But it was decreed, that the Money which was received for the Sale of the Lands shall go in Aid of this Purchase, which was for a valuable Consideration without any Notice, &c. *Fin. Rep. 137.*

A. purchased the Manor of *D.* in which were Lands called *B.* and *P.* The Manor, at the Time of the Purchase, was in Mortgage for a Term of Years, and the Mortgage was paid off, and the Term assigned in Trust to attend the Inheritance; afterwards *A.* upon the Marriage of his Son, settles Part of these Lands, and amongst them the Lands called *B.* and *P.* but no Care was taken of the Mortgage-Term that stood out; afterwards *A.* being in Possession contracts with *Brockett* to sell him all the said Manor, except the Lands of *B.* and *P.* but shews the Lands *B.* and *P.* as Part that he would sell; for *Brockett* did not know that any Part of the Lands were called by that Name; and in the Conveyance to him there is an Exception of Lands called *B.* and *P.* After the Purchase-Money paid, *Brockett* was evicted of the said Lands by *Oxwick*, who claimed under *A.*'s Son; upon which *Brockett* having found the old Term that was on Foot at the Time of *A.*'s Purchase, and got an Assignment of it, *Oxwick* brought his Bill against *Brockett* to be relieved and to have an Assignment of the Term; and that as to the Lands called *B.* and *P.* he was no Purchaser of them, for they were expressly excepted in his Conveyance. But Lord Chancellor was of Opinion, that these Lands being shewn to the Defendant as Part of his Purchase, he (not knowing them to be excepted by the Name of *B.* and *P.*) was in Equity a Purchaser of them; and the Court ought not to assist in defeating of him, and therefore dismissed the Bill as to all the Lands purchased by him. *Abr. Ca. Eq. 355.*

Purchaser assisted as to Lands excepted in a fraudulent Manner.

A Purchaser of Lands from *A.* which *B.* makes Title to, getting the Deeds that make out *B.*'s Title, is not bound to discover them. *1 Chan. Ca. 69.*

Discovery of Deeds.

An Heir exhibited a Bill for the Discovery of Evidences concerning Lands that were his Ancestors; the Defendant swore that he was a Purchaser of the Lands, and the Heir demanded a Sight of his Deeds and Writings. But per Lord Chancellor, he shall not see them; for altho' the Heir *prima facie* has a legal Title, he may go into a Court of Law if he pleases; but this Court will not compel the shewing the Writings to any Person unless he has an equitable Title, as a Mortgagee, &c. And this is the Difference between a legal and an equitable Title. *2 Freem. Rep. 24.*

A. employed by *B.* to purchase Lands, contrary to Agreement purchased them in his own Name, but by Persuasion let *A.* into the Purchase by Deed, wherein were several Omissions of Things comprized in the Purchase-Deed. On a Bill for Relief the Omissions were decreed to be supplied. *Nel. Chan. Rep. 7.*

Supplying Defects in Deeds.

The Husband made a Lease of the Wife's Land to one who was ignorant of the defeasible Title. The Lessee built upon the Land, and was at great Charge therein. The Husband died, and the Wife avoided the Lease at Law, but was compelled in Equity to yield a Recompence for the Building and Bettering of the Land; for it was so much the better worth unto her. *Rep. Chan. 5.*

favoured by Allowance.

Lease by Baron of the Feme's Land.

But where a Purchaser of a Term of sixty-one Years, which he assigned to Trustees, and also of the Reversion and Inheritance, being in Possession, had laid out 1000*l.* in Building, and enjoyed the same till the Death of the Vendor, and then the Land was recovered by Virtue of an old dormant Entail; the Court would not relieve the Purchaser who was Plaintiff, nor give Defendant any Costs. *Nel. Chan. Rep. 57, 58.*

Purchaser of a Term.

But Allowance for Improvements and necessary Reparations were made to a Purchaser of a Term, upon decreeing it to be delivered up to Devisees in Remainder. *Fin. Rep. 379.*

So where it was after a long Time, (the Person claiming having been beyond Sea twenty Years, and ignorant of his Title till after his Return) and divers Purchases made, and the last Purchaser had laid out Money in Building, it was decreed in Chancery that he hold till satisfied, discounting for the Profits received after the Purchase. *2 Lev. 152. Ca. Eq. Abr. 356. p. 9.*

A Purchaser, who before his Purchase-Money paid, or Deeds executed, (tho' not before his Contract made) had Notice of a prior Settlement, was ordered to be allowed what he had laid out in lasting Improvements upon the Premises, tho' they were made pending the Suit. *1 Vern. 487.*

Prior Settlement.

And where it appears that Articles of a Purchase were unfairly obtain'd, tho' not to such a Degree as to set them aside, yet if upon the Prospect of their being perform'd he has improv'd the Estate, it is reasonable he should have Allowance for lasting Improvements.

Articles of Purchase.

Improvements.

provements, provided he deliver up the Articles, and account for the Profits; but if he goes to Law he must not expect it. *Ca. Eq. in Lord Talbot's Time* 234, 236.

Bill for Purchase-Money dismissed, there being a prior Settlement; and a Note given for that Money, decreed to be delivered up, and the Premises re-conveyed.

P.'s Wife, before her Marriage with P. being possessed of a Term of Years as Executrix to her first Husband, and which was liable as Assets to the Payment of his Debts; in order thereto, and to raise Money for that Purpose, P. and his Wife, after their Marriage, entered into an Agreement with D. for Sale of the House in Question, for the Residue of the Term, for 450*l.* whereof 210*l.* was to be applied in Discharge of a Mortgage thereon to one J. S. and the Remaining 240*l.* was to be paid to P. and his Wife; accordingly P. and his Wife executed an Assignment of the House to D. with a Receipt indorsed thereon for the whole Purchase-Money; but D. did not then pay the Purchase-Money, but gave a Note for the Payment of 210*l.* Part thereof, to J. S. the Mortgagee, and of the Remaining 240*l.* to P. and his Wife; and for the Non-payment thereof P. and his Wife brought their Bill in Chancery to have a specific Performance and Payment of the Money accordingly. D. by his Answer admitted the whole Case to be as above, but insisted that he ought not to be bound thereby, for that P. and his Wife could not make him a good Title, they having, by Articles before Marriage, agreed to settle this House for the Benefit of themselves and their Issue, of which he had no Notice at the Time of his Purchase; and for the Discovery of these Articles, and to have up his Note on a Re-assignment of the House, D. brought his Cross-Bill. P. and his Wife, by their Answer, admitted there were such Articles, but insisted, that the House lying in *Middlesex*, those Articles were never registered in the *Middlesex* Office, and therefore void as against D. But it was decreed, that the original Bill should be dismissed with Costs, and on the Cross-Bill it was decreed, that the Note given for the Purchase-Money should be delivered up on a Re-assignment of the House, and D. likewise to have his Costs by Reason of P.'s Fraud and concealing the Articles. *Abr. Ca. Eq.* 357, 358.

So where the second Purchaser having Notice of the first Purchase, but that it was not registered, went and purchased the same Estate, and got his Purchase registered; yet it was decreed, that having Notice of the first Purchase, tho' it was not registered, bound him; and that his getting his own Purchase first registered was a Fraud, the Design of those Acts being only to give Parties Notice, who might otherwise without such Registry be in Danger of being impos'd on by a prior Purchase or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, tho' not by the Registry. *Abr. Ca. Eq.* 358.

Favoured after Length of Time, Statute.

An *antient Statute* being against a Purchaser, tho' no direct Proof on either Side, was decreed to be cancelled. *Totb.* 258, 277.

Mortgage and Recognizance.

Purchasers relieved of a sleeping Mortgage. *Totb.* 258.

A Purchaser, and those under whom he claimed, had been in *quiet Possession* for sixteen Years, and then the Defendant set up a Mortgage and a Recognizance to incumber the Premises, against whom the Purchaser exhibited his Bill to be relieved; but there being no Proof to confirm, but that the Mortgage and Recognizance might both be satisfied, the Mortgage was decreed to be delivered up and cancelled, and the Recognizance to be vacated. *Fin. Rep.* 250.

Use.

A Man possessed of a Lease for fifty Years, he died Intestate, the Wife administered, and made a Feoffment to her own Use; a little before her Marriage with a second Husband, the Feoffees sold the Land for a valuable Consideration, which was enjoyed many Years accordingly; after the Wife's Death the second Husband would avoid this Purchase by Reason of the Use; but the Court decreed that the Purchasers should enjoy it, notwithstanding a Verdict at Law. *Totb.* 223, 224.

Legacies.

Lands devised to be sold for Payment of Legacies, the Sale was made by W. who possessed them six Years, and then sold them to A. A and his Heir enjoyed the same twenty-two Years more, without any Demand of the Legacies. This *quiet Possession* for twenty-eight Years was held a good Title, and the Bill brought against the Purchaser for the Payment of the Legacies was dismissed, W. the Vendor having received by the Sale Money sufficient to discharge the Legacies. *Fin. Rep.* 316.

Copyhold.

A Tenant in Tail of a Copyhold, Remainder to himself in Fee, purchased the Freehold of the Lord, and then sells to J. S. and dies; and after thirty Years Possession the Son of A. sets up a Title as Issue in Tail. The Lord Chancellor declared, that the Purchaser of the Freehold shall attract the other Estate, which was but at Will; and decreed the Purchaser to enjoy against the Issue in Tail. 1 *Vern.* 393. For the Copyhold being severed from the Manor, there is no Means to bar it. 2 *Chan. Ca.* 174. & vide 1 *Vern.* 458.

P. having

P. having a Lease of certain Mills for twelve Years, which were near expired; Lessor on his Marriage made a Settlement of these Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his own right Heirs. Afterwards P. took a new Lease of these Mills from the said Lessor for thirty Years, and laid out 2800*l.* in Building and Improvements; D. was the eldest Issue Male of the Lessor, and during the Time P. was making Improvements, went to his Father, and told him, he had no Power to make any such Lease; that after his Death the Estate would be his, but never acquainted P. with this, or of the Settlement made on his Father's Marriage; but on the contrary, wrote to P. to take Care to keep one of the Mills in particular in Repair; then the Father died, and the Son recovered in an Ejectment against the Lessee, who thereupon brought his Bill to be quieted in the Possession of the Mills during the Residue of his Lease, because D. was fully acquainted with the Circumstances of this Lease, knew his Father had no Power to make it, and yet never forbade nor cautioned P. from going on with his Repairs, but on the contrary stood by and saw them, and encouraged him in the Proceeding therein; and therefore it was decreed that P. should hold during the Residue of his Term; for tho' D. was not privy to the making of this Lease, that being only the Fraud of the Father, yet he being to have the Estate after his Father's Death, and taking Notice thereof to his Father, that he had no Power to make any such Lease, and yet suffering P. to go on in his Repairs, with a Design to reap the whole Benefit himself when his Father was dead, was such a Fraud and Practice in him as ought to be discountenanced in Equity; for *Qui tacet assentire videtur.* Abr. Ca. Eq. 356, 357.

Lessee decreed to hold his Term tho' ejected on Account of a prior Settlement.

(E) *In what Cases Purchases are affected.*

Voluntary Articles shall never be set up against an absolute Purchaser, altho' such Purchaser had Notice by being a Party to the Articles; but *Quære*; for there was another Point in the Case, which might be the Foundation of the Judgment. *By Incumbents.* Articles. *Vin. Abr. Tit. Purchaser, (D) pl. 5.*

A Church Lease was agreed by Marriage-Articles to be settled upon the Husband and Wife, and the Issue of the Marriage. They had Issue; the Husband mortgaged the Lease to A. and then the Husband and Wife surrendered the Lease, and a new one was granted to J. S. afterwards B. purchased this last Lease, without Notice of the Articles. B. died, and his Executors sold the Lease to C. who had Notice of the Articles, and gave him a collateral Security for better assuring his Title. The Plaintiff claimed under the Articles, and prayed that C. by Reason of the Notice he had of the Articles, might be considered as a Trustee for him: C. pleaded his Purchase, and confessed the Notice, but insisted principally upon B.'s Purchase without Notice, and that he had now B.'s Title. And because C. claimed under B. who was a Purchaser without Notice, and who had barred the Plaintiff's Right, and that all B.'s Right was now devolved upon C. Lord Chancellor Talbot decreed for C. and said, it would be the same tho' C. had been only a Voluntier, as B.'s Executors were, and that C.'s taking collateral Security would not make his Case the worse; but if B. had had Notice, all would be overturn'd. *Ca. Lord Talbot's Time 187.*

Purchaser is not to be affected with a concealed Conveyance. *Butler v. Burk, 6 Feb 1719. Vin. Abr. Tit. Purchaser, (D) pl. 7.* Concealed Conveyance.

Ordered, That a Decree for a Lease and other personal Estate by Consent shall bind Purchasers for valuable Consideration. *3 Chan. Rep. 22.* Decree.

An Estate was awarded to A. who had Possession pursuant to the Award, and devised it to a Charity. B. having Notice of the Award, and the Devise, purchased it. Decreed against the Purchaser, and in Favour of the Charity. *Fin. Rep. 76.* Award.

A general Power to make a Jointure, and not said of what Lands in particular, is not such a Lien upon the Lands as will affect a Purchaser, tho' the Power had been afterwards executed, much less where it is not executed at all. *1 Vern. 407.* Jointure.

A Devisee of Lands got a Decree to hold against the Heir, who was supposed to will have suppressed the Will; the Testator had mortgaged the Land, and a third Person, pending the Suit, got Assignment of the Mortgage, and purchased the Equity of Redemption of the Heir, with Notice of the Will. The Court would not admit the Purchaser to dispute the Justice of the Decree, nor to try at Law if the Will was cancelled by the Testator or not. *2 Vern. 216, 217.*

Judgment.

Lord *Cowper* seemed to be of Opinion, That in Case of a *Covenant to convey* Land, the Money being paid, and afterwards the Vendor confess'd a *Judgment* to a Creditor between the Time of the Conveyance and the Covenant, it should not affect the Purchaser, because in Equity the Land is esteemed to be sold from the Time of the Covenant. *Lucas's Rep.* 468.

And the same Point is admitted and affirmed by Lord Chancellor *Cowper*, tho' the Judgment-Creditor had no *Notice* of the Covenant, because from the Time of the Articles and Payment, the Seller would be only a Trustee for the Purchaser. *1 Will. Rep.* 278, 279.

But if the Consideration paid is not somewhat adequate to the Thing purchased, as if the Money paid is but a small Sum in Respect of the Value of the Land, this shall not prevail over a *mesne* Judgment-Creditor. *Per* Lord Chancellor *Cowper*, *1 Will. Rep.* 282.

But a Mortgagee, for a valuable Consideration, without *Notice* of such Covenant, shall hold Place against such Covenantee; for there the Money is lent upon the Credit of the Land, and attaches upon the Land, which a Judgment does not; which was granted. *1 Will. Rep.* 279.

By the Stat. of 29 *Car. 2. c. 3. §. 2.* Any Judge, or Officer of any of the Courts at *Westminster*, that shall sign any Judgments, shall (without Fee) set down the Day of the Month and Year of his so doing, upon the Paper or Record, &c. which he shall sign, which shall be entered upon the Margin of the Roll of the Record of the said Judgment; and such Judgments, as against Purchasers *bona fide*, for valuable Consideration, shall be Judgments only from such Signing.

Upon this Statute a Judgment shall have no Relation but from the Time of the Signing, not only as against Purchasers of the Lands themselves, but also as against prior Judgments entered in the Grand Sessions of *Wales*, to which that Statute does not extend; and said, That a Man, who trusted his Money on a Judgment, was in some Part a Purchaser of the Land, as he might take out Execution, and extend the Land itself; that the Rule laid down by the Statute for the Safety of Purchasers of the Lands themselves, was a good Rule to follow in the other Case, and the Relations were not to be favoured in a Court of Equity. *Proc. in Chan.* 478.

If a Judgment be signed in the Vacation, yet it is entred as of the Term before, and none but a Purchaser shall be admitted to say it was signed as of any other Time, and it is the Course of the Court to let all Things be done in the Vacation as of the Term before. *1 Salk.* 401. *Fareley* 39.

The Stat. 4 & 5 *W. & M. c. 20. §. 2, 3.* enacts, That the Clerk of the Essoigns of the Court of *C. B.* Clerks of the Dockets in *B. R.* and the Master of the Office of Pleas in the Exchequer, shall, before the End of every *Easter* Term, alphabetically enter a Particular of all the Judgments of Debt by Confession, *Non sum Informatus*, &c. of the *Hillary* Term preceding, and within ten Days deliver Notes in Writing to the Clerks, &c. The like before the End of *Michaelmas* Term, of the Terms of *Easter* and *Trinity*, and before the End of *Hillary* Term, of *Michaelmas* Term, under the Penalty of 100 *l.* And that no Judgment shall affect Purchasers of Lands or Mortgages, 'till docketed and entred as aforesaid.

Purchaser in another's Name.

Lands in Mortgage were purchased in another Man's Name in Trust for the Purchaser. He, in whose Name they were bought, was a Debtor by Judgment; now if all the Lands, which were purchased in his Name, were in Trust for the Purchaser, they could not be affected with the Judgment; but it appearing that a Moiety was only in Trust, the Judgment-Creditor had Relief. *Fin. Rep.* 63.

Purchase for another.

K. contracted with *M.* to sell him Lands; afterwards *A.* the Father knowing of the said Contract purchased them of *K.* in Behalf of *A.* his Son, and had a Conveyance from *K.* to *A.* the Son and his Heirs. *M.* brought a Bill in Chancery to be relieved upon his said Contract, and against the Conveyance to *A.* and charged *Notice* of this Contract to both *A.*'s. *A.* the Son pleaded, that he was a Purchaser *bona fide* for a valuable Consideration, without any Notice of *K.*'s Contract with *M.* and without any Trust for his Father. *Per Cur.*, Notice to the Father was Notice to the Son, and should affect him tho' a Purchaser; for Notice of a dormant Incumbrance to a Party who purchases for another, shall affect the Purchaser himself; and decreed, that *A.* should convey the Lands to *M.* *Nel. Chan. Rep.* 59.

Fraud.

A Purchaser with Notice aliened to one who had no Notice. In this Case, tho' the Court would not affect the Purchaser without Notice, yet it being a Fraud, the Vendor, who was the Purchaser with Notice, was decreed to make Satisfaction to his

his Vendee, who had sued for Relief. Cited by Lord Chancellor *Talbot*, as a Case which he said he remembered. *Ca. in Lord Talbot's Time* 188.

If an Estate subject to a *Trust* is purchased from the Trustees, for a valuable Consideration without Notice, a Court of Equity cannot affect the Purchaser, tho' they can the Trustees; but if such Purchaser had Notice, then the Trust goes along with the Estate, and the Land continues subject to it. *Ca. Eq. Talbot's Time* 260.

A. devised Lands to his Wife for Life, and after to his Eldest Son, upon Condition that if his Wife should be with Child, 80*l.* should be paid by the Heir at Law to the Child after the Mother's Death. The Wife had a Child, and after the Mother and Eldest Son conveyed away the Land to a Purchaser. Upon Notice proved of the Will, the Money devised was decreed to the Daughter, and the Court declared it was a *Trust* devised to go with the Land; and yet this *Will* was void in Law as to the Legacy, seeing he who was to have the Benefit of the Breach of the Condition was Heir, and also the Party that should pay the Legacy. 3 *Ch. Rep.* 93.

A. devised Lands to *B.* charged with Payment of 600*l.* to *C.* and *D.* at a certain Time, and in Default *A.* devised the Lands to *E.* *B.* and *E.* joined in a Mortgage of these Lands to *F.* and *F.* suffered *B.* to continue in Possession, and to fell Timber; so that there was not sufficient to satisfy the 600*l.* and the Mortgage; and by *B.* and *E.* joining, it must be intended that *F.* had Notice of the *Trust*. Decreed that the 600*l.* be paid before the Mortgage. *Fin. Rep.* 225.

A Statute which was for Performance of Covenants ought not to take away the Possession of a Purchaser. *Toth.* 258.

A Term in Trust for Payment of Debts generally, is good against an Heir, tho' no Creditor be Party to the Deed, nor Debt expressed in particular, nor Covenant in the Lease to pay; but the Lord Keeper said he would not maintain it against a Purchaser. 1 *Chan. Ca.* 249.

W. devised Lands to *A.* and *B.* his Wife for Life, upon Condition that *A.* his Executors, Administrators or Assigns, should pay all his Debts and Legacies, and after the Decease of the Survivor of them, then he devised the Inheritance to *C.* their Son, and the Heirs Male of his Body, &c. and made *A.* his Executor, and died; *A. B.* and *C.* joined in a Conveyance to *D.* *A.* died, leaving no personal Estate. *Per Cur'*, The Lands were liable in the Hands of the Purchaser to pay the Debts and Legacies; and *D.* was decreed to pay the same with Damages and Costs, and then he was to take his Remedy against *B.* for the Profits received, which the Court declared was likewise liable to pay this Legacy; and she was decreed to pay the same to the Purchaser, for which Purpose he was to have the Benefit of this Decree. *Nel. Chan. Rep.* 38, 39, 40.

A. purchases a Leasehold Estate of an Executor, having Notice of Testator's owing *C.* 100*l.* on Bond; *A.* the Purchaser was also a Creditor of the Testator for 200*l.* and of his Executor for 550*l.* and discounted both Debts, and then paid the Surplus, being 150*l.* in Money. *C.* exhibited a Bill against *A.* to have Satisfaction for his Debt out of the said Estate, being Part of the Testator's Assets. *A.* insisted that an Executor may sell, and with the Money, when he has it, may pay his own Debts; and for the same Reason, he may upon Sale discount, and allow the Debt the Purchaser owes him, and the rather in this Case, because he paid 150*l.* in Money, with which the Executor might have paid the Plaintiff's Debt; yet it was decreed at the Rolls for the Plaintiff, and affirmed on Appeal to the Lord Chancellor, he saying the Defendant was a Party, and consenting to, and contriving a *Devastavit*. 2 *Vern.* 616. The same Case is said to be cited and agreed by the Lord Chancellor, 13 November 1738. in *Nugent v. Giffard*; who said that he had examined the Register-Book, and the Decree was there founded upon particular Proof of Fraud, which Mr. *Vernon's* Report does not plainly and fully set forth.

An Executor being possessed of a Term for Years in Right of his Testator, and being indebted to one on his own Account, agreed with his Creditor for Sale of this Term, and that the Debt should be discounted out of the Purchase-Money. Upon a Bill brought against him by the Testator's Creditors, he was not allowed to sink his own Debt, but was decreed to pay the Money, he having purchased with full Notice; that this was a Testamentary Estate, and nothing came into the Executors Hands as an equivalent for it, to make up the *Quantum* of the Testator's Assets. *Prec. in Chan.* 434.

A. was indebted by three Bonds, in which *B.* was Surety for him, and also in another Bond alone to one to whom *B.* afterwards gave his own Bond alone. *A.* being

so indebted, made his *Will*, and in the beginning says, *My Will is, that all my Debts be paid, and I do Charge all my Lands with Payment thereof.* Item, *I give all my Real and Personal Estate to B. his Heirs, Executors, Administrators and Assigns, chargeable nevertheless with Payment of all Debts and Legacies.* And made B. his Executor. A. died in 1724. B. proved the Will, and in the same Year sold a Freehold Estate of A.'s to E. In 1725, B. sold a Leasehold Estate of A.'s to F. and in 1727 he sold another Estate of A.'s, consisting of both Freehold and Leasehold, to G. In every Conveyance A.'s Will was recited. To one of the Deeds J. S. a Creditor of A. was a subscribing Witness. These Lands were sold in the Neighbourhood by Outcry. At the Time of the Sales, all the Creditors either lived in the Town where B. lived, or within four Miles thereof. All along, 'till 1730, the Creditors received the Interest at 5*l.* per Cent. regularly from B. who was a solvent Person, till 1732, when he became Bankrupt. In 1734, the Creditors of A. brought a Bill against B. and the Assignees of the Bankrupt's Estate, for Satisfaction of their Debts out of the Lands sold by B. to E. F. and G. The Master of the Rolls said, that with Regard to the Leasehold Estate sold to F. the Creditors cannot have Satisfaction out of that, and this was so plain, that it would be monstrous to call it in Question; that the Executors are the proper Persons at Law to dispose of a Testator's Personal Estate, which indeed in some Cases might be cloathed with such particular Trust, that possibly the Court in such Cases may require a Purchaser thereof to see the Money rightly applied; but unless there is some such particular Trust, or a Fraud in the Case, it is impossible to say but that the Sale thereof by an Executor must stand, and the Creditors cannot afterwards break in upon it; and as to the Sale to E. he observed, that the general Rule is, *That a Trust, directing Land to be sold for Payment of Debts generally, does not bind the Purchaser to see the Money rightly applied;* but if it be for Payment of certain Debts, specified in a Particular, the Purchaser must see a right Application. This Case does not fall within either of these Rules, because here the Lands are only charged with Payment of Debts, and not ordered to be sold for Payment; however that Circumstance does not make any Difference, for if such Distinction was to be made, the Consequence would be, that when Lands are charged generally, they can never be discharged without a Suit in Chancery, which would be very inconvenient; besides the Circumstances of Acquiescence so long as 'till 1734, without insisting on any Charge upon these Estates, and the Solvency of B. 'till 1732, and the Creditors receiving their Interest regularly of B. 'till 1730. who could not be supposed ignorant of the Purchases made by Outcry, and they living within three or four Miles of B. and J. S. a Creditor, being a subscribing Witness to one of the Purchase-Deeds; nor does it appear that the Purchasers knew to whom the Debts were owing. Besides B.'s being a Co-obligor in three Bonds, and having given to another Obligee his single Bond, may be well deemed a Satisfaction for that Bond; by all which it appears that the Creditors relied upon B. and therefore it is not reasonable that they should resort now to A.'s Estate. His Honour dismissed the Bill with Costs, as to F. the Purchaser of the Leasehold only, and as to the other Defendants, without Costs, and so he was pleased to decree accordingly. He observed, that the only Objection that seemed of any Weight in this Matter is, that where Lands are appointed to be sold for Payment of *Debts generally*, the Trust may be said to be performed as soon as the Lands are sold; but that where they are only charged with the Payment of Debts, that the Trust is not performed 'till these Debts are discharged; and said, that so far it is true, that where Lands are charged with Payment of Annuities, those Lands will be charged in the Hands of a Purchaser; because it was the very Purpose of making the Lands a Fund for that Payment, that it should be a constant and subsisting Fund; but where Lands are not burthened with such a subsisting Charge, the Purchaser ought not to be bound to look to the Application of the Money, and that seems to be a true Distinction. *Barn. Rep. Chan. 78 to 83.*

Rents.

If Lands be given to a *charitable Use*, and to dispose of an Overplus, if the Purchaser had no Notice, it cannot bind him; but if Rent issue out of Land, the Purchaser must pay it, but will not charge him to pay Arrears before Purchase, nor lay it upon one, nor excuse the other. *Toth. 95, 96.*

Annuity and Recognizance.

A. being seised of several Estates, granted an *Annuity* out of one of the Estates for a valuable Consideration, and gave a *Recognizance* for securing the Payment of the Annuity; afterwards A. sold other Lands to B. who had no Notice of this Recognizance; and after that A. sold the Land, charged with the Annuity, to C. The Annuity was greatly in Arrear. Decreed that the Annuity was a just and clear Duty,

and

and ought to be paid out of the Lands purchased by C. they being originally charged; and this in Ease of B. whose Lands are bound only by the Recognizance, and that the same ought to be paid out of the Assets of C.'s Estate in the Hands of his Executors, and if there be a Deficiency, then D. (to whom C. had sold the Lands) to pay out of the Profits received; but on B.'s offering to pay the Annuity and Arrears, it was decreed he should have the Benefit of the Deed by which the Annuity was granted, and of the Recognizance, to reimburse him. *Fin. Rep. 130.*

A. seised of Lands, conveys them to B. in Trust, for Payment of all his Debts in general. C. the Plaintiff, being one of the Creditors of A. exhibits his Bill against D. as being a Purchaser under that Trust, to pay the Debts, &c. It was insisted for D. that the Conveyance to B. being general, to wit, for the Payment of all his Debts, and none of the Creditors Parties to it, it was therefore revocable at Pleasure, and merely voluntary; and that it had been so adjudged by Lord Keeper Coventry, and that such Conveyances are ambulatory, and that if a Man makes a Conveyance to B. in Trust to pay all his Debts mentioned in a Schedule, and all other his Debts, that as to all the Debts, besides those mentioned in the Schedule, such Conveyance is fraudulent against a Purchaser. But it was insisted for D. that if the Deed to B. was revocable by A. yet D. purchasing under that Conveyance, had confirm'd it. *Nel. Chan. Rep. 126, 127.*

A. drew in B. a young Gentleman, to sell his Estate at a great Under-value, with Covenants from B. for A.'s quiet Enjoyment; and it happened the Title was defective. A. was evicted, and brought an Action on the Covenants. B. came into Chancery to be relieved against the said Action. A. insisted that he ought to have the Value of the Estate evicted. *Per Lord Keeper, A. who was a Lawyer, and ought to have understood a Title, purchased this Estate at a great Under-value; and the Title now proving defective, and the Land evicted, it is unreasonable he should make an Advantage of this catching Bargain; and therefore decreed him his Purchase-Money, with Interest only, discounting mesne Profits. 1 Vern. 320.*

Where a Purchaser has Allowance in Respect of an Incumbrance, this shall make the Incumbrance good, tho' it was before defective. *1 Vern. 358.*

Where a Deed of Trust is for the Payment of Debts in general, a Purchaser is not affected with any Misapplication of the Money; otherwise where it is for Payment of Debts particularly specified. *1 Vern. 260, 261.*

Where no Creditors are Parties, such Conveyances are ambulatory, revocable at Pleasure, and merely voluntary; and if a Man makes a Conveyance to another in Trust to pay all his Debts mentioned in a Schedule, and all other his Debts; as to all the Debts, besides those mentioned, such Conveyance is fraudulent against a Purchaser. *Nel. Ch. Rep. 127.*

Where Lands are to be sold for Payment of particular Debts mentioned in a Schedule, the Purchaser must see his Money rightly applied; and if the Debts be not paid, that is such a Breach of Trust as shall affect the Purchaser. But if more be sold than is sufficient to pay the Debts, that shall not turn to the Prejudice of the Purchaser, for he is not obliged to enter into the Account, and the Trustees cannot sell just so much as is sufficient to pay the Debts. *1 Vern. 303. Abr. Ca. Eq. 358.* But if the Trust be general, to pay Debts, tho' he has Notice of them, yet the Purchaser is not obliged to see the Money applied. *Abr. Ca. Eq. 358.*

If the Words of a Will are thus, *I give my Lands to A. and B. in Trust, to sell to pay my Debts*; the Purchaser is safe; and it does not concern him to see if the Debts are satisfied, especially if there is no Schedule. *2 Chan. Cases 223.*

A Purchaser of Lands devised to be sold by Executors for Payment of Debts in Case of Deficiency of Personal Estate, is not concerned whether there be Sufficiency or not; for if he buys and pays, tho' there were sufficient to pay the Debts out of the Personal Estate, yet he shall hold the Lands against the Heir, and the Heir shall take his Remedy against the Trustee; and so if the Matter rests in Account between the Heir and the Trustee, his Purchase is safe, tho' the Money be Mis-spent by the Trustee. *2 Chan. Ca. 115.*

But *Lis pendens* between the Heir and Trustee to have an Account, is sufficient Notice in Law, without actual Notice of the Suit; so that if he purchase, 'tis at his Peril: So that if in the Event of that Suit it falls out that the Debts were paid when he purchased, or sufficient of the Personal Estate to pay his Debts without Sale, the Heir will recover against the Purchaser; but if it falls out that there was a Necessity

to sell them, then the Purchaser is safe; but such Dependence of Suit must be real, and not collusive. 2 Chan. Ca. 116.

And in 2 Chan. Ca. 223. it was agreed and resolved, that by the Trust in the Will to sell, the Purchaser purchases at his own Peril, if the Personal Estate and Profits of the Land should prove sufficient, and afterwards should prove insufficient.

Lands (whereof Part were in *Jointure*) were vested in Trustees by Act of Parliament, to sell and to raise Money for building, and stocking a Printing House, (burnt down in the Fire of London) and the Surplus to purchase Lands to be settled to the Uses of the Marriage Settlement. Money was borrowed accordingly upon a Mortgage, and the Question was between the Remainder-Man in Tail under the Settlement, and the Mortgagees, whether any more Money ought to be charged on the Mortgage, than what was taken up and employed according to the Trust of the Act of Parliament. It was decreed by Lord Chancellor Jefferies, that there ought not, and that an Account be taken of how much had been employed, and the Defendant, on paying so much, with Interest and Costs, discounting the Profits received by the Mortgagees, should be let in to redeem; tho' for the Mortgagees it was insisted, that it could not be reasonably intended they could be privy to, and prove the laying out of the Money according to the Act of Parliament, and that no one would lend Money upon the Trusts of an Act of Parliament, if it was incumbent on him to see the Money laid out according to the Act, and that such Construction could not consist with the Intention of the Act, but utterly prevent the same. 2 Vern. 5. Abr. Ca. Eq. 358. p. 3.

A. had an Interest in a Term of Years in a Printing-Office, and made his Will, and devised his Term in the Printing-Office to his Executors, in Trust, by Profits, &c. to raise 2000*l.* for the Portion of his Daughter, and then for other Trusts, and died; The Executors mortgaged the Term for 1000*l.* to J. S. on Pretence of want of Assets to pay Testator's Debts; and the Plaintiff, the Assignee of the Mortgagee, brought a Bill to Foreclose the Equity of Redemption. The Daughter opposed it, and insisted this Mortgage ought not to take Place till her Portion was raised, for that the said Term was devised to the Executors in Trust for that Purpose in the first Place, and the Mortgagee could not but have Notice of it; and that there were no Debts of the Testator; or if any, the Mortgagee at his Peril ought to see the Money applied to discharge them, and to be allowed no more than he could make out to be so applied. Lord Keeper: Where a Trust is to sell for Payment of Debts in a Schedule, the Purchaser at his Peril is to see the Money applied to the Payment of those Debts; but here the Question is, how far an Executor's Power extends over a Chattel which has a Trust annexed to it; the Law has intrusted the Executor with the Personal Estate to pay Debts, and unless he has a general Power, he has none at all; for if he cannot sell, none can buy, and the general Trust must take Place; and a Purchaser is not bound to prove the Debts, or the Number of them, or the Application of the Purchase-Money, therefore the Sale is good; but after, on Appeal to the House of Lords, they altered the Decree, and preferred the Portion. *Quære causam inde.* Abr. Ca. Eq. 358, 359. and by 2 Vern. Rep. 445. The Court was of Opinion in this Case, that the Executor of a Testamentary Estate had the Power over it so as to alien or sell, as he should judge necessary; and that if he sold in Prejudice of a Residuary or Specific Legatee, they might have their Remedy against the Executor, but not follow the Estate into the Hands of a Purchaser; for should that be allowed, no one would venture to buy of an Executor; for it would be unreasonable that a Purchaser should take upon him to make out the Account, as to the *Quantum* of the Debts or Assets; nor is he intitled to have the Vouchers to make out such an Account; and if such Difficulties be put upon Purchasers of Chattels, &c. from Executors, it will follow, that Executors will be under an Incapacity, and disabled to sell, tho' there be never so much Occasion for it, for Payment of Debts; and therefore the Court decreed an Account to the Plaintiff of the Rents and Profits, and to hold and enjoy the Printing-Office, and Defendants to redeem, or be foreclosed. But the Decree was reversed as aforesaid.

Purchasers coming in *Pendente lite*, are bound. *Toth.* 259.

3. By presumptive Notice, and where there is a Settlement.

In the Case of *Hitchcock & al' v. Sedgwick & al'*, Lord Rawlinson said that the Chancery has been always very careful not to impeach Purchasers by *presumptive Notice*, and cited the Case of *Brampton and Barker*, where Tenant for Life, Remainder to his first Son, mortgaged for 1500*l.* the Deed of Settlement was then produced, and seen by the Mortgagee, who notwithstanding lent the Money, being advised

advised that Tenant for Life, not having then any Son born, could destroy the Contingent Remainder, whereas there was a Son born five Days before the Money lent; but the Mortgagee having no Notice thereof, and having got the Deed of Settlement, the Court would not relieve against him, but dismissed the Bill. And the Case of *Philips and Redbill*, where Tenant for Life sold as Tenant in Fee, and the very Deed of Settlement, at the Time of the Purchase, was produced and delivered to the Purchaser himself, yet the Court would not affect the Purchaser with presumptive Notice, but dismissed the Bill. 2 *Vern.* 159, 160.

A. and *M.* his Wife, being Tenants for Life, Remainder to Trustees to raise 6000 *l.* Portions, Remainder in Fee. *A.* and *M.* by Deed created a Term for raising another 6000 *l.* for such Persons as *M.* should appoint; with Power for *A.* and *M.* jointly to revoke the Uses. They mortgaged Part thereof for 200 *l.* having before by Deed revoked *pro tanto* the former Uses; the Mortgage recited both the Power of Revocation, and the Execution of it. *M.* by Will appointed the 6000 *l.* to the Plaintiffs, and died; afterwards *A.* married Defendant, and jointured the Premises upon her; in the Settlement was an Exception of the Trust for the 6000 *l.* Portions, and of the Mortgage, but no Mention made of the other 6000 *l.* Upon a Bill brought for the 6000 *l.* appointed by *M.* it was insisted that the second Wife was a Purchaser without Notice of this Incumbrance; but *per Cur.* There was sufficient Notice in Law, or an implied Notice; for the Mortgage was excepted in the Jointure, so that they could not be ignorant of the Mortgage, and therefore ought to have seen that, which would have led them to the other Deeds, in which, if pursued from one to another, the whole Case must have been discovered to them. 1 *Chan. Ca.* 287 to 291.

A Purchaser having Notice of a Settlement made after Marriage, ought to have inquired of the Wife's Relations, who were Parties to the Deed, whether it was voluntary, or made pursuant to an Agreement before Marriage, and having Notice of the Deed, must at his Peril purchase, and be bound to the Effect and Consequence of the Deed. 2 *Vern.* 384.

(F) Of Disputes between Purchasers.

A Parol Agreement for a Purchase and Possession delivered, was decreed to be performed against a subsequent Purchaser with Notice, who had a Conveyance, and paid his Money. 1 *Vern.* 363.

Where a Writ of Dower was brought against several Purchasers, the Court directed that the Sheriff should charge them all proportionably, tho' otherwise the Sheriff might have charged them all out of one Party, and the Party should have no Remedy at Law; but in Equity they ought all to be equally charged; and therefore the Court gave this Direction. 1 *Freem. Rep.* 227.

Plaintiff and Defendant severally purchased the same Reversion expectant on the Death of Tenant for Life. Plaintiff brought a Bill to examine Witnesses to preserve their Testimony, and to be admitted to try his Title in the Life of Tenant for Life. But as the Purchaser was a Defendant, the Court would do nothing in it, but dismissed the Plaintiff's Bill, and he lost his Land for want of examining his Witnesses. Cited by Lord Commissioner Rawlinson in the Case of *Hitchcock v. Sedgwick*, as the Case of *Seybourne v. Clifton*, 2 *Vern.* 159. *Abr. Ca. Eq.* 354. p. 3. *Nelson* (in his *Reports in Chanc.* p. 125.) has the same Case by the Name of *Seabourn v. Chilston* thus: The Plaintiff's Father and Mother in their own Right were seised in Fee of the Lands in Question, in which one *P.* had an Estate for Life, and in 1643. they covenanted to levy a Fine thereof to the Use of the Father and Mother for Life, and the Survivor of them, Remainder to their first Son (the Plaintiff) in Tail Male, with several Remainders over. The Father survived, and then forged another Deed, declaring the Uses of the Fine to be to the Father and Mother, and to the Survivor of them, and to his or her Heir. Under which Deed Defendant purchased the Lands of the Father, who is since dead, and *P.* the Tenant for Life being still living, the Plaintiff exhibited his Bill to perpetuate the Testimony of Witnesses, to prove the true and disprove the forged Deed. The Defendant demurred as being a real Purchaser under the pretended Deed, believing it was a true and real Deed; therefore it being to draw under Examination a Matter of Forgery against a dead Person, who could not answer for himself, and to get aid to impeach a real Purchaser, he insisted he ought not to Answer. And upon Debate it appearing that the Tenant for Life was still

still living, so that the Plaintiff could not try his Title at Law, and that the Chancery is obliged to preserve a Title at Law, which by such Impediment could not at present be tried, the Demurrer was over-ruled.

V. on Marriage with *M.* (in Consideration of 6000 *l.* Portion mentioned as received by him with *M.* an Infant) covenanted with *B.* and *C.* Trustees, that if he and his Wife lived seven Years, then in three Months afterwards to lay out 10,000 *l.* in a Purchase, and settle it on himself for Life, and on *M.* for her Jointure, &c. and if he died before a Settlement made, to leave her 10,000 *l.* and confessed a Judgment to *B.* and *C.* for Performance of Covenants; 1500 *l.* of the Wife's Portion was laid out in purchasing an Annuity of 100 *l.* per Annum in the Exchequer, in the Name of *C.* and he gave a Declaration of Trust to *V.* that his Name was used in Trust for him, his Executors and Administrators. *H.* lent *V.* 1000 *l.* on his assigning the Annuity, and depositing the Tallies and Orders with him, *H.* brought a Bill to compel *C.* to assign the Trust for securing his 1000 *l.* But on a Cross Bill *M.* insisted that the Annuity purchased in *C.*'s Name was to be as a Pledge 'till the Marriage Agreement performed, and that the Tallies, &c. were deposited in *C.*'s Hands for that Purpose, but that her Husband persuaded her to take them out of his Hands, on Pretence they were not safe there; and she having so done, he afterwards took them out of her Cabinet, and delivered them to *H.* The Counsel for *H.* insisted, that whatever private Agreement might be between *V.* and his Wife, as he had not heard of it, it could not bind him, being only by Parol, and void by the Statute of Frauds, and that a Parol Agreement could not be tacked to a written one. But Cooper C. dismissed the Bill of *H.* and decreed 100 *l.* a Year to *M.* her Husband being broke, and said that tho' Parol Agreements are bound by the Statute, and that Agreements are not to be part Parol, and part in Writing, yet a Deposit or Collateral Security is not within the Purview of the Statute; and said that *M.* who was married in her Infancy, and her Trustees, who had made an improvident Agreement in Writing, did well afterwards, upon Recollection, to get that Deposit for Performance of the Agreements. *Hales v. Vanderchem*, Mic. 1708. 2 Vern. 617.

F. in Consideration of the Marriage, and 4000 *l.* Portion, covenanted with *K.* that within six Months after *K.*'s Request he would settle all his Lands in *B.* to the Use of himself for Life, Remainder to Trustees to preserve contingent Remainders, Remainder to *E.* his intended Wife for her Jointure, Remainder to the first, &c. Son of the Marriage in Tail Male, Remainder to Trustees for five hundred Years, to raise 5000 *l.* for Daughters Portions. The Wife died, leaving no other Issue than one Daughter; *F.* married a second Wife, and settled the greatest Part of the Lands in the Articles, without giving Notice of the Articles, and had Issue a Son and a Daughter by her, and died Intestate. It was held by the Master of the Rolls, that this 5000 *l.* ought to be made good out of the real Estate contracted to be settled, supposing that such Part thereof as is left unsettled be sufficient; but that it must be agreed that the Land actually settled by *F.* on his second Marriage without Notice, is a good Settlement, (tho' it be a Breach of Trust) and must take Place against the Articles, no more Lands being liable to the Articles than are omitted out of the Settlement on such second Marriage. And Lord Chancellor King signified the Opinion of Mr. Justice Price to be (as to this Point) that the Lands not included in the Settlement made on the second Marriage, must stand liable for raising the said Daughters Portions. 2 Will. Rep. 436, 447.

See several Chapters hereafter concerning the different Deeds or Instruments whereby Estates are conveyed to Purchasers.

S E C T. IV.

Of claiming Title to Estates by Prescription.

Prescription,
what.

PRESCRIPTION is a Title by Use and Time allowed by Law. 1 Inst. 113. a.

It supposes a Descent or Purchase originally. Wood's Inst. B. 1. c. 3.

To make such a Title to an Inheritance, the Time by Common Law is, Time whereof there is no Memory of Man to the contrary; which is no limited Time. Wood's Inst. B. 1. c. 3. cites Lit. 170. 1 Inst. 115. a. & b. 2 Inst. 95, 96, 238, 653.

By Statutes Prescription may be within Memory. *Wood's Inst. B. 2. c. 3.*

A Prescription properly so called, (as it relates to an Inheritance) is to be Time out of Mind, and is for the most part *Personal*, being made in the Name of a certain Person and his Ancestors, or those whose Estate he has, or of a Body Politick and their Predecessors; as when J. S. seised of the Manor of D. in Fee, shews that he and his Ancestors, and all those whose Estate he has in the said Manor, have Time out of Mind of Man had and used to have Common of Pasture, &c. in such a Place (being the Land of another) as appertaining to the said Manor. *Wood's Inst. B. 2. c. 3. cites Lit. 170, 183. 1 Inst. 113. b. 115. a. 121. a. 1 Vent. 386, 387, &c.*

Tenant in Fee-simple ought to prescribe in his own Name: Tenant for Life, Years, or at Will, in the Name of him who has the Fee. *Ibid.*

A Park-keeper for Life cannot prescribe in himself and Predecessors to have such Profits as incident to his Office, because he has not any Interest in the Office in Perpetuity, neither is there any Inheritance in it; and a Man cannot prescribe to the Incidents, unless he can prescribe to the principal Thing. *Dyer 70.*

Lessee for Life cannot prescribe alone, but he and him in Remainder may prescribe together, both being but one Estate. *2. 1 Leon. 177.*

Natural Persons cannot gain or be charged by a general Prescription from their Ancestors; tho' Bodies Politick may gain or be bound by Prescription only. *Wood's Inst. B. 2. c. 3.*

Tenants in Common may be by Prescription, but not Jointenants, because there is a Survivorship betwixt them; nor Tenants at Will. In that Case of Tenancy in Common, one may make Title to Lands by Prescription. *Lit. 310. 1 Inst. 114. b. 195. b.*

Prescription may be laid in a great many, where it tends but to claim an Easement or Discharge, not Matter of Interest and Profit. *Wood's Inst. B. 2. c. 3.*

A Man may prescribe that all the Inhabitants of the Parish have used to be buried in the Church-yard, &c. tho' they are not a Corporation. *Ibid.*

Inhabitants, unless they are incorporated, cannot prescribe to Matters of Profit in alieno solo, but they may for Matters of Easement, as for a Way to a Church, &c. or for Matters of Discharge, as for a Modus Decimandi, or to be discharged of Tithes or Toll. *6 Rep. 59, &c.*

He that would have a Thing that lies in Grant by Prescription, must prescribe in himself and his Ancestors, whose Heir he is by Descent; not in himself and those whose Estate he has, (unless the Que Estate is but a Conveyance to the Thing claimed by Prescription, as in the former Case); for he cannot have their Estate that lies in Grant without Deed, which ought to be shewed to the Court. But of Things that are appendant to a Manor, Lands or Tenements, it is otherwise, because the Manor, &c. might pass without Deed. *Wood's Inst. B. 2. c. 3.*

Nothing can be prescribed for, which cannot be raised by Grant at this Day. *Wood's Inst. B. 2. c. 3. cites Finch 132. 1 Vent. 387. 2 Roll. Abr. 264.*

One cannot make Title to Land by Prescription, but only to Rent or Profit out of Land. *Ibid.*

It relates to a Fee-simple, and is always applied to incorporeal Inheritance. *Wood's Inst. B. 2. c. 3. cites 4 Rep. 31, 32. 1 Inst. 113. b. 2 Inst. 720. 6 Rep. 60.*

No one can prescribe against the King, where he has an Estate permanent, and a certain Interest, nor against an Act of Parliament. *Wood's Inst. B. 2. c. 3. cites 7 Rep. 28. 1 Inst. 41. b. 113. a. 114. a. & b.*

Tho' regularly a Man cannot prescribe or alledge a Custom against a Statute, because it is Matter of Record, and is the highest Proof and Matter of Record in Law; yet a Man may prescribe or alledge a Custom against an Act of Parliament, when his Prescription or Custom is saved or preserved by another Act of Parliament. *Co. Lit. 115. a.*

None can prescribe directly to Goods and Chattels of Traitors, Felons, Felons of themselves, Fugitives, of those that are put in the Exigent, Deodands, Conusance of Pleas, to make a Corporation, to make a Coroner, &c. But one may make Title by Usage or Prescription only to Treasure-Trove, Waifs, Estrays, Wreck of Sea, to hold Pleas, Courts-Leet, Hundreds, to have a Park, Warren, Royal Fishes, Fairs, Markets, Frank-Foldage, the Keeping of a Gaol, Toll, to have a Corporation by Prescription, &c. *Wood's Inst. B. 2. c. 3.*

B. being seised of the Manor of D. he and all those whose Estate he has in the said Manor, Time out of Mind have had Liberty of Foldage in the Town of D. *Et pro meliori pastura-*

pasturatione omnium suorum, the Inhabitants of the said Town having any Lands therein might erect Herdals in their Lands, with the Leave of the Lord of the Manor, and not otherwise. *B.* had let the said Manor to *P.* and *L.* had erected Herdals without Licence, so as the Profits of his Foldage is impaired by it. It was objected that the Prescription is not good, for it is against Law and common Right to abridge the Subject of the Profits of his Lands: But *per Cur'* the Prescription is good, for it only restrains the Tenant from erecting Herdals. 1 Leon. 11.

Prescription,
how laid.

A Prescription must not be laid in an *Uncertainty*, or in the *Disjunctive*, nor against the *Publick Good*; as, to do a Thing which is a Nufance, &c. nor against *Reason* or *Religion*, nor as to a mere *Negative*. Wood's Inst. B. 2. c. 3. cites 2 Roll. Abr. 265, 270.

When a Title by Prescription may be lost.

The Title being once gained by Prescription or Custom, it cannot be lost by *Interruption* of the *Possession* for ten or twenty Years; but it may be lost by *Interruption* in the *Right*; as if one has had a Rent or Common by Prescription, Unity of Possession (or a Possession of the Land with the Rent or Common) of as high and durable Estate, is an Interruption in the Right. Wood's Inst. B. 2. c. 3. cites 1 Inst. 114. b. 2 Inst. 653, 654. 2 Roll. Abr. 271.

A *Modus Decimandi* being alledged by Prescription for Tithes of Lambs; the Payment of the Tithe-Lamb in *Specie* for twenty Years last past did not destroy the Prescription. *Ibid.*

If one that has Title to a Common by Prescription takes a Lease of the Land, after the Expiration of the Lease he may still claim by Prescription, for the Suspension was only of the Possession. *Ibid.*

Tho' a House or Mill falls by Default of the Owner, or otherwise, he may rebuild it upon the same Foundation; and all those Things that were appendant or appurtenant to it shall continue. Wood's Inst. B. 2. c. 3. cites 4 Rep. 87.

A Corporation that has Privileges by Grant or Prescription, tho' they are incorporated by another Name, yet the new Body shall have all the Privileges that the old one had. Wood's Inst. B. 2. c. 3.

If a Court held by Prescription is granted and confirmed by the King's Letters Patent, this does not destroy the Prescription; but the Court may be held by Prescription as before. *Qu. Ibid.* cites 2 Roll. Abr. 271.

And if one claims any Thing by Prescription, and also by Charter, if the Charter is not contrary to the Prescription, it shall be good by way of Confirmation, as some affirm. Wood's Inst. B. 2. c. 3.

The Difference between Prescription, Custom and Usage.

There is a Difference between a *Prescription*, *Custom* and *Usage*; *Prescription* has respect to a *certain Person*, who by Intendment may have a Continuance for ever; as for Instance, he, and all those whose Estate he has in such a Thing, this is a Prescription. *Nel. Abr.* 1277.

But a *Custom* is *Local*, and is alledged in no Person, but is within some Manor or other Place: As, that there is such a Custom Time out of Mind within the Manor of *A.* that all the Copyholders of the said Manor have had and used to have Common of Pasture, &c. in such a Waste of the Lord, Parcel of the said Manor, &c. Wood's Inst. B. 2. c. 3. 1 Inst. 113. b. *Nel. Abr.* 1277.

Copyholds.

Thus it must be, when a Copyholder alledges a *Custom* against his Lord; for a Copyholder cannot lay a Prescription in himself and his Ancestors, by reason of the Baseness of his Tenure; therefore this is allowed for Necessity; but when he claims Common or other Profit in the Soil of a *Stranger*, he must prescribe in the Name of the Lord of the Manor, (*viz.*) That the Lord of the Manor and all his Ancestors, and all those whose Estate he has, have had Common in *such a Place* for themselves and Tenants at Will, &c. Wood's Inst. B. 2. c. 3.

Local, and in no Person.

Custom is *Local*, and alledged in no Person; and this serves for them who cannot prescribe in their own Name, nor in the Name of any certain Person, as Inhabitants of a Town, &c. Wood's Inst. B. 2. c. 3.

Also a Custom may be alledged, when it is referred to *insensible Things*; as, that all such Lands are devisable, &c. Wood's Inst. B. 2. c. 3.

Usage.

Usage differs both from Prescription and Custom; for Usage may be either to *Persons* or *Places*, as to Inhabitants of a Town to have a Way, or to such a Hundred in such a County: Thus Tenant for Life cannot prescribe, but he shall have the Benefit of an Usage. *Nel. Abr.* 1277.

The Incidents inseparable to Prescription and Custom.

But to speak in general of Customs and Prescriptions without Distinction.

To Customs and Prescriptions, Possession and Time are inseparably incident. Wood's Inst. B. 2. c. 3. cites 1 Inst. 113. b. 114. a. 115. a.

Possession

Possession must be long, continual and peaceable. *Wood's Inst. B. 2. c. 3.*

Time (as has been said) by Common Law must be beyond the Memory of Man.

Ibid.

But if there is a sufficient Proof by Record or Writing to the contrary, then it is within the Memory of Man. *Ibid.*

From what has been said, it may be observed, that a *Prescription* is properly a Title or Claim of a real Interest of Profit in the Land of another; which in Actions at Law must be strictly pleaded according to certain Rules; and are not like *Customs*, or improper *Prescriptions*, that are by way of Discharge, or for Easements, or for Matters of personal Exemption or Privilege.

As to Title by Prescription in Lands by *Fine* and *Non-Claim*, see concerning *Fines*, *postea*.

S E C T. V.

Of acquiring real Estates by Escheat.

ESCHEAT, *Eschaeta*, is a Word of Art, and derived from the French Word *Escheat*, (*id est*) *Cadere*, *Excidere* or *Accidere*, and signifies properly when the Lands fall to the Lord of whom they are holden, by Accident, and unlooked for; in which Case we say, the Fee is escheated. *Co. Lit. 13. a. 92. b.*

Escheat.
The Derivation and Signification of the Word.
Escheator.

And of this Word *Eschaeta* comes *Eschaetor*, an Escheator, so called because his Office is to inquire of all casual Profits, and to seise them into the King's Hands. *Co. Lit. 13. a. 92. b.*

Property of Lands by Escheat, is where the Owner died seised of the Lands in Possession without Child or other Heir; thereby the Land, for want of other Heir, is said to escheat to the Lord of whom it is holden. *Bac. L. Tracts 130. Shaw's Bac. Vol. 2. p. 246.*

Property of Lands by Escheat.

This want of Heir happens principally in two Cases: First, where the Land's Owner is a *Bastard*. Secondly, where he is attainted of *Felony* or *Treason*. For neither can a Bastard have any Heir, except it be his own Child; nor a Man attainted of *Treason*, altho' it be his own Child. *Bac. L. Tracts 131. Shaw's Bac. Vol. 2. p. 246.*

Causes of Escheat.

Upon Attainder of *Treason* the King is to have the Land, altho' he be not the Lord of whom it is held, because it is a *Royal Escheat*. But for *Felony* it is not so, for there the King is not to have the Escheat, except the Land be holden of him: And yet where the Land is not holden of him, the King is to have the Land for a Year and a Day next ensuing the Judgment of the Attainder, with a Liberty to commit all Manner of Waste all that Year in Houses, Gardens, Ponds, Lands and Woods. *Ibid.*

(1) Bastardy.
(2) Attainder of *Treason*, *Felony*, &c.

An Escheat may be either *per defectum sanguinis*, or *per delictum Tenentis*. *Co. Lit. 13. a. 92. b. Godb. 211. S. P. per Coke.*

But in Case of an Attainder of *Felony*, the Escheat to the Lord is *per defectum Tenentis*, and not Descending the Consequence of the Corruption of Blood; but in Case of *Treason*, the Lands come to the Crown as an immediate Forfeiture, and not as an Escheat. *1 Salk. 85.*

Lands held of the King, as of an Honour, come to him by common Escheat, as the Tenant's dying without Heir, or committing *Felony*, these Lands are Part of the Honour. *2 Inst. 64. 4 Inst. 224. Et vide Kelw. 104. b. 2 Roll. Rep. 251.*

Otherways if forfeited for *Treason*, for then it comes to the King by reason of his Person and Crown; and if he grants them over, &c. the Patentee shall hold of the King in chief, and not of the Honour. *2 Inst. 64.*

If one seised in Fee of a Fair, Market, Common, Rent-Charge or Seck, Warren, Corrody, or other Inheritance not holden, is attainted of *Felony*, the King shall have the Profits of them during his Life; but after his Death they cannot descend, because his Blood is corrupted, nor escheat, because not holden, but perish and are extinct by Act in Law. *3 Inst. 21.*

If the Tenant be disseised, and the Disseisee dies without Heir, during the Continuance of the Disseisor, this Right shall escheat to the Lord. *3 R. 2. Entry Congeable 38. 3 Danv. 136. 3 Co. 35. b. S. P. 1 Roll. Abr. 816.*

If the Tenant be disseised, and the Disseisor by Fine grants and renders the Land to one in Tail, the Remainder to another in Fee, and after the Tenant in Tail dies without

without Issue, and he in Remainder enters, and after the Disseisee dies without Heir, this Right shall not escheat to the Lord, because he had another Tenant by Title in the Life of the Disseisee. 3 R. 2. *Entry Congeable* 38. 3 *Danv.* 136. 1 *Roll. Abr.* 816.

If a Disseisor makes a Feoffment, or dies seised, and after the Disseisee dies without Heir, there shall be no Escheat, because the Lord hath a Tenant by Title. *Co. Lit.* 268. b. *Hob.* 142.

Tho' a Lord hath not been seised of his Services within the Time of Limitation, yet if the Tenant dies without Heir, the Land shall Escheat; for at the Time of the Escheat, the Seignior remained, the Seisin of the Services was wanting. 4 *Co.* 11. a.

If an Infant, or *Non Compos*, in Person makes a Feoffment, and after dies without Heir, the Land shall not escheat. 4 *Co.* 125. a.

Otherwise if made by Letter of Attorney, for then the Feoffment is void. 4 *Co.* 125. a.

Things to be
observed in
Escheats.

In these Escheats two Things are especially to be observed; (1) the *Tenure* of the Lands, because it directs the Person to whom the Escheat belongs, viz. the Lord of the Manor of whom the Land is holden. (2.) The *Manner* of such *Attainder* which draweth with it the Escheat. *Bac. L. Tracts* 131. *Shaw's Bac.* Vol. 2. p. 246.

(1) The Tenure.

Concerning the *Tenures* of Lands, it is to be understood, that all Lands are holden of the *Crown* either *mediately* or *immediately*, and that the Escheat appertaineth to the *immediate* Lord, and not to the *mediate*. *Ibid.*

The Conqueror got all the Lands of the Realm into his Hands, and reserved Rents and Services.

The Reason why all Land is holden of the *Crown* immediately, or by *Mesne-Lords*, is this: The *Conqueror* got by Right of Conquest all the Lands of the Realm into his own Hands in *Demefne*, taking from every Man all Estate, Tenure, Property and Liberty of the same, (except Religious and Church Lands, and the Land in *Kent*;) and still as he gave any of it out of his Hand, he reserved some Reftitution of Rents, or Services, or both, to him and to his Heirs; which Reservation is that which is called the *Tenure* of Land. *Ibid.*

In which Reservation he had four Institutions, exceeding politick, and suitable to the State of a Conqueror. *Bac. L. Tracts* 132. *Shaw's Bac.* 246.

Knights-Service.
1. Marriage of the Wards.

The first was, that seeing his People to be Part *Normans*, and Part *Saxons*, the *Normans* he brought with him, the *Saxons* he found here; he bent himself to conjoin them by Marriages in Amity, and for that Purpose ordains, that if these of his Nobles, Knights, and Gentlemen, to whom he gave great Rewards of Lands should die, leaving their Heir within Age, a Male within twenty-one, and a Female within fourteen Years, and unmarried, then the King should have the bestowing of such Heirs in Marriage in such a Family, and to such Persons as he should think meet; which Interest of Marriage went still implied in every Tenure called Knight-Service.

2. Horse for Service.

The second was, to the End that his People should still be continued in Warlike Exercises and able for his Defence. When therefore he gave any Portion of Lands, that might make the Party of Abilities or Strength, he withall reserved this Service, that that Party and his Heirs having such Lands, should keep a Horse of Service continually, and serve upon himself when the King went to Wars; or else having Impediment to excuse his own Person, should find another to serve in his Place; which Service of Horse and Man, is a Part of that Tenure called Knight-Service. *Shaw's Bac.* Vol. 2. p. 247. *Bac. L. Tracts* 232.

But if the Tenant himself was an Infant, the King was to hold this Land himself until he came to full Age, finding him Meat, Drink, Apparel, and other Necessaries, and finding a Horse and Man with the Overplus, to serve in the Wars as the Tenant himself should have done if he was at full Age. *Ibid.*

But if this Inheritance descended upon a Woman that could not serve by her Sex, then the King was not to have the Lands, she being of fourteen Years of Age, because she was then able to have an Husband that might do the Service in Person. *Ibid.*

3. Homage and Fealty.

The third Institution was, that upon every Gift of Land the King reserved a *Vow* and an *Oath* to bind the Party to his Faith and Loyalty; that *Vow* was called *Homage*, the *Oath* *Fealty*. *Bac. L. Tracts* 133. *Shaw's Bac.* Vol. 2. p. 247.

Homage was to be done kneeling, holding his Hands between the Knees of the Lord, saying in the French Tongue, *I become your Man of Life and Limb, and of earthly Honour.* *Ibid.*

Fealty was to take an Oath upon a Book, that he would be a faithful Tenant to the King, and do his Service, and pay his Rents according to his Tenure. *Ibid.*

The *fourth* Institution was, that for Recognition of the King's Bounty by every Heir succeeding his Ancestor in those Knight-Service Lands, the King should have *Primier Seisin* of the Lands, which was one Year's Profit of the Lands; and until that was paid, the King was to have Possession of the Land, and then to restore it to the Heir; which was the very Cause of suing Livery, and that as well where the Heir had been in Ward as otherwise. *Ibid.*

These before mentioned be the Rights of the Tenure, called Knight-Service *in Capite*, which is as much as to say, *Tenure de persona regis*, and *Caput* being the chiefest Part of the Person, it is called a Tenure *in Capite*, or in *chief*. *Ibid.*

Aid-Money to make the King's eldest Son a Knight, or to marry his eldest Daughter, was likewise due to his Majesty from every one of his Tenants in Knight-Service, who hold by a whole Fee 20 s. and from every Tenant in Socage, if his Land be worth 20 l. per Ann. 20 s. *Note at the bottom of the same Page.*

Esuage was also due from his Tenants by Knight-Service, when his Majesty made a *Voyage Royal* to War against another Nation, those of his Tenants who did not attend him there for forty Days with Horse and Furniture fit for Service, were to be assessed in a certain Sum by Act of Parliament, to be paid to his Majesty, which Assessment is called Esuage. *Ibid.*

And it is also to be noted, that as this Tenure *in Capite* by Knight-Service generally was a great Safety to the Crown, so also the Conqueror instituted other Tenures *in Capite* necessary to his Estate; as namely, he gave divers Lands to be holden of him by some special Service about his Person, or by bearing some special Office in his House, or in the Field, which had Knight-Service and more in them, and these he called Tenures by *Grand Serjeanty*. Also he provided upon the first Gift of Lands, to have Revenues by continual Service of ploughing his Land, repairing his Houses, Parks, Pales, Castles, and the like; and sometimes to have a yearly Provision of Gloves, Spurs, Hawks, Horses, Hounds and the like; which Kind of Reservations are called also *Tenures in Chief*, or *in Capite* of the King; but they are not by Knight-Service, because they required no personal Service, but such Things as the Tenants may hire another to do, or provide for by Money. And this Tenure is called a Tenure by *Socage in Capite*, the Word *Socagium* signifying the *Plough*; howbeit in this latter Time, the Service of ploughing the Land is turned into *Money Rent*, and so of harvest Works, for that the Kings do not keep their Demesne in their own Hands, as they were wont to do; yet what Lands were *de Antiquo dominio coronæ*, it well appeareth in the Records of the Exchequer, called the Book of *Domesday*. And the Tenants by Antient Demesne have many Immunities and Privileges at this Day, that in ancient Times were granted unto those Tenants by the Crown; the Particulars whereof are too long to set down. *Bac. L. Tracts* 134. *Shaw's Bac. Vol. 2. p. 247, 248.*

These Tenures *in Capite*, as well that by Socage, as the others by Knight-Service, have this Property; that the Tenants cannot Alien their Lands without Leave of the King: If they do, the King is to have a Fine for the Contempt, and may seize the Land, and retain it until the Fine be paid; and the Reason is, because the King would have a Liberty in the Choice of his Tenant, so that no Man should presume to enter into these Lands, and hold them (for which the King was to have these special Services done him) without the King's Leave; this License and Fine, as it is now digested, is easy and of Course. *Bac. L. Tracts* 134, 135. *Shaw's Bac.* 248.

There is an Office called the *Office of Alienation*, where any Man may have a License at a reasonable Rate, that is, at the third Part of one Year's Value of the Land moderately rated. A Tenant *in Capite* by Knight-Service or Grand Serjeanty, was restrained by ancient Statute, that he should not give nor Alien away more of his Lands, than that with the rest he might be able to do the Service due to the King; and this is now out of Use. *Bac. L. Tracts* 135. *Shaw's Bac.* 248.

And it is to be noted, that all those that held Lands by the Tenure of Socage *in Capite* (although not by Knight-Service) could not alien without License, and they were to sue Livery and pay *primier Seisin*, but not to be in Ward for Body or Land. *Ibid.*

But now by Stat. 12 Car. 2. c. 24. All Tenures by *Knights Service* and *Socage in Capite* are turned into *Common Socage*, and discharged of Homage, Livery, *Primier Seisin*, Wardship, &c. which were at Law incident to such Tenures, and Aids *pur fe Marrier*, & *pur faire fitz Chivalier*. And any Father (tho' under twenty-one) may by Act executed, or by Will in Writing dispose of the Tuition of his Children, as long as they shall be under twenty-one Years of Age, to such Persons (except Popish Recufants,) and in such Manner as he thinks fit.

How Manors
were at first
created.

Knight Ser-
vice.

Relief.

Socage.

Relief.

Villanage, or
Tenure by
Copy of
Court-Roll.

Court Baron
with the Use
of it.

* Shillings.

Suit to the
Court of the
Lord incident
to the Tenure
of the Free-
holders.

What Attain-
ders shall give
the Escheat to
the Lord.

Outlawry.

In imitation of the King's Policy in these Institutions of Tenures, the great Men and Gentlemen of this Realm did the like as near as they could: Thus, when the King had given to any of them two thousand Acres of Land, the Party purposing in this Place to make his Dwelling, or (as the old Word is) his Mansion-house, or his Manor-house, devised how he might make his Land a compleat Habitation to supply him with all Manner of Neccessaries; and for that Purpose, he would give of the uttermost Parts of these two thousand Acres, one hundred or two hundred Acres, or more or less as he should think meet, to one of his most trusty Servants, with some Reservation of Rent to find a Horse for the Wars, and go with him when he went with the King to the Wars, adding Vow of Homage, and the Oath of Fealty, Wardship, Marriage, and Relief. This Relief was to pay five Pounds for every Knight's Fee, or after the Rate for more or less at the Entrance of every Heir; which Tenant so created and placed, was called a *Tenant by Knight-Service*, and not by his own Person, but of his Manors; of these he might make as many as he would. Then this Lord would provide that the Land which he was to keep for his own Use, should be ploughed, and his Harvest brought home, his House repaired, his Park paled, and the like: And for that End he would give some lesser Parcels to sundry others, of twenty, thirty, forty, or fifty Acres; reserving the Service of ploughing a certain Quantity, or so many Days of his Land, and certain Harvest Works or Days in the Harvest to Labour, or to repair the House, Park pale, or otherwise, or to give him for his Provision Capons, Hens, Pepper, Cumin, Roses, Gilliflowers, Spurs, Gloves, or the like; or to pay him a certain Rent, and to be sworn to be his faithful Tenant, which Tenure was called a *Socage* Tenure, and is so to this Day, tho' most of the ploughing and Harvest Services are turned into Money-Rents. *Shaw's Bac. Vol. 2. p. 248, 249. Bac. L. Tracts 136.*

The *Tenants in Socage* at the Death of every Tenant were to pay Relief, which was not as Knight-Service was, five Pounds a Knight's Fee: But it was, one Year's Rent of the Land; and no Wardship or other Profit to the Lord. The Remainder of the two thousand Acres he kept to himself, which he used to Manure by his Bondmen, and appointed them at the Courts of his Manor how they should hold it, making an Entry of it on the Roll of the Remembrances of the Acts of his Court, yet still in the Lord's Power to take it away; and therefore they were called Tenants at Will by Copy of Court-Roll; being in truth Bond-Men at the Beginning: But having obtained Freedom of their Persons, and gained a Custom by Use of occupying their Lands, they now are called Copyholders, and are so privileged, that the Lord cannot put them out, and all through Custom. Some Copyholders are for Lives, one, two, or three successively; and some Inheritances from Heir to Heir by Custom; and Custom ruleth these Estates wholly, both for Widows Estates, Fines, Heriots, Forfeitures, and all other Things. *Shaw's Bac. Vol. 2. p. 249. Bac. L. Tracts 136, 137.*

Manors being thus made at the first, it was reasonable that the Lord of the Manor should hold a Court, which is no more than to assemble his Tenants together at a Time by him to be appointed; in which Court he was to be informed by Oath of his Tenants, of all such Duties, Rents, Reliefs, Wardships, Copyholds, or the like, that had happened to him; which Information is called a *Presentment*, and then his Bailiff to seize and distrain for those Duties, if they were denied or withholden, which is called a *Court-Baron*: Wherein a Man may sue for any Debt or Trespas under forty * Pounds Value, and the Freeholders are to judge of the Cause upon Proof produced upon both Sides. And therefore the Freeholders of these Manors as incident to their Tenures, do hold by Suit of Court, which is, to come to the Court, and there to judge between Party and Party in these petty Actions; and also to inform the Lord of Duties, Rents, and Services unpaid to him from his Tenants. By this Course it is discerned who be the Lords of Lands, such as, if the Tenants die without Heir, or be attainted of Felony or Treason, shall have the Land by Escheat. *Shaw's Bac. Vol. 2. p. 249, 250. Bac. L. Tracts 137, 138.*

Now concerning what Attainders shall give the Escheat to the Lord; it must either be by *Judgment* of Death given in some Court of Record against the Felon found guilty, by *Verdict*, or *Confession*, of the Felony, or else by *Outlawry* of him. *Bac. L. Tracts 138. Shaw's Bac. Vol. 2. p. 250.*

The Outlawry proceeds thus: A Man is indicted for Felony, being not in hold, so as he cannot be brought in Person to appear and to be tried, insomuch that Process of a *Capias* is therefore awarded to the Sheriff, who not finding him, returns, *Non est inventus in balliva mea*; and thereupon another *Capias* is awarded to the Sheriff,

Sheriff, who likewise not finding him makes the same Return; then an *Exigent* is directed to the Sheriff, commanding him to proclaim him in his *County-Court* five several Court-Days, to yield his Body; which if the Sheriff do, and the Party yield not his Body, he is said, by the Default, to be outlawed, the Coroners there adjudging him outlawed, and the Sheriff making the Return of the Proclamations, and of the Judgment of the Coroners upon the back-side of the Writ. This is an Attainder of Felony, whereupon the Offender forfeits his Lands by an *Escheat* to the Lord of whom they are held. *Ibid.*

But a Man found guilty of Felony by Verdict or Confession, and praying his Clergy, and thereupon reading as a Clerk, and so * burnt in the Hand and discharged, is not attainted; because by his Clergy he preventeth the Judgment of Death, and is called a Clerk convict, who loseth not his Lands, but all his Goods, Chattels, Leases and Debts. *Ibid.*

So a Man indicted, that will not answer and put himself upon Trial, although he be by this to have Judgment of pressing to Death, yet he forfeits no Lands, but Goods, Chattels, Leases and Debts, except his Offense be Treason, and then he forfeits his Lands to the Crown. *Shaw's Bac. Vol. 2. p. 250. Bac. L. Tracts 138, 139.*

So a Man that kills himself shall not lose his Lands, but his Goods, Chattels, Leases and Debts. So of those that kill others in their own Defence, or by Misfortune. *Shaw's Bac. Vol. 2. p. 250. Bac. L. Tracts 139.*

A Man that being pursued for Felony, and flyeth for it, loseth his Goods for his flying, although he return and is tried, and found not guilty of the Fact. *Ibid.*

So a Man indicted of Felony, if he yield not his Body to the Sheriff until after the *Exigent* of Proclamation is awarded against him, the Man doth forfeit all his Goods for his long Stay, although he be not found guilty of the Felony; but none is attainted to lose his Lands, except such as have Judgments of Death by Trial upon Verdict, or their own Confession, or that they be by Judgment of the Coroners outlawed as before. *Ibid.*

Besides the Escheats of Lands to the Lords of whom they are held for want of Heirs, and by Attainder of Felony (which only hold Place in *Fee-simple* Lands) there are also Forfeitures of Lands to the Crown by Attainder of Treason; as namely, if one who has *Entailed Lands* commit Treason, he forfeits the Profits of the Lands for his Life to the Crown, but not to the Lord. *Shaw's Bac. Vol. 2. p. 251. Bac. L. Tracts 139.*

And if a Man having an Estate for Life of himself, or of another, commit Treason or Felony, the whole Estate is forfeited to the Crown, but no Escheat to the Lord. *Ibid.*

But a *Copyhold*, for *Fee-simple*, or for *Life*, is forfeited to the Lord, and not to the Crown; and if it be *Entailed*, the Lord is to have it during the Life of the Offender only, and then his Heir is to have it. *Ibid.*

The Custom of Kent is, that *Gavelkind* Land is not Forfeitable nor Escheatable for Felony: For they have an old saying; *The Father to the Bough, and the Son to the Plough.* *Ibid.* See more concerning Forfeitures in the two next Sections.

If the Husband was attainted, the Wife was to lose her Thirds in Cases of Felony and Treason, but yet she is no Offender; but at this Day by the Statute Law, she shall not lose them for the Husband's Felony. *Shaw's Bac. Vol. 2. p. 252. Bac. L. Tracts 140.*

If two hundred Faggots are granted to a Master and his Co-brethren and their Successors, to perceive from all the Lands of the Grantor, and after the Master and Co-brethren grant them over, and after their Corporation is dissolved; yet the Thing granted to them shall not escheat to the Grantor, altho' it ought to have escheated if they had not granted it over. *3 Danv. 135. Popb. 91, 92.*

The Law is the same where Land, Rent, or other Thing is granted to a Corporation and their Successors, and after the Corporation grants it over, and after is dissolved; for this is all one as when it is granted to a Man and his Heirs, and he grants it over, and after dies without Heirs, there it shall not escheat. *3 Danv. 135. Co. Lit. 13. b.*

But if Land, Rent, or other Thing be granted to a Corporation Aggregate in Fee, and after the Corporation is dissolved, the Thing granted to them shall escheat to the Donor. *3 Danv. 135. Co. Lit. 13. b. S. P. Winch 38. Godb. 211.*

The Law is the same of a Sole Corporation. *3 Danv. 135.*

If

If a Man grants a Rent to another and his Heirs, and he dies without Heirs, it shall escheat to the Grantor, and shall be extinct in the Land. 3 *Danv.* 135.

If a Man grants an Advowson in gross to another in Fee, and the Grantee dies without Heirs, it seems this shall revert to the Grantor, not being held of any Body; for this is a gross Thing, which cannot vanish, but ought to be in some Person; and it seems if the Grantor shall not have it, the King shall have it as supreme Patron. *Contra Sta. Escheat*, it shall be extinct. 3 *Danv.* 135.

Who shall
take Advan-
tage of an
Escheat.

If one Lease a Manor for Life or Years, and a Tenancy escheats, this belongs to the Manor held in Farm, and for which the Lessor shall have a General Writ; and suppose a Lease by him made of the Lands escheated, and maintain it by the special Matter. 2 *Inst.* 146. The Tenancy comes in lieu of the Seignior. 1 *Co.* 122. a.

By what Act
an Escheat
shall be pre-
vented.

After the Death of the Tenants for Life the Lessor may have a Writ of Escheat. *Kelw.* 114. a.

If he that hath Title to a Writ of Escheat accepts Homage or Fealty of the Tenant, this will bar him. *Co. Lit.* 268. a.

Otherwise if he accepts Rent of the Tenant, for that may be done by a Bailiff. *Co. Lit.* 268. a.

By some, if there be Lord and Tenant, and the Tenant is disseised, and the Disseisee dies without Heir, and after the Lord accepts the Rent from the Disseisor, this is no Bar to him. *Co. Lit.* 268. a.

Otherwise if he avows upon the Disseisor for the Rent. *Co. Lit.* 268. a.

But if after a Title of Escheat accrued, the Disseisor makes a Feoffment, or dies feised, the Acceptance of the Rent from the Feoffee, or Heir, will be a Bar. *Co. Lit.* 268. a.

If one attainted of Felony commits Treason afterwards, and is thereof attainted, as he may be, because the Offense is of an higher Nature than the Felony; yet this shall not devert the Right of Escheat which by the Felony was lawfully vested in the Lord, contrary to the Opinion of *Stanford*, for the Act of the Party shall not devert the lawful Escheat of the Lord. 3 *Inst.* 213.

If *A.* as Principal, is attainted of Felony by Outlawry, and *B.* is after attainted as Accessory by Verdict, and the Lord enters into the Lands of *B.* by Escheat, and after the Judgment against *A.* is reversed, by which the Attainder of *B.* is also reversed, the Escheat is avoided, and *B.* may enter, or have an Action for Recovery of the Lands against the Lord. 3 *Inst.* 232. 2 *Brownl.* 220. *S. P.* cited 9 *Co.* 119. b.

At what Time
Forfeitures
commence.

The Relation of these Forfeits are these; That Men attainted of Felony or Treason, by Verdict or Confession, do forfeit all the Lands they had at the Time of their Offence committed; and the King or the Lord, whosoever of them has the Escheat or Forfeiture, shall come in and avoid all Leases, Statutes or Conveyances made by the Offender, at any Time since the Offence committed. *Bac. L. Tracts* 140. *Shaw's Bac. Vol. 2. c. 251.*

But where a Man commits Felony, and before Conviction the King pardons him, by this Pardon the Lord shall lose his Escheat, for the Lord can have no Escheat before there be an Attainder, but that is prevented before by the Pardon. *Owen* 87.

And the Law is clear, that if a Man be attainted for Treason by Outlawry; but upon Attainder of Felony by Outlawry, it hath been much doubted by the Law-Books, whether the Lord's Title by Escheat shall relate back to the Time of the Offence done, or only to the Date or Test of the Writ of *Exigent for Proclamation*, whereupon he is outlawed; tho' at this Day it is ruled, that it shall reach back to the Time of his Fact; but for Goods, Chattels and Debts, the King's Title shall look no further back than to those Goods, which the Party attainted by Verdict or Confession had at the Time of the Verdict and Confession, given or made, and in Outlawries at the Time of the Exigent, as well in Treasons as Felonies: Wherein it is to be observed, that upon the Party's first Apprehension, the King's Officers are to seize all the Goods and Chattels, and preserve them together, dispending only so much out of them, as is fit for the Sustentation of the Person in Prison, without any wasting, or disposing them until Conviction; and then the Property of them is in the Crown, and not before. *Bac. L. Tracts* 140. *Shaw's Bac. Vol. 2. p. 251.*

Of seizing
Felons Goods
and Chattels.

Of a Purchase
by a Person
attainted.

Note also, that Persons attainted for Felony or Treason, have no Capacity in them to take, obtain or purchase, save only to the Use of the King, until the Party be pardoned, yet the Party giveth not back his Lands or Goods without a special Patent of Restitution, which cannot restore the Blood without an Act of Parliament. *Ibid.*

So if a Man have a Son, and then is attainted of Felony or Treason, and pardoned, and purchaseth Lands, and hath Issue another Son, and dieth; the Son he had before he had his Pardon, altho' he be his Eldest Son, and the Patent have the Words of Restitution to his Lands, shall not inherit, but his second Son shall inherit them, and not the first; because the Blood is corrupted by the Attainder, and not to be restored by Patent alone, but by Act of Parliament. *Bac. L. Tracts 141.* Restitution in Blood.

And if a Man have two Sons, and the Eldest is attainted in the Life of his Father, and dieth without Issue, the Father living, the second Son shall inherit the Father's Land; but if the Eldest Son have any Issue, tho' he die in the Life of the Father, then neither the second Son, nor the Issue of the Eldest, shall inherit the Father's Lands, but the Father shall there be accounted to die without Heir; and the Land shall escheat, whether the Eldest Son have Issue or not, afterward or before, tho' he be pardoned after the Death of his Father. *Ibid.*

S E C T. VI.

Of acquiring real Estates by Means of Forfeitures and Losses in Civil Cases.

(A) *Of Forfeitures and Losses of real Estates in general.*

THE foregoing Sections of this second Chapter show the different Ways of acquiring and claiming Titles to Lands, &c. This and the following Section will show how they may be forfeited and lost, which, with respect to the Persons that gain, may be also called *the Means of acquiring Estates*. Forfeiture, what.

To do any Thing against or without Law or Custom, is legally called a Forfeiture. *Co. Lit. 59. a.*

(B) *Of Forfeitures by the Alienation of a particular Tenant, by claiming a greater Estate than one ought; or by affirming a Reversion or Remainder to be in a Stranger.*

First, *Of the Nature of the Things forfeited, whether in pais or by Record.*

SOME Alienations are forbidden, viz. an Alienation of a particular Tenant, and an Alienation in Mortmain. The Alienation of a particular Tenant, as Tenant for Life, &c. incurs a Forfeiture of the Estate. This Forfeiture by the Alienation of a particular Tenant, may be either in *Pais*, or by Matter of Record.

1. In *Pais*, of Lands which lie in Livery, as where Tenant for Life (not being an Infant or Feme Covert) maketh over a greater Estate than he may lawfully, whereby the Remainder or Reversion is devested. This must be understood of a Feoffment, Fine or Recovery by Consent. 1. In Pais.

But in Case of the King it is a Forfeiture, tho' the Remainder or Reversion is not devested out of him.

If Lessee for Life makes a Lease for the Life of another, or a Gift in Tail, it is a Forfeiture of his Estate. And if Tenant for Life and he in Remainder for Life join in a Feoffment in Fee, this is a Forfeiture of both their Estates, because he in the Remainder is *Particeps injuriæ*. And if he in the Remainder for Life enters, and disseises Tenant for Life, and makes a Feoffment in Fee, this is a Forfeiture of the Right of his Remainder.

Thus it is if Tenant in Tail after Possibility of Issue extinct, Tenant by the Curtesy, Tenant in Dower, Tenant for another's Life, Tenant for Years, by Statute Merchant, Staple or *Elegit*, make a greater Estate than they lawfully may make. *Lit. §. 416. Co. Lit. 233. b. 251. a. & b. 252. a. 8 Co. 44.*

But if a Copyholder for Life surrenders to the Use of another in Fee, this is no Forfeiture, for the Estate passes by *Surrender* to the Lord, and not by *Livery* *4 Co. 23.*

A particular Estate of any Thing that lies in Grant cannot be forfeited by Grant in Fee by Deed. As if Tenant for Life or Years of an Advowson, Rent, Common, or of a Reversion or Remainder of Land, by Deed grant the same in Fee, it is no Forfeiture of their Estates; for nothing can pass thereby but what may lawfully pass. *Co. Lit. 251. b.*

2. By Matter of Record.

2. *Forfeitures by Matter of Record*, may be by Alienation, by claiming a greater Estate than one ought, or by affirming the Reversion or Remainder to be in a Stranger.

The different Ways.

First, *By Alienation*, which is of two Kinds, *viz.* By Alienation divesting, or not divesting the Reversion or Remainder. (1) *Divesting*, as by levying a Fine, or suffering a common Recovery of Lands whereby the Reversion or Remainder is divested. (2) *Not divesting*, as by levying a Fine in Fee, of an Advowson, Rent, Common, or other Thing that lies in Grant. Upon which Note two Diversities; First, between a Grant by *Fine* (which is of Record) and a Grant by *Deed in Pais*; and yet in this they both agree, that the Reversion or Remainder in neither Case is divested. Secondly, Between a *Matter of Record*, as a Fine, &c. and a *Deed recorded*, as a Deed inrolled, for that incurs no Forfeiture, because the Deed is the Original. *Co. Lit. 251. b.*

Secondly, *By Claim*, express or implied. (1) *Express*, as if Tenant for Life claims a Fee in a Court of Record; or if Lessee for Years be ousted, and brings an Assise, *Ut de libero tenemento*. (2) *Implied*, as if in a Writ of Right brought against him, he takes upon him to join the Mise upon the mere Right, which none but Tenant in Fee-simple ought to do. So if Lessee for Years loses in a *Præcipe*, and brings a Writ of Error for Error in Process, this is a Forfeiture. *Co. Lit. 251. b.*

Thirdly, *By affirming the Reversion or Remainder to be in a Stranger*, actively or passively. (1) *Actively* may be five different Ways: 1. If Tenant for Life prays in Aid of a Stranger, whereby he affirms the Reversion to be in him. 2. If he attorns to the Grant of a Stranger, this is intended of an Attornment of Record to a Stranger, for an Attornment in *Pais*, incurs no Forfeiture. 3. If a Stranger brings a Writ of Entry *in casu proviso*, and suppose the Reversion to be in him, if Tenant for Life confesses the Action, it is a Forfeiture. 4. If Tenant for Life plead covinously to the Disinheritance of him in the Reversion, it is a Forfeiture. 5. If a Stranger brings an Action of Waste against Lessee for Life, and he pleads *Nul waste fait*, it is a Forfeiture, or the like. (2) *Passively*, as if Tenant for Life accepts a Fine *Sur conusans de droit come ceo*, &c. of a Stranger, it is a Forfeiture, for thereby he affirms of Record, the Reversion to be in a Stranger. *Co. Lit. 252. a.*

What is a Forfeiture by Matter of Record.

If a Man leases at Will, and afterwards grants a Rent-Charge in Fee to another, it is not any Determination of the Will; admitted 11 H. 6. 28, 33. But *Quære*, for what Remedy shall the Grantee have for the Rent, for he shall not distrain the Cattle of the Lessee, if the Lease continues, because he comes Paramount to the Charge. 3 *Danv.* 219. 1 *Roll. Abr.* 852.

If a Lessee for Life in a *Quid juris clamat* attorn to a Grant by Fine of one who had nothing in the Reversion, it is a Forfeiture, for he thereby acknowledgeth the Reversion in a Stranger. 27 *E.* 3. 77. *Fitz. Quid juris clamat* 34. *S. C. Co. Lit.* 252. a. 2 *And.* 30. *S. P.*

If there be a Lessee for Life, the Reversion over jointly to Husband and Wife, and the Husband alone aliens the Reversion by Fine, and the Conussee brings a *Quid juris clamat*, and the Lessee attorns to the Grant, it is a Forfeiture to the Wife, and she shall have Advantage of it after the Death of her Husband, because the Lessee by the Attornment hath acknowledged the Reversion in a Stranger. 27 *E.* 3. 77. *Fitz. Quid juris clamat* *S. C.*

(a) So if of a Rent, Common, or other Things which lie in Grant.

Co. Lit. 251. b.

Owen 147.

(b) But a

Grant by Deed recorded, as a Deed inrolled, works no Forfeiture because the Deed is the Original. *Co. Lit.* 251. b. & vide

Owen 147. 2 *Leon.* 60, 65. 4 *Leon.* 124, 129. But whether it be otherwise where Bargain and Sale inrolled in London before the Recorder, according to Custom, vide *Moor* 211. pl. 352. *Godb.* 105. 3 *Leon.* 169. *Goulsh.* 40, 41.

If Tenant for Life of an (a) *Advowson* in Gross (b) levies a Fine *Come ceo*, &c. of it, it is a Forfeiture, altho' it doth not divest the Reversion. *Trin.* 13 *Car. B. R.* *Springe* and *Sir Julius Caesar*, Master of the Rolls, adjudged *per Curiam* without Doubt; and they would not suffer it to be argued in a Writ of Error upon a Judgment in *Banco*, in a *Quære Impedit*. 3 *Danv.* 219. *W. Jon.* 389, 391. *S. C.* adjudged. *Co. Lit.* 251. b. *Stile* 192. *S. P.*

For most of the old Cases where a Tenant for Life or Years may in a real Action by Pleading forfeit his Estate, vide Sir William Pelham's Case, 1 Co. 14. Moor 271. 2 Leon. 60. 4 Leon. 123. 1 And. 227. & vide Godb. 105. Goulf. 40, 41.

If Tenant for Life affirms the Land in a Stranger in a Court of Record, it is a Forfeiture. 13 H. 4. 13. b. 3 Danv. 220. 1 Roll. Abr. 852.

If Lessee for Life accepts a Fine Sur conusans de droit come ceo que ad, &c. it is a Forfeiture, for he hath acknowledged by Estoppel, that he hath the Fee from him. 1 H. 7. 12. b. 2 Co. 56. 9 Co. 106. b. Vide Dy. 3, 4. Ma. 148, 149. 3 Danv. 220. Co. Lit. 252. a. S. P. & vide 1 Mod. 117. 1 Roll. Abr. 852.

But it is otherwise if he accepts a Fine Sur conusans de droit tantum with Release, for that enures for the Benefit of the Reversion, and is no Estoppel. 1 H. 7. 12. b. 3 Danv. 220. 1 Roll. Abr. 853.

If Tenant for Life has Aid granted of him in Reversion, and J. S. comes without Process, and says that he is the same Person of whom Aid is prayed, and is ready to join; to which the Lessee says, that he is not the same Person; whereupon he is adjudged to answer alone: It is a (a) Forfeiture if he be the same Person who hath the Reversion, because by this Plea he supposeth the Reversion in another. 21 E. 3. 14. 3 Danv. 220. 1 Roll. Abr. 853.

2 Co. 55. b. at the Bottom. 2 Leon. 62. (a) By praying Aid of a Stranger. Co. Lit. 252. a. Cro. El. 758.

In *Quid juris clamat* if Lessee for Life or Years (b) claims Fee, it is a Forfeiture. 11 H. 4. 57. B. Br. *Quid juris clamat* 10. & Fitz. *Quid juris clamat* 15. S. C. 2 Co. 68. b. 30 E. 3. 29. 3 Danv. 220. 1 Roll. Abr. 853.

(b) Forfeiture for claiming Fee in a Court of Record. Co. Lit. 251. b. If he takes the Tenancy upon him and pleads. 2 And. 30.

So it shall be altho' he hath Colour to claim it by a void Condition to have Fee. 6 R. 2. (Fitz. *Quid juris clamat* 20. S. C. 1 And. 30. S. C. cited. Goulf. 41. S. C. cited) *Plesington Quid juris clamat* 20. adjudged. 19 H. 6. 62. 3 Danv. 220. 1 Roll. Abr. 853.

In *Quid juris clamat* brought against one as Tenant for Life of 10 l. Rent, if the Defendant says that it is but 40 s. Rent, if it be found against him, yet it is not any Forfeiture. 46 E. 3. 27. Br. *Quid juris clamat* 7. S. C. 3 Danv. 220. 1 Roll. Abr. 853.

In *Quid juris clamat*, if the Defendant pleads special Matter of Attainder and Forfeiture of him of whom the Plaintiff claims, and a Grant over by the King, and the Plaintiff shews a special Reversal of the Attainder, on which the Parties demur, and it is adjudged against the Defendant, yet it is not any Forfeiture. 29 E. 3. 25. 3 Danv. 220. Godb. 105. 1 Roll. Abr. 853.

In *Quid juris clamat*, if the Defendant be erroneously adjudged to attorn to a Stranger, who hath nothing in Reversion, and he doth it accordingly, it is not a Forfeiture, because it is the Act of the Court. 29 E. 3. 25. b. 3 Danv. 220. Holt and Lister, S. P. Cro. Eliz. 757. adjudged. Owen 146. 1 Roll. Abr. 853.

If Tenant for Life attorns to a Grant by Fine of the Reversion in Mortmain, it is not a Forfeiture. 17 E. 3. 7. Fitz. *Quid juris clamat* 25. S. C. 3 Danv. 220. 1 Roll. Abr. 853.

If a Stranger who hath nothing in the Reversion brings an Action of Waste against the Lessee, if he pleads in Bar *Nul wast fait*, it is a Forfeiture, because thereby he affirms the Reversion in him. 18 E. 3. 54. 1 Roll. Abr. 853. 3 Danv. 221. S. P. Cro. Eliz. 451, 758. Co. Lit. 252. a.

If a Man brings a *Præcipe in capite* against the Lessee for Life, and him in Remainder in Tail as Jointenants, by the Assent and Covin of the Lessee with the Demandant, and they procure another to answer for him in Remainder as Jointenant, and after the *Mise* joined they make Default, whereby Judgment is given against them; if he in Remainder reverse the Judgment by Writ of Deceit, he shall have the Land, for the Lessee hath forfeited his Estate. 17 E. 3. 60. b. 3 Danv. 221. 1 Roll. Abr. 853.

And where such Recovery is had by Agreement and Covin between the Demandant and Tenant for Life, it is a Forfeiture. Co. Lit. 362. a. & vide Co. Lit. 356. a. 1 Co. 16. a. 2 And. 30.

So if Tenant for Life suffers a common Recovery, it is a Forfeiture, for that is an Assurance of which the Law takes Notice. Co. Lit. 362. a. Sir William Pelham's Case,

Cafe, 1 Co. 15. b. adjudged. Moor 271. pl. 423. adjudged. 2 Leon. 60. 4 Leon. 123. 1 And. 227. & vide 3 Co. 4. b. 10 Co. 44. a. Co. Lit. 356. a.

If a Stranger brings a Writ of Entry against the Lessee for Life, supposing that he holds of his Lease, and the Lessee confesseth the Action, whereby the Stranger recovers, it is a Forfeiture to the Lessor. 5 Aff. 3. adjudged. Fitz. Entry Congeable 42. S. C. Br. Entry Congeable 49. Br. Forfeiture de Terres 29. 1 Co. 15. b. 2 Leon. 60. 4 Leon. 120. 3 Danv. 221. 1 Roll. Abr. 853.

In a real Action against the Lessee for Life, if he loses by Mispleading, it is not any Forfeiture. 18 E. 3. 28. b. 3 Danv. 221. 1 Roll. Abr. 853.

But if the Plaintiff recovers by Render of the Lessee, it is a Forfeiture. 18 E. 3. 28. b. 3 Danv. 221. 1 Roll. Abr. 853.

So if he recovers by Nient dedire of the Lessee. 18 E. 3. 28. b. 3 Danv. 221. 1 Roll. Abr. 853.

So if he recovers by Default of the Lessee. 18 E. 3. 28. b. 3 Danv. 221. 1 Roll. Abr. 853.

(a) Where he pleads covenously to the Disinheriton of him in Reversion. Co. Lit. 252. a.

So if he recovers by Mispleading of the Lessee, if he (a) pleads faintly. Contra 18 E. 3. 28. b. 3 Danv. 221. 1 Roll. Abr. 853.

As if he pleads to an Inquest faintly in a Scire facias, and loses where he might have barred the Demandant by a Plea of Nient comprise, it is a Forfeiture. 22 E. 3. 2. b. Curia. 3 Danv. 221. 1 Roll. Abr. 853. 2 Leon. 61. S. C. cited.

So if Lessee for Years be ousted, and brings an Affise Ut de libero tenemento. Co. Lit. 251. b. 1 Co. 16. a. S. P. Or in a Writ of Right brought against Lessee for Life or Years, he joins the Mife upon the mere Right, which none but Tenant in Fee-simple ought to do. Co. Lit. 251. b. 3 Leon. 169. S. P.

So if Lessee for Years lose in a Præcipe, and brings a Writ of Error for Error in Procefs, this is a Forfeiture. Co. Lit. 251. b.

If Tenant for Life bargains and sells to A. and his Heirs, and after levies a Fine Sur consufance de droit come ceo, &c. to A. and his Heirs; this is a Forfeiture by the Bargainee, and not by the Bargainor, who at the Time of the Fine had nothing to forfeit. Per Cur'. 1 Leon. 264.

If A. be Tenant for Life, the Remainder to B. for Life, Remainder to A. in Fee, and B. being in Possession, levies a Fine Sur consufance de droit come ceo, &c. to a Stranger, tho' the Remainder in Fee is not touched or discontinued thereby; yet it is a Forfeiture, for as much as B. had done what he could for disposing of the Fee by Fine. Per totam Curiam. 1 Leon. 40.

(b) So held 4 Leon. 3.

If in an Action of Debt brought against Lessee for Years for the Rent reserved, he claims a Fee by Bargain and Sale to him and his Heirs, upon which Issue is joined; if false, this is a Forfeiture of his Term, (b) for the very Claim makes it so, which cannot be saved by the subsequent Matter. Per Cur. 3 Leon. 169. Moor 211. pl. 352. — The Bargain and Sale being by Deed inrolled in London, Godb. 105. seems to be the S. C. contra, tho' the Issue was found against the Defendant in the Action of Debt. Goulf. 40, 41. The Plea in the Action of Debt being entered on Record, and pending that an Affise of fresh Force brought in London, where the Bargain and Sale was inrolled according to Custom.

If in a Quid juris clamat the Defendant pleads he was seised in Fee Tempore levationis notæ absque hoc quod ipse tempore, &c. held pro termino vitæ suæ tantum; and Issue being thereupon joined, it is found that he held as Tenant after Possibility of Issue, &c. this will excuse him from attorning, and the Inducement of the Traverse is no Cause of Forfeiture. Cro. El. 671.

But where there was Tenant for Life, Remainder for Life, and he in Remainder for Life, reciting that he had an Estate in Fee, levied a Fine Sur consufance de droit come ceo, &c. and whether it was a Forfeiture, because it made no Discontinuance, Dubitatur, Cro. El. 757. the Court divided. S. C. Court divided, Owen 146. But vide Buckler's Cafe, 2 Co. 55. b. 2 And. 29. Moor 423. Cro. El. 450, 486.

If Tenant for Life levies a Fine Sur consufance de droit come ceo, &c. to him in Remainder for Life; this is a Forfeiture of both their Estates, the one by the Gift, and the other by the Acceptance. 2 Lev. 202. 2 Jon. 75. The Fine being levied by Tenant for Life and a Stranger, to him in Remainder for Life, who agreed thereto and accepted thereof; but there is a Quære by the Reporter, whether any Judgment was given. 3 Keb. 687, &c. S. C.

Secondly, Of what Estates such Forfeitures may be.

IF Tenant for Life of a Copyhold surrenders to another in Fee, it is no Forfeiture.

4 Co. 23. a.

So if he suffers a Recovery to the Use of another in Fee. 1 Mod. 199, 200.

Lessee for Life, Remainder in Tail, Remainder in Fee to the right Heirs of the Lessee, and he makes a Feoffment, it is a Forfeiture of his Estate for Life. 42 E. 3.

18. 50 E. 3. 4. 1 Roll. Abr. 851. 3 Danv. 217. Popb. 84. S. P.

If Tenant in Tail after Possibility alien in Fee, or for another's Life, it is a Forfeiture, because he has in Effect but for Life. 39 E. 3. 16. Br. Forfeiture S. C.

3 H. 6. 52. 10 H. 6. 1. b. Fitz. Ayde 67. S. C. 45 E. 3. 25. Br. Entry Congeable

12. S. C. 11 H. 4. 15. Lit. 7. b. 29 Aff. 64. admitted. Fitz. Affise 292. S. C.

32 Aff. 9. admitted by Issue. 43 Aff. 24. adjudged by Admittance. Co. Lit. 28. a.

252. a. S. P. 1 Roll. Abr. 851. 3 Danv. 217.

A Right to a particular Estate may be forfeited, and he that has but a Right to the Remainder or Reversion may take Advantage of it. Co. Lit. 252. a. 2 Leon. 264.

As if Tenant for Life be disseised, and levies a Fine to the Disseisor, he in Reversion or Remainder may presently enter upon the Disseisor for the Forfeiture. Co. Lit. 252. a. S. P. 2 Co. 55. b. 2 And. 29. Moor 423. pl. 591. Cro. El. 450, 586. adjudged.

So if after a Disseisin he levies a Fine to a Stranger, tho' to some Respects *Partes finis nihil habuerunt*, yet it is a Forfeiture of his Right. Co. Lit. 252. a.

So a Forfeiture may be by the Alienation of Tenant by the Curtesy, Tenant in Dower, Tenant *pur auter vie*, Tenant for Years, Tenant by Statute-Merchant, Staple, or Flegit. Co. Lit. 252. a.

If the Husband seised of Land in Right of his Wife, for the Life of his Wife, makes a Charter of Feoffment, whereby he grants the Land to another, to have and to hold to him, his Heirs and Assigns, *ad solum opus & usum* of his said Wife, during the Life of the said Wife, it is not any Forfeiture, for the last Words (during the Life of the said Wife) shall guide all the preceding Sentence, *Ut res magis valeat quam pereat*. Dubitatur, 1 Roll. Abr. 854. 3 Danv. 223. Cro. El. 131. S. C. adjudged by all except Gaudy, that it was a Forfeiture, and Wray said he asked the Opinion of the Justices of his House, and they held it clearly a Forfeiture. 1 Leon. 125. adjudged, and the Opinion of the other Judges mentioned. Owen 64. S. C. adjudged. Godb. 141. adjudged, because the *Habendum* was absolute, and the Use in another Clause; and the Law limits the Remainder of the Use to the Party who makes the Feoffment. Lane 38. S. C. cited. 1 Roll. Rep. 385. S. C. cited to be adjudged. Tenant for Life aliens to B. *Habendum sibi & heredibus suis*, for the Life of Tenant for Life; this is no Forfeiture, for the Whole is but the Limitation of the Estate. Br. Forfeiture 87.

If Lessee for Life levies a Fine to B. for the Life of the Lessee, to the Use of B. for his Life, it is not any Forfeiture, because the Estate granted by the Fine is but for the Life of the Lessee, and the Limitation of a greater Use cannot be any Forfeiture. 1 Roll. Abr. 854. 3 Danv. 224. Cro. Jac. 200.

If A. Lessee for Life, leases to B. for the Life of B. if A. so long lives, it is a Forfeiture, because B. has an Estate for his own Life. 1 Roll. Abr. 854. 3 Danv. 224. 2 Roll. Abr. 781. pl. 7.

A. devised his Lands to R. his youngest Son for ever, and after his Decease, the Remainder to his Heirs Male for ever, and died; the Son made a Lease to B. G. for three Lives. Adjudged, that if by this Devise the Son took only an Estate for Life, then his making a Lease for three Lives had been a Forfeiture of his Estate for Life; but it was resolved to be an Estate-tail in him, and so the Lease is good. 1 Bulst. 219.

Husband seised of Land in Right of his Wife in Tail, and of the Reversion of another's Life in his own Right, he and his Wife levy a Fine *Come ceo, &c.* and afterwards the Wife dies without Issue; the Levying of this Fine is not any Forfeiture, for it is stronger, or at least all one with *Bredon's Case*; for the Law construes that each passed that which lawfully he might pass. 1 Roll. Abr. 854. 3 Danv. 224. Hob. 273. S. C.

If there be Lessee for Life, Remainder in Tail, Remainder in Fee to the right Heirs of the Lessee, and the Lessee makes a Feoffment in Fee, it is a Forfeiture of

A a

his

his Estate for Life. 42 E. 3. 18. 50 E. 3. 4. 3 Danv. 224. 1 Roll. Abr. 851. 2 Roll. Abr. 854.

If Lessee for Life makes a Lease for Years, and Lessee for Years afterwards makes a Feoffment in Fee, and afterwards Lessee for Life releases all his Right to the Feoffee, it is not any Forfeiture of the Estate for Life, so that he in Reversion may enter for a Forfeiture, because the Lessee for Life has not done any Act to take the Reversion out of him in Reversion in Fee. 1 Roll. Abr. 855. 3 Danv. 224.

If A. be Tenant for Life, the Remainder to B. in Tail, the Remainder to C. in Tail, the Remainder to the right Heirs of A. in Fee, and A. makes a Feoffment in Fee to B. and his Wife, and afterwards B. dies without Issue, and his Wife enters, it is a Forfeiture to C. so that he may enter; for this Feoffment by the Entry of the Wife after her Husband's Death, is all one as if A. and B. had aliened to a Stranger, whereby the Remainder to C. would be devested. 41 E. 3. 21. 41 Aff. 2. adjudged, 1 Co. 76. b. 3 Danv. 224. 1 Roll. Abr. 855.

If Tenant for Life, Remainder for Life, Remainder in Tail, Remainder to the right Heirs of Tenant for Life in Remainder for Life, and afterwards the two Tenants for Life join in a Feoffment in Fee by Deed, it is a Forfeiture of both Remainders for Life, so that he in Remainder in Tail may enter for a Forfeiture in the Life of him in Remainder for Life. Dy. 17 El. 339, 44. per Cur. 1 Co. 76. b. 1 Roll. Abr. 855. 3 Danv. 224. 1 And. 45. pl. 116. N. Bendl. 222. pl. 253. Co. Lit. 251. b. 302. b. S. P. because he in Remainder for Life is *Particeps Criminis*. 1 Leon. 262. S. P. 2 And. 66. Cro. El. 253.

If there be Tenant for Life, Remainder for Life, Remainder in Tail, Remainder to the right Heirs of him in Remainder for Life, and he in Remainder for Life who hath the Fee expectant levies a Fine *Come ceo*, &c. to another, it is a Forfeiture of his Remainder for Life; so that after the Death of the Tenant for Life in Possession, he in Remainder in Tail may enter for the Forfeiture, because he is estopped by this Fine *Come ceo*, to say, but that he passed a Fee in Possession, without any Fraction of Estates; for this is not like *Bredon's Case*, for there the Estate for Life and Remainder in Tail are immediate the one to the other, and no Fraction of the Estate passed; but this Interpretation cannot be made in this Case to pass only an Estate in Remainder for Life, and a Remainder in Fee expectant on an Estate-tail; and so a Fraction of Estates, and not an intire Estate in Possession, according to the Purport of the Fine. *Trin.* 1653. *Garret and Blizard*, adjudged on a special Verdict. *Intratur Hill.* 24 Car. B. R. Rot. 383. This Case was adjudged after several Arguments at the Bar, and after it was argued at the Bench by the Court, and adjudged *per totam Curiam præter Jermyn*, who argued against the Judgment. 1 Roll. Abr. 855. 3 Danv. 225. *Stiles* 193, 194. S. C. adjudged.

Lessee for Life bargained and sold the Lands to W. R. and his Heirs; and afterwards he suffered a Recovery to the Use of the Bargainor; adjudged that this is a Forfeiture of the Estate for Life. *Moor* 271.

And if Tenant for Life make a Bargain and Sale in Fee, and afterwards suffer a common Recovery, tho' it be afterwards reversed for Error, yet it is a Forfeiture of the Estate for Life. *Sid.* 90.

Thirdly, *What Persons may commit such Forfeitures.*

IF a Husband and Wife, Tenants for Life, make a Feoffment, it is a Forfeiture during the Coverture. 45 E. 3. 21. b. 18 E. 3. 39. 1 Roll. Abr. 851. 3 Danv. 218.

So it shall be a Forfeiture during the Coverture where the Husband is seised in the Right of his Wife, and the Husband and Wife make a Feoffment. 1 Roll. Abr. 851. 3 Danv. 218. Co. Lit. 326. a.

So if Husband and Wife are Tenants for Life, and the Husband alone makes a Feoffment, it is a Forfeiture during the Coverture. 29 Aff. 43. 43 Aff. 17, 45. 1 Roll. Abr. 851. 3 Danv. 213. *Fitz. Cui in vita* 2. 6. Co. Lit. 326. a. For in Substance this is a Feoffment of the Husband only.

But in these Cases it shall not be any Forfeiture against the Wife after the Death of the Husband. 45 E. 3. 21. b. 29 Aff. 43. 43 Aff. 17. 8 Co. 44. b. 1 Roll. Abr. 851. 3 Danv. 218. Co. Lit. 233. b. 2 Roll. Abr. 796. pl. 11.

But if the Husband possessed of a Term in Right of his Wife forfeits the Term, it shall bind the Wife, because he might dispose of the Term at his Pleasure. 7 H. 6. 2. b.

2. b. *Br. Forfeiture* 69. S. C. 1 *Danv.* 703. G. 2. S. C. 9 H. 6. 52. *Br. Forfeiture* 76. S. C. 1 *Roll. Abr.* 851, 852. 3 *Danv.* 218.

If Husband and Wife, Lessees for Life, in the Right of the Wife accept a Fine come *ceo*, &c. of a Stranger, it shall not be any Forfeiture against the Wife after the Death of the Husband, because she was not examined on that Fine. *Dy.* 3, 4 *Ma.* 148, 89. 3 *Danv.* 218. 1 *Roll. Abr.* 852.

If an Infant being a Lessee for Life makes a Feoffment in Fee, and the Lessor enters for the Forfeiture, as he may; this will not bar the Infant but that he may enter. *Co. Lit.* 44. b.

If the Husband, after Issue, makes a Feoffment in Fee of the Wife's Land of Inheritance, and the Wife dies, the Feoffee shall hold it during the Life of the Husband against the Heir of the Wife; for it was no Forfeiture, the Estate of the Husband being only a Tenancy by the Curtesy initiate, and not consummate. *Co. Lit.* 30. a.

Fourthly, *By what Alienation, &c. such Forfeiture may be.*

IF Lessee for Life (a) aliens in Fee, it is a Forfeiture. 40 E. 3. 5. *Fitz. Issue* 142. S. C. 2 H. 4. 20. b. 3 *Danv.* 32. 1 *Roll. Abr.* 854.

So if he aliens for another's Life, it is a Forfeiture. 40 E. 3. 5. *Fitz. Issue.* *Co. Lit.* 252. a. S. P. 1 *Roll. Abr.* 854. 3 *Danv.* 222.

If Lessee for Life of a Rent grants it in Fee, it is not a Forfeiture; for nothing but his own Estate passeth. 48 E. 3. 23. b. 3 *Danv.* 222. 1 *Roll. Abr.* 854. Because it being only a Thing which lies in Grant, it cannot be forfeited by any Grant or Deed. *Co. Lit.* 541. b. 2 *Leon.* 60. Otherwise if such Grant be by Fine, tho' the Estate be not thereby devested. *Co. Lit.* 252. b. *Styl.* 192.

So if Reversioner for Life of Land grants it in Fee, it is not a Forfeiture. *Lit.* 137. 48 E. 3. 23. b. 3 *Danv.* 222. 1 *Roll. Abr.* 854.

If Lessee for Life of an Advowson aliens in Fee, it is not a Forfeiture, because this Thing lies only in Grant, and the Estate determines by the Death of the Lessee 17 E. 3. 19. b. admitted. *Contra* 43 E. 3. 25. b. 18 E. 3. 16. 3 *Danv.* 223. 1 *Roll. Abr.* 854.

If Lessee for Life of a Manor to which an Advowson is appendant, aliens an Acre with the Advowson in Fee, it is a Forfeiture of the Advowson, for the Lessor may enter, and present to it after Entry into the Acre, if not before. 18 E. 3. 44. admitted by *Issue.* 3 *Danv.* 223. 1 *Roll. Abr.* 854.

So if he had aliened the whole Manor with the Advowson, the Lessor might enter for a Forfeiture, and should have the Advowson. 19 H. 6. 33. b. 3 *Danv.* 223. 1 *Roll. Abr.* 854.

If Lessor disseises his Lessee for Life, and leases to another for Life, who leases to the first Lessee for Life, it is not any Forfeiture, for nothing passed by his Lease, for the first Lessee is remitted, and so the Livery void; and so the second Lessee hath a Reversion for Life. 18 E. 3. 48. admitted. 3 *Danv.* 223. 1 *Roll. Abr.* 854.

If he in Remainder for Life enters and disseises Tenant for Life, and makes a Feoffment in Fee; this is a Forfeiture of his Right of Remainder. *Co. Lit.* 255. b.

If Tenant for Life or Years, the Reversion or Remainder being in the King, makes a Feoffment in Fee; this is a Forfeiture, tho' the Reversion or Remainder be not devested out of the King; and the Reason is in respect of the Solemnity of the Feoffment by Livery tending to the King's Disinheriton. *Co. Lit.* 252. b. So where there was Tenant for Life, Remainder for Life, Remainder to the King, and the first Tenant for Life made a Feoffment. 1 *Co.* 76. b.

If there be Tenant for Life, Remainder in Tail, Remainder in Tail, and Tenant for Life and he in the first Remainder in Tail join in a Fine; this is no Forfeiture, for the Law (which abhors Wrong) shall construe this first to be the Grant of him in Remainder in Tail, and after of the Tenant for Life. 1 *Co.* 76. 2 *And.* 66. *pl.* 48. *Hob.* 277. and *Vide Owen* 130. *T. Raym.* 142, 147.

If Lessee for Life makes a Feoffment in Fee to Husband and Wife in Reversion seised in Right of the Wife, it is a Forfeiture to the Wife. 39 E. 3. 29. b. *per Thorpe*; and so the Wife remitted. *Contra* 39 *Aff.* *pl.* 7. 3 *Danv.* 225. 1 *Roll. Abr.* 855.

If Husband and Wife, seised in Right of the Wife, for the Life of the Wife, lease by Indenture to him in Reversion, who is within Age, for the Life of the Husband, it is a Forfeiture; for the Acceptance of the Estate by the Infant shall not prejudice him. 29 *Aff.* 64. *Fitz. Aff.* 292. S. C. 3 *Danv.* 225. 1 *Roll. Abr.* 855.

But

(a) By Feoffment, Fine or Recovery by Consent. *Co. Lit.* 151. a. b.

In respect of the Person to whom it is made.

But if Tenant for Life and he in Reversion join in a Fine, and it is after reversed for the Nonage of the Reversioner, yet he shall not enter for the Forfeiture; because he joined in the Fine, and consented to it. *Cro. Eliz.* 124. 2 *Leon.* 108.

But where Tenant for Life aliens or makes a Feoffment to him in Reversion or Remainder, it amounts to a Surrender, and is no Forfeiture. *Co. Lit.* 252. a.

If Tenant for Life enfeoffs him in Remainder for Life; this is a Surrender, and no Forfeiture. *Co. Lit.* 42. a. *Popb.* 84. S. P.

If Tenant for Life leases to him in Reversion or Remainder, in Tail or Fee, for Life of him in Reversion or Remainder; this is no Forfeiture, because he in Reversion, &c. was Party, it cannot be a Surrender, because his whole Estate was not given. *Co. Lit.* 42. a. *Sed vide* 2 *Roll. Abr.* 497. pl. 6, & 8.

If Tenant for Life leases for his own Life to the Lessor, the Remainder to the Lessor and a Stranger in Fee; this is a Surrender of one Moiety, and a Forfeiture as to the Remainder to the Stranger, the Limitation of the Fee working the Wrong, and when the Lessor enters, he shall take Benefit of it. *Co. Lit.* 335. a.

If there be Tenant for Life, Remainder in Tail, the Reversion in Fee, and the Tenant for Life enfeoffs him in Reversion in Fee; this is a Forfeiture of his Estate, and shall devest the Estate-Tail. 1 *Co.* 140.

If there be Tenant for Life, Remainder in Tail to an Infant, and they levy a Fine, and it is after reversed as to the Infant; yet he shall not enter for the Forfeiture, because he joined in the Fine, and so assented to it. 2 *Leon.* 108. *Cro. Eliz.* 124.

Testator being seised in Fee, devised his Lands to his youngest Daughter in Tail, Remainder to his eldest Daughter in Tail, with divers Remainders over; *Proviso* that if either of them willingly agreed to do any Act, whereby the Lands should not come to them in Remainder, that then the Estate limited to them should cease, &c. The youngest Daughter married, and then she and her Husband suffered a Recovery to them and their Heirs. Adjudged, that this being incident to an Estate-tail, could not be barred by any Limitation or Condition, and therefore her suffering a Recovery, was no Forfeiture of her Estate. 10 *Co.* 35.

Fifthly, *In what Cases such Forfeitures may be dispensed with.*

Who in respect of the Estate may dispense therewith.

IT seems Tenant in Tail in Remainder or Reversion cannot dispense with a Forfeiture of the Lessee by Alienation. 3 *Danv.* 226. 1 *Roll. Abr.* 855.

If there be Tenant for Life, the Remainder in Tail, and he in Remainder releases in Fee to the Lessee, and after he aliens in Fee, it seems that he in Remainder cannot enter for the Forfeiture against his Release; yet after his Death his Issue may enter for the Forfeiture, for now the Release is void. 43 *Aff.* 45. adjudged. 3 *Danv.* 226, 855, 856.

What Act shall be a Dispensation of it.

If Tenant for Life levies a Fine, by which he forfeits his Estate; yet if the Reversioner joins with him in the Declaration of the Uses, this is a Dispensation with a Forfeiture. *Styl.* 464. *per Glynn C. J.* but *Vide* 3 *Keb.* 307.

If Husband and Wife, seised in Right of the Wife, for the Life of the Wife, lease by Indenture to him in Reversion for the Life of the Husband, it is not any Forfeiture, for he hath dispensed with it by the Acceptance of the Estate. 29 *Aff.* 64. *per Curiam*; and the Reversion is not discontinued. *Fitz. Aff.* 292. S. C. 3 *Danv.* 226. 1 *Roll. Abr.* 856.

Sixthly, *What shall Excuse such Forfeitures.*

IF Husband and Wife are seised for Life, the Remainder to B. their Son and Heir apparent in Tail, the Remainder to the right Heirs of B. and the Husband makes a Feoffment in Fee to C. with general Warranty, and dies, and afterwards the Wife enters, and she and B. (neither of them, by any Thing appearing, having Knowledge of this Warranty descended on B. or of the Feoffment) join in a Feoffment in Fee to D. it is a Forfeiture of the Wife's Estate for Life, so that C. may enter immediately for this Forfeiture; for the Estates in Remainder in Tail and Fee limited to B. were bound by the Collateral Warranty, so that the Feoffment was made by the Lessee and another who had nothing in the Reversion; and although the Estate of B. was only bound by a Warranty which doth not destroy the Right; and altho' the Wife had not any Notice of it, yet forasmuch as no Body is obliged to give Notice thereof, the Wife ought to take Notice of it at her Peril; and therefore inasmuch as she joined

joined with B. in a Conveyance which was voluntary, and did not grant her Estate by herself, the not having Notice of the Bar of the Estate of B. shall not excuse the Forfeiture. 1 Roll. Abr. 856. Cro. Car. 391, 393. 3 Danv. 226, 227.

Seventhly, *What Act shall purge such Forfeitures.*

IF Lessee for Life makes a Feoffment on Condition, and enters for it broke; yet the Forfeiture by the Alienation remains, and the Lessor may enter. 39 Aff. 15. Fitz. Entry Congeable 47. 43 Aff. 47. Co. Lit. 202. b. and Vide 1 And. 352. 3 Danv. 227. 1 Roll. Abr. 856.

If Tenant for Life aliens on Condition, that if he himself pays 10 l. to the Alienee, that he may re-enter; and if not, that he shall have a Fee; and at the Day he pays the 10 l. and re-enters, yet he in Reversion may enter for the Forfeiture, because by the Alienation the Reversion was once discontinued. 43 E. 3. Entry Congeable 30. 1 Roll. Abr. 856. 3 Danv. 227.

If a Gift be to two, and to the Heirs of the Body of one by her Husband begotten, and she who hath but for Life aliens her Part in Fee; and the other enters for a Forfeiture; and afterwards the Husband dies without Issue, whereby her Estate is determined as to that Moiety (admitting it to be Law) *Quære*, whether she be not Tenant *apres Possibilitie* of that Moiety; yet it shall not devert the Title executed by the Entry for the Forfeiture. 45 Aff. 7. 3 Danv. 227. 1 Roll. Abr. 227.

If A. being Tenant for Life, leases to B. for his Life, and B. dies, and A. re-enters, yet the Forfeiture remaineth. Co. Lit. 252. a.

A Devise by the Wife of Lands to her Executors to pay 500 l. out of them to her Son: Provided that if his Father did not give a sufficient Release to the Executors of all the Goods and Chattels remaining in such a House, then the Devise of this 500 l. should be void, and it should go to the Executors; the Testatrix died, a Release was tendered to the Father, who refused to execute it; then the Son exhibited a Bill against the Father and the Executors for the 500 l. and to compel the Father to release. Decreed that the Money be paid to the Son, tho' the Executors in their Answer insisted to have it as forfeited to them, upon the Refusal of the Father to execute the Release: And the Lord Chancellor said it was a standing Rule in Equity, *That a Forfeiture should not bind where the Thing might be done afterwards, or a Compensation made for it, unless where there is a Devise over to another Person upon the Forfeiture of the first.* 2 Vent. 352.

Eighthly, *Of Entry for a Forfeiture.*

IF Lessee for Life aliens for Life, the Remainder over, and Remainder enters after the Death of the Lessee, the first Lessor may enter on him for the Forfeiture; for by Agreement to the Remainder he agreed to the whole, and so a Party. 50 E. 3. 21. b. (Fitz. Entry Congeable 36. Br. Entry Congeable 17.) 43 Aff. 17, 45. 1 Roll. Abr. 857. On whom made.

The Lessor may enter on the Alienee of his Lessee, or any who is Party to the Forfeiture. 50 E. 3. 21. b. (Br. Entry Congeable 17.) 43 Aff. 24. 25 Aff. 11. 1 Roll. Abr. 857.

So he may enter on the Alienee of the Alienee, or any that hath the Land, altho' he be not Party to the Forfeiture. *Contra* 50 E. 3. 22. (Br. Entry Congeable 17.) *Dubitatur* 25 Aff. 11. 1 Roll. Abr. 857.

If Lessee for Life gives in Tail, the Remainder in Fee to another, and afterwards he in Remainder dies, and afterwards the Donee dies without Issue, the Lessor may enter on the Heir of him in Remainder; for by his Entry he agrees to the Disinheritance made by the Alienation. *Contra* 43 Aff. 17. *per Finchden.* 1 Roll. Abr. 857.

If Tenant for Life gives it in Tail, and the Donee dies, the Lessor may enter on the Donee for the Forfeiture. *Contra* 43 Aff. 45. *per Finchden.* 1 Roll. Abr. 857.

Feoffment in Fee, upon Condition that the Feoffees should re-grant the Lands to the Feoffor and his Wife in Tail, Remainder to his own right Heirs, which was done accordingly; the Husband and Wife had Issue a Son, and then the Husband died; the Son, who was the Issue in Tail, levied a Fine in the Life-time of his Mother, *who was Tenant in Tail*, and this was to Sir G. B. and his Heirs; the Mother afterwards

made a Lease for three Lives, without reserving any Rent, and therefore not warranted by the Stat. 32 H. 8. Adjudged, that this Lease for three Lives was a Discontinuance, and within the Stat. 11 H. 7. and so a Forfeiture of her Estate; and that Sir G. B. the Conufee might enter for the Forfeiture, because the Estate-tail was barred by the Fine levied by the Issue in Tail, and the Remainder in Fee passed by it to the Conufee; so as he had the Remainder in him at that very Time when the Discontinuance was made by the Tenant in Tail, in making a Lease for Lives not warranted by the Statute, because no Rent was reserved, and then he is within the very Words and Intent of the Statute to enter for a Forfeiture. 3 Co. 50. Cro. El. 513. Moor 455. & vide Dy. 148.

At what
Time.

If Lessee for Life aliens in Fee and dies, he in Remainder or Reversion may enter after the Death of the Lessee. Contra 18 E. 3. 35. 17 Aff. 27. Curia. 1 Roll. Abr. 857.

If Tenant for Life of an Advowson in Gross levies a Fine Come ceo, &c. of it, and before any Claim made by him in Reversion, the Church becomes void; afterwards he in Reversion shall not have Advantage of the Forfeiture as to the present Presentation, because before Election made by him in Reversion, the Estate of the Lessee was not defeated nor destroyed, which Election ought to be by Claim; and then it was a Chattel vested in the Lessee before the Election made by him in Reversion, which cannot be defeated afterwards by the Presentation of him in Reversion. 1 Roll. Abr. 857. 1 Jon. 389, 391. 2 Roll. Abr. 352.

If A. being Tenant for Life, leases to B. for his Life, and B. dies, and A. re-enters; yet the Forfeiture remains, and the first Lessor may enter. Co. Lit. 252. a.

If Tenant for Life suffers a common Recovery, and Execution is thereupon had, yet he in Remainder may enter; for being a Forfeiture, the suing Execution will not prevent him, tho' it appeared the Recovery was suffered before the Statute of 14 Eliz. 1 Co. 14, 15. 2 Leon. 60, &c. 4 Leon. 123, &c. Moor 271. pl. 423. S. C. in which it was adjudged a Forfeiture, but nothing said as to the Entry after Execution upon the Recovery. 1 And. 227. pl. 243. But a Writ of Error was after brought, and the Parties agreed, tho' the Chief Justice of B. R. was of Opinion the Judgment was good; but the Reporter seems to be of another Opinion.

If Tenant for Life bargains and sells in Fee, and then suffers a Recovery, in which he comes in as Vouchee, and after reverses this Recovery; yet this is a Forfeiture. 1 Sid. 90. But there is a Nota by the Reporter, that Sir R. T. (who was in Remainder) entred before the Recovery was reversed.

Ninthly, What Person shall take Advantage of a Forfeiture.

Tenant for Life made a Lease for Years, and afterwards granted the Lands to T. S. *Habendum* after the Determination of the Lease for Years to him during the Life of the Lessor; afterwards the Lessee for Years was turned out, and the Tenant for Life was disseised of his Freehold, and being so disseised levied a Fine, &c. to the Disseisor, and thereupon he in Reversion in Fee entered for a Forfeiture; it was insisted that this was no Forfeiture, because at the Time of the Fine levied the Cognisor had nothing in the Land, and by Consequence he who had nothing could not forfeit: But adjudged, that it was a Forfeiture, for every particular Tenant ought to maintain his own Estate, and in doing that he maintains the Estate of him in Reversion, out of which the particular Estate is drawn; and for that Reason he ought not to do any Act by which he in Reversion may receive any Prejudice: Now by levying this Fine, the Tenant for Life did not maintain but destroy his own Estate; and therefore he in Reversion may take Advantage of it, and enter upon the Disseisor, who was the Cognisee, and had the Land by *Tort* during the Life of the Tenant for Life. 2 And. 29.

If there be Lessee for Life, Remainder in Tail, Remainder in Fee to the Lessee, and the Lessee enfeoffs the first Remainder, if he afterwards dies without Issue, the second Remainder may enter for a Forfeiture; for the Feoffment devested his Estate, and the other could not dispense with the Forfeiture as to him. 41 Aff. 2. Contra 41 E. 3. 21. in Fitz. Congeable 25, 34. Bro. Entry Congeable, the Remainder in Tail, and his Wife being enfeoffed, who survived her Husband. 1 Roll. Abr. 857.

If there be Tenant for Life, Remainder in Tail, Reversion in Fee, and the Lessee enfeoffs the Reversioner, Remainder in Tail may enter for a Forfeiture. 1 Co. 140. 1 Roll. Abr. 857.

If Lessee for Life, Remainder in Tail, Remainder to the right Heirs of the Lessee, makes a Feoffment, Remainder in Tail may enter. 42 E. 3. 18. 50 E. 3. 3. b.

45 Aff. 7. 1 Roll. Abr. 857.

If there be Tenant for Life, the Remainder in Tail, and he in Remainder releases in Fee to the Lessee, and afterwards the Lessee aliens in Fee, and afterwards he in Remainder dies, his Issue may enter for a Forfeiture, for his Estate was not amended by the Release, (and altho' his Father could not take Advantage of it for his Release, yet he is now gone). 43 Aff. 45. 1 Roll. Abr. 857, 858.

If Lessee for Life aliens, he in Remainder in Fee may enter. 17 Aff. 27. 18 E. 3. 35. 1 Roll. Abr. 858.

If there be Lessee for Life, the Remainder in Tail, and the Lessee aliens, the Remainder may enter for it. 2 H. 4. 20. b. 43 Aff. 45. 45 Aff. 7. 1 Roll. Abr. 858.

The same Law of a Reversion in Tail. 3 H. 4. 10. 1 Roll. Abr. 858.

If there be Tenant for Life, Remainder for Life, Remainder in Fee, and the Lessee aliens in Fee, the Remainder for Life may enter for the Forfeiture. 50 E. 3. 4. 1 Roll. Abr. 858.

And in that Case, if the Remainder for Life does not enter, the Remainder in Fee may enter to the Use of Remainder for Life, to defeat the Alienation. 50 E. 3. 4. 1 Roll. Abr. 858.

If there be Tenant for Life, Remainder in Tail, the Remainder in Fee, and Tenant for Life makes a Feoffment, and afterwards he in Remainder in Tail dies, his Issue may enter for the Forfeiture. 43 Aff. 45. 1 Roll. Abr. 858.

So if after the Alienation he in Remainder in Tail dies without Issue, he in Remainder in Fee may enter for the Forfeiture, for his Remainder was devested by the Alienation. 43 Aff. 45. 1 Roll. Abr. 858.

So if there be Tenant for Years, Remainder for Life, Remainder in Fee, and Tenant for Years aliens in Fee, and then Tenant for Life in Remainder dies, he in Remainder in Fee may enter. Moor 8. pl. 64.

If a Gift be to two, and to the Heirs of one, if he who hath but for Life aliens in Fee, the other who hath the Fee may enter for the Forfeiture. 45 Aff. 7. 1 Roll. Abr. 858.

If the Lord of a Copyholder for Life leases for Years, to commence at the End, Forfeiture or Surrender of the Tenant for Life, and afterwards the Tenant for Life commits a Forfeiture by making a Feoffment, if the Lord will not enter for the Forfeiture, yet the Lessee for Years may. 1 Roll. Abr. 858.

If a Gift be to a Feme Covert and *J. S.* and to the Heirs of the Body of the Feme by her Husband begotten, and afterwards the Husband dies without Issue, and afterwards *J. S.* aliens his Part in Fee, the Wife shall not enter into it for a Forfeiture; for by the Death of her Husband without Issue, she ought to be Tenant *apres Possibilitie* of the Remainder; but because she was seised of it *per mie & per tout* for her Life before, that Estate vanished, and she had not any Estate in Remainder at the Time of the Forfeiture. 45 Aff. 7. 1 Roll. Abr. 858.

If Lessee for Life aliens in Fee, and afterwards he in Reversion dies, his Heir may enter for this Forfeiture. 27 Aff. 32. 41 E. 3. 21. b. (Br. Entry Congeable 8. Fitz. Entry Congeable 34.) 50 E. 3. 21. (Fitz. Entry Congeable 36. Br. Entry Congeable 17. Br. Donne 7.) 1 Roll. Abr. 858.

If Tenant for Life, being disseised, levies a Fine to the Disseisor, or to a Stranger, he in Reversion or Remainder (tho' he had but a Right at the Time of the Forfeiture) may presently enter upon the Disseisor. Co. Lit. 252. a. 2 Co. 55. 2 And. 29. pl. 19. Moor 423. pl. 591. Cro. El. 460, 586.

Tenant for Life in Remainder may enter for the Forfeiture of the first Tenant for Life, or if he makes continual Claim, tho' the Alienee dies seised, he may enter; and if he dies before, then he in Remainder in Fee may enter in Respect of the Priority of Estate. Co. Lit. 252. a. 2 Leon. 61.

(C) By Alienation in Mortmain.

Mortmain.
Derivation
and Significa-
tion of the
Word.

LANDS, &c. may be forfeited by Alienation in Mortmain. There have been various Opinions concerning the Derivation of the Word *Mortmain*. Some have said that it is called Mortmain *Manus mortua, quia possessio eorum est immortalis, manus pro possessione, & mortua immortalis*, and the rather because Ecclesiastical Persons are restrained by the Laws and Statutes of the Realm from aliening; others say it is called *Manus mortua per Antiphrasin*, because Bodies Politick and Corporate never die; others say that it is called Mortmain by Resemblance to the holding of a Man's Hand who is ready to die, for that he them holdeth he letteth not go till he be dead. But Lord Coke (*Ch. Lit. 2. b.*) says, that these and such others are framed out of Wit and Invention; but the true Cause of the Name, and the Meaning thereof, was taken from the Effects, as it is expressed in the Statute (*de Religiosis, 7 E. 1.*) itself, *Per quod que servitia ex hujusmodi feodis debentur, & quæ ad defensionem regni ab initio provisæ fuerunt, indebite subtrahuntur & capitales domini eschaetas suas amittunt*, so as the Lands were said to come to Dead-Hands as to the Lords, because by Alienation in Mortmain they wholly lost their Escheats, and in Effect their Knights-Services for the Defence of the Realm, Wards, Marriages, Reliefs, and the like; and therefore was called a Dead-Hand, for a Dead-Hand yields no Service.

What is a
Mortmain.

An Appropriation of an Advowson is a Mortmain, or a Grant of an Advowson in Fee to a Sole or Aggregate Corporation, and a Rent extinct by a Release to a Corporation.

But the Grant of an Annuity cannot be a Mortmain, because it charges the Person only; nor an Appropriation of Tithes, because they are Things merely Spiritual; the Cognizance whereof regularly belongs to the Ecclesiastical Court. *Wood's Inst. B. 2. c. 4. F. N. B. 223. 1 Inst. 2. b. 304. a. & b. 5 Co. 56. 7 Co. 26. 9 Co. 96. 2 Inst. 361, 640. Kitch. 280.*

The Statutes
of Mortmain,
and their Ex-
positions, and
what Evasions
have been
made out of
them.

The Foundation of all the Statutes of Mortmain was *Magna Charta, (9 H. 3.) chap. 36.* For, by that Charter, it shall not be lawful to give Lands to any Religious House, and to take the same again to hold of the same House, &c. upon Pain that the Gift shall be void, and that the Land shall accrue to the Lord of the Fee.

This Chapter of *Magna Charta*, by *Stat. de Religiosis, (7 E. 1.)* is expounded to extend to a Gift of Lands to a Religious House, tho' they gave them not back again to hold of the same House, but kept the Lands so given unto themselves in their own Hands; and in that Case the Land should incur to the Lord of the Fee. *2 Inst. 75.*

But Ecclesiastical Persons found many Ways to creep out of this Statute; Religious Men, as Abbots, Priors, and other Ecclesiastical Persons *Regular*, by purchasing Lands holden of themselves, or by taking Leases for a long Term of Years, &c. And Bishops, Parsons, and other Ecclesiastical Persons *Secular*, thought that they were out of this Statute. *2 Inst. 75.*

But the said Stat. *7 E. 1.* was intended to provide against these Devices, and enacted, That no Person Religious or other whatsoever (*i. e.* other whatsoever of like Quality of being a Body Politick, Ecclesiastical or Lay, Sole or Aggregate) shall buy or sell any Lands or Tenements, or under the Colour of Gift or Lease, (and to prevent all other Inventions and Evasions added to this Effect) or by Reason of any other Title whatsoever, receive the same, or by any other Craft or Engine shall presume to appropriate to himself, whereby such Lands may in any wile come into Mortmain, under Pain of Forfeiture of the same. And within the Year after the Alienation, the next Lord of the Fee may enter; and if he do not, then the next immediate Lord from Time to Time to have half a Year; and for Default of all the mesne Lords, the King shall have the Lands so alienated for ever, and shall infeoff others by certain Services, &c.

This Statute is to be understood of such Inheritances as may be *holden*; but if such Inheritances as are not holden, as Rent-Charges, Commons, Advowsons, &c. the King shall have them presently by a favourable Interpretation of the Statute. *Wood's Inst. B. 2. c. 4.*

Lord Coke says, (*2 Inst. 75.*) a Man would have thought that this Statute of *7 E. 1.* would have prevented all new Devices; but the Ecclesiasticks also found out an Evasion out of this Statute, because it extended only to Gifts, Alienations and Conveyances made between them and others, *Arte vel ingenio, &c.* and therefore they gave over them;

them; and they pretending a Title to the Land (which they meant to get) brought a *Præcipe quod reddat* against the Tenant of the Land; and he by Consent and Collusion was to make Default, and thereupon they recovered the Land, and entered by Judgment of Law, *Et sic fieret fraus statuto*. And Lord Coke (2 *Inst.* p. 429.) says, that tho' such Recovery by Default was by Consent and Collusion, yet the Justices held, that these Religious and Ecclesiastical Persons came not to the Land *per titulum doni, vel alienationis*; nor was within the general Words of the Statute of 7 E. 1. *aut alio quovis modo, arte, vel ingenio sibi appropriare præsumat*: For that Recoveries being prosecuted in Course of Law, were by Law presumed to be just and lawful, it was holden by the Justices, that they were not within the former Statute; and yet these Recoveries were done *in fraudem Legis*, for Remedy whereof the Stat. of *Westm.* 2. or 13 Ed. 1. *ch.* 32. was made, whereby it is enacted, That it shall be inquired by the Country, whether or no the Demandant had a just Title to the Land; and if so, then he shall recover Seisin; but if otherwise, the Lord of the Fee shall enter, &c.

All Actions brought for any Lands or Tenements wherein a Freehold Inheritance, or a long Term is recovered, are within this Statute; as *Præcipe quod reddat*, *Quare impedit*, *Droit de gard*, *Ejectione firmæ*, *Quare ejecit infra terminum*, *Warrantia Chartæ*, *Convenit* to levy a Fine, *Execution per Elegit*, Statute-Merchant or Statute-Staple, &c. 2 *Inst.* 429.

Recoveries by Default are within this Statute, if they are had by Collusion. 2 *Inst.* 429.

Notwithstanding all these Statutes, Ecclesiastical Persons (not being able to get Lands by Purchase, Gift, Lease or Recovery) caused the Lands to be conveyed by Feoffment, or in other Manner, to divers Persons and their Heirs, to the Use of them and their Successors, by Reason whereof they took the Profits. 2 *Inst.* 75.

But this was barred by Stat. 15 *Rich.* 2. *c.* 5. whereby it is deemed within the Compasses of 7 Ed. 1. *De Religiosis*, to convert any Land into a Church-yard without Licence of the chief Lords, tho' done by the Sufferance and Assent of the Tenants. And no Feoffment, &c. of Lands and Tenements, Advowsons or other Possessions, to the Use of any Spiritual Person, and whereof such Spiritual Persons take the Profits, shall hereafter be made without Licence of the King and of the Lords, &c. upon Pain of Forfeiture, &c. The same Law shall likewise be of Lands, Advowsons, and other Possessions purchased by Guilds, Fraternities and Corporations, or to their Use.

And by Stat. 23 H. 8. *c.* 10. Feoffments, Fines, Recoveries, Devises, &c. of Lands, Tenements and Hereditaments, in Trust to the Use of Parish Churches, Chapels, Church-wardens, Guilds, Companies, &c. erected and made of Devotion, or by common Assent of the People, without any Corporation, or to the Uses and Intents to have perpetual Obits, or a continual Service of a Priest for ever, or for threescore or fourscore Years, or to such like Uses or Intents, to the Prejudice of the King, and to other Lords and Subjects, as in Case where Lands are aliened in Mortmain, shall be utterly void. Provided that such Uses and Intents may be made and declared to continue twenty Years from the Time of limiting them, and no longer.

This Act shall not prejudice Corporations, where there is a Custom to devise Lands in Mortmain; as in *London*, a Freeman that is Resident there, and pays Scot and Lot, may devise all his Leases and Lands in that City, or Part thereof, in Mortmain, without Licence. *Wood's Inst.* B. 2. *c.* 4. *Dr. & Stud. Dial.* 1. *c.* 10. 1 *Roll Abr.* 556.

See Stat. 14 Car. 2. *c.* 9. concerning the President and Governors for the Poor in London and Westminster.

The said Statute of 23 H. 8. *c.* 10. extends only to superstitious Uses, and therefore notwithstanding that or any of the aforesaid Statutes, any Man at this Day may give Lands, Tenements or Hereditaments to any Person or Persons, and their Heirs, for the Finding of a Preacher, Maintenance of a School, Relief of maimed Soldiers, and the Poor, Reparation of Churches, Highways, Bridges, Causeways, discharging poor Inhabitants of a Town of common Charges, for making a Stock for poor Labourers in Husbandry and poor Apprentices, and for the Marriage of poor Virgins, or for any other charitable Uses.

And it is good Policy upon every such Estate to reserve a small Rent to the Feoffor and his Heirs; for then the Feoffees shall be seised to their own Use, and not to the Use of the Feoffor: Or it may be proper to express some Consideration of a small Sum; and then the 23 H. 8. cannot by any Pretence make void the same. 1 *Co.* 26. 11 *Co.* 70, 71.

By Stat. 17 *Car. 2. c. 3.* Owners of Improvements, Tithes, &c. may annex the same to the Parsonage or Vicarage where they lie, or settle them in Trust for the Curates, where the Parsonage is impropriate and no Vicarage endowed, without any Licence of Mortmain. And if the settled Maintenance of any Benefice with Cure shall not amount to 100 *l. per Ann.* clear, the Incumbent may purchase to him and his Successors Lands, &c. without Licence in Mortmain.

By Stat. 7 & 8 *W. 3. c. 37.* The King may licence any Person or Bodies Politick to alien in Mortmain, or to purchase or take in Mortmain (in Perpetuity or otherwise) any Lands, Tenements or Hereditaments whatsoever, of whomsoever the same are holden; and such Lands, &c. so aliened, or purchased and licensed, shall not be subject to any Forfeiture by Reason of such Alienation or Purchase.

By Stat. 2 *Ann. c. 11.* Any Person may vest Lands, &c. in the Corporation for the Bounty of Queen Anne, by Deed inrolled, according to the Statute of 27 *H. 8. c. 10.* or by Will, for Augmentation of Churches, which have not a competent Provision.

The said Corporation also may take and purchase for the said Purposes without Licence or Writ *Ad quod damnum.*

(D) *By Non-performance of a Condition.*

LANDS, &c. may be forfeited or lost by the Non-performance of a Condition, whether it be *express'd* or *implied* by Law.

For the Nature of Conditions and Rules, &c. concerning them, see Chap. 4. post.

(E) *By Waste.*

Waste, what.

LANDS, &c. may be forfeited by Waste.

Waste (*Vastum dicitur a Vastando*, to Waste) is a Spoil or Destruction in Houses, Gardens or Orchards, Dove-houses, Parks, Warrens, Fish-ponds, Trees, Woods, Lands, &c. to the Prejudice of the Heir, or of him in Remainder or Reversion. *Co. Lit. 52. b. 53. a.*

Search if
Waste com-
mitted.

The Lessor may enter at seasonable Times, to see whether any Waste is committed; and if the Lessee hinders his entering, the Lessor may bring an Action on the Case. *2 Cro. 478.*

Kinds of
Waste.

There are two Kinds of Waste, *voluntary* or *actual*, and *permissive*.

Voluntary
and permis-
sive.

1. *Voluntary*, by *Commission*, that is, By cutting down Timber-Trees, prostrating Houses, or the like; and the same Word has the Statute of *Glouc. c. 5. Que aver fait Waste*, and yet is understood as well of passive as active Waste; for he who suffers a House to decay, which he ought to repair, does the Waste: And therefore if a Man makes a Lease for Years by Indenture of a House and Lands, upon Condition that if it happen that the Lessee commits Waste, that the Lessor shall re-enter; in this Case if the Lessee suffers the House to be wasted, the Lessor shall re-enter. 2. *Permissive*, *i. e.* By Omission, or not doing, as in not Repairing. *2 Inst. 145.* Both are equally injurious to him that has the Inheritance.

Active and
passive.

Waste in
Houses.

In pulling
them down,
&c.

Waste may be committed in Houses, by pulling or prostrating them down, or by suffering them to be uncovered, whereby the Spars or Rafters, Planchers or other Timber of the House becomes rotten. But if the House be uncovered when the Tenant comes in, it is no Waste in the Tenant to suffer the House to fall down. *Co. Lit. 53. a.*

Yet in such Case the Lessor shall have the Timber, and so he shall if a House be pulled down or blowed down by Tempest. *11 Co. 81. b.*

Though a House be ruinous at the Tenant's coming in, yet if he pulls it down, it is Waste, unless he builds it up again. *Co. Lit. 53. a.*

If Glass Windows (tho' glazed by the Tenant himself) be broken down or carried away, it is Waste; for it is Part of the House. *Co. Lit. 53. a. 10 Co. 63, 64.*

The same is of new Chimney-pieces; tho' in some Places they pretend a Custom to take them down within the Term, if they set up the old Chimney-pieces.

And so it is of Wainscot fastened by Nails, Screws or Irons put thro' Posts or Walls, Benches, Doors, Furnaces, &c. fix'd to the House, either by him in Remainder or Reversion, or by the Tenant himself. *Co. Lit. 53. a. 4 Co. 64.*

If Wainscot, Benches, Furnaces, &c. are not fix'd, they may be taken away at any Time. And a fix'd Furnace may be taken away at any Time within the Term, if it is not fixed to the Walls or Posts of the House.

If one pulls down a Malt-Mill, and builds a Corn-Mill, it is Waste, tho' the Corn-Mill is of greater Value.

If the Tenant builds a new House, it is Waste, (1 Roll. Abr. 507. *contra*) and then if he suffers that to be wasted, it is a new Waste. *Co. Lit. 53. a.*

If the House falls down by Tempest, or is burnt by Lightning, or thrown down by Enemies, &c. without the Fault of the Tenant, he shall not be charged with Waste, (*Plowd. 29. 1 Co. 98. Co. Lit. 283.*) unless he bound himself by Covenant that he would leave it in as good a Condition as he found it. *Dr. & Stud. Dial. 2. c. 4. 1 Roll. Abr. 939.*

But in this Case, or where the House was ruinous at his coming in, and falls down, the Tenant may build the same again with such Materials as remain, and with other Timber which he may take growing on the Premises. *Co. Lit. 53. a.*

Yet he must not make the House lesser or larger than it was before, or fell the Trees, and with the Money build it up, for the Sale is Waste. *Ibid.*

If the House is uncovered by Tempest, the Tenant must repair it in convenient Time. *Co. Lit. 53. a.*

And tho' there be no Timber growing upon the Ground, yet the Tenant, at his Peril, must keep the House from wasting. *Co. Lit. 53. a.*

A Lessor has no Remedy against a Tenant at Will for permissive Waste; but a Tenant for Years is of Course bound to sustain or repair the House. *Lit. §. 71. Co. Lit. 57. a.*

If one suffers the Houses to be wasted, and then fells Timber to repair them, this is double Waste. *Co. Lit. 53. b.*

But in many Cases a Tenant for Life or Years may fell Timber to repair, tho' he is not forced to it; as if a House is ruinous at the Time of the Lease made, he is not bound to repair it; but if he cuts down Timber, and doth repair it, he may justify it; for the Law doth favour the Maintenance of Houses for the Habitation of Mankind. And therefore if two or more Jointenants or Tenants in Common be of a House of Habitation, and one will not repair the House, the other shall have a Writ *De reparatione facienda*. And the Writ says, *Ad sustentationem ejusdem domus teneantur*.

So it is if the Lessor covenants to repair the House, the Lessee (if the Lessor does not do it) may with Timber growing on the Ground repair it, tho' he cannot be compelled to it. *Ibid.*

A Tenant may dig for Gravel or Clay (tho' no Pit was open at the Time of the Lease) for Reparation of the House, by the same Reason that he may cut down Timber to repair it. *Co. Lit. 53. b.*

If the House is burnt by Negligence or Mischief, it is Waste. *Ibid.* See Stat. 6 Ann. c. 31.

If the Tenant cuts down or destroys any Fruit-Trees growing in the Garden or Orchard, it is Waste; but if such Trees grow upon any Part of the Ground out of the Garden or Orchard, it is no Waste. *Co. Lit. 53.*

If the Tenant of a Dove-house, Park, Warren, Vivary or Fish-pond, &c. does take so many Pigeons, &c. as that such sufficient Store is not left as he found there when he first entered, it is Waste. *Co. Lit. 53. a. 2 Inst. 304.*

And to suffer the Park-pales to decay, whereby the Deer are lost or dispersed, it is Waste.

Waste in Land. If a Tenant converts Arable Land into Wood, or Wood into Arable Land, or Meadow into Arable, or Arable into Meadow, or Pasture into Arable, it is Waste; for it not only changes the Course of the Husbandry, but the Proof of the Landlord's Evidence of his Estate. *Co. Lit. 53. b.*

If ancient Meadow Ground beyond the Memory of Man, or Brook Meadow, is ploughed up, it is Waste. *2 Roll. Abr. 814.*

But if Meadow Ground hath been at any Time Arable, or sometimes Meadow and sometimes Pasture, it is no Waste to plough it up. *Ibid.*

Therefore such Meadow must be defended from being ploughed up by Covenant, (*viz.*) to pay so much an Acre (as five Pounds an Acre, &c.) if the Tenant doth plough it up. *2 Roll. Abr. 815.*

For an absolute Restraint to plough is void; [*Quia*] because Arable is to be preferr'd before Meadow. *Ibid.*

Waste in
Gardens and
Orchards.

Waste in
Dove-houses,
Parks, &c.

Waste in
Land.

It

It is Waste to suffer a Wall of the Sea to be in Decay, so as by the flowing and reflowing of the Sea the Meadow or Marsh Ground is surrounded, and thereby rendered unprofitable. *Co. Lit. 53. b.*

But if the Land is surrounded suddenly by the Violence of the Sea, occasioned by a Tempest, without any Default of the Tenant, it is no Waste that is punishable. *Co. Lit. 53. b.*

So it is if the Tenant does not repair the Walls or Banks against Rivers, or other Waters, whereby the Meadows or Marshes are surrounded, and become rushy and unprofitable. *Co. Lit. 53. b.*

Digging for
Gravel,
Mines, &c.

Digging for Gravel, Lime, Clay, Stone, Brick, Earth, &c. or for Mines of Metal, Coal, &c. hidden in the Earth, which were not open when the Tenant came in, is Waste; but he may dig for Gravel, Clay, &c. for the Reparation of the House, as well as he may take convenient Timber-Trees. *Co. Lit. 53. b.*

If one makes a Lease of his Land for Life or Years, in which there is a Mine of Coals, &c. not mentioning any Mines in his Lease, the Lessee may dig and take the Profit of such Mines as were open at the Time of the Lease made. *Co. Lit. 54. b. 5 Co. 12.*

But he cannot dig for any new Mine that was not open, for that would be Waste. *Ibid.*

And if there are open Mines, and the Owner makes a Lease of the Land with the Mines therein, this shall extend to the open Mines only, and not to any hidden Mine. *Ibid.*

But if there be no open Mine, and the Lease is made of the Land with all Mines, the Tenant may dig for Mines, and have the Profits; otherwise those Words would be void. *Ibid.*

Trees and
Woods.

Waste in Trees and Woods. Trees are Parcel of the Inheritance; and tho' they are excepted in a Lease, yet they are not Chattels.

The Lessor after he has made a Lease for Life, may by Deed grant the Trees, or reasonable Estovers out of them, to another and his Heirs, and the same shall take Effect after the Death of the Lessee. *Ibid.*

But such a Gift to a Stranger is void during the Estate for Life, because of the particular Prejudice it may be to the Lessee. *Ibid.*

Timber is reserved by Law to the Lessor; therefore if it be cut down by a Lessee, the Lessor may take it away; the Lessee had only an Interest in Trees while standing, as in the Fruit, Shrowd, Shadow, &c. 4 Co. 62, 63. 5 Co. 11, 76. 11 Co. 48, 50, 81. On this Account, if he cuts down Timber-Trees, (*viz.*) Oak, Ash and Elm, (which are Timber-Trees in all Places, except Elms on some Copyhold Estates) or tops them, or doth any other Act whereby the Timber may decay, it is Waste. *Co. Lit. 53. a.*

And if the Lessee has covenanted to leave the Wood in as good Plight at the End of the Term as he found it, the Lessor shall presently have an Action of Covenant for cutting down the Timber, for now it is not possible for him to perform the Covenant, or to leave the Wood in as good Plight as he found it. Otherwise, if during the Term the Lessee do Waste in Houses; for these may be repaired before the Term expires. *F. N. B. 145. 5 Co. 21. 7 Co. 15.*

Also in Counties where Timber is scarce, and Beech and the like serves to build Houses for the Habitation of Man, or the like, they are to be accounted Timber, and to cut them down is Waste. *Co. Lit. 53. a.*

If Timber-Trees are thrown down by the Wind, the Landlord or Lessor shall have them. 4 Co. 63. 11 Co. 81.

If a Tenant suffers the young Germins to be destroy'd by Beasts, or does stub them up, it is Destruction. *Co. Lit. 53. a.*

Cutting down Willows, Beach, Birch, Asp, Maple, &c. standing in the Defence and Safeguard of the House, is also Destruction. *Co. Lit. 53. a.*

If there is a Quick-set Fence of white Thorn, and the Tenant or Lessee stubs it up, or suffers it to be destroy'd, it is Destruction. *Co. Lit. 53. a.*

And for all these and the like Destructions an Action of Waste lies. *Co. Lit. 53. a.*

For Waste and Destruction in a large Sense are synonymous Terms.

Turning Trees into Coals for Fuel, when there is sufficient dead Wood, is Waste. *Co. Lit. 53. b.*

The Tenant may take sufficient Wood to repair Walls, Pales, Fences, Hedges and Ditches, as he found them; but not to make these a-new. *Co. Lit. 53. b.*

And he may take sufficient Plough-bote, Fire-bote, and other House-bote. *Co. Lit. 53. b.*

He may also cut down Underwood at seasonable Times. *2 Roll. Abr. 817.*

A Copyholder without Custom may cut down great Trees to repair his Copyhold House, tho' this may be restrained by Custom; or he may be restrained to cut them down without Assignment of the Lord or his Bailiff. *1 Roll. 508.*

A Tenant also may cut down dead Wood. *4 Co. 63.*

Dilapidation or Waste of Ecclesiastical Places, Houses and Buildings, is a good Cause of Deprivation. Some say an Action of the Case will lie for Dilapidations. *3 Inst. 204. 11 Co. 49. 3 Lev. 116. 1 Lev. 268.*

If he who has the Inheritance fears Waste will be committed in any of the foregoing Instances, he may (before any Waste done) have a Prohibition directed to the Sheriff, that he shall not permit Waste to be done by the Tenant; and then the Sheriff may take the *Posse Comitatus*, and withstand the doing of it. *F. N. B. 55. 1 Co. 115. Co. Lit. 53. b. 2 Inst. 146, 299.*

Or he in Remainder or Reversion may have an Injunction out of the Chancery to stay the Waste. *F. N. B. 55. 1 Co. 115. Co. Lit. 53. b. 2 Inst. 146, 299.*

He in Reversion, either personally or by another, may enter into the House or Lands, let for Life or Years, to see if Waste is committed. *2 Inst. 306.*

A Patron may have a Prohibition to hinder a Person from cutting down Trees to his own private Use. *11 Co. 49. 2 Roll. Abr. 819.*

The Forfeiture and Judgment in Waste appears in the Statute of *Gloucester*, or 5 & 6 Ed. 1. c. 5. For by it, the Party convicted of Waste shall forfeit the Thing wasted, and Recompence thrice so much as the Waste is taxed at. [See *West. 2.* or the 13 Ed. 1. c. 14. and the 8 & 9 W. 3. c. 11. for Recovery of Costs, and also 11 & 12 W. 3. c. 4. §. 4. concerning wilful Waste in the Lands of Papists disabled, &c.]

If Waste be done *sparsim* here and there in Woods, the whole Woods shall be recovered, or so much wherein the Waste *sparsim* was done. *Co. Lit. 54. a. 2 Inst. 303, 304.*

And so in Houses, so many Rooms shall be recovered wherein there is Waste done; but if the Waste is committed here and there throughout, all shall be recovered. *Ibid.*

Regularly, he that enters or recovers by Force of an implied Condition, shall not avoid precedent Incumbrances; for if a Tenant for Life grants a Lease for Years, and afterwards doth Waste, and the Lessor recovers in an Action of Waste against the Tenant for Life, he shall avoid the Lease made before the Waste done; because the Action of Waste must of Necessity be brought against the Lessee for Life to recover the Place wasted, which must bind the Lessee for Years. *Co. Lit. 233. b. 234. a.*

A precedent Rent granted out of the Land shall not be avoided. *Ibid.*

For if Lessee for Life grants a Rent-Charge, and afterwards doth Waste, and the Lessor recovers in an Action of Waste, he shall hold the Land charged during the Life of Tenant for Life. *Ibid.*

But if the Rent was granted after the Waste done, the Lessor shall avoid it. *Ibid.*

None shall have Judgment to recover in an Action of Waste, where the Waste is of small Value. *Co. Lit. 54. a. 2 Inst. 306.*

Yet the Law will take Notice of Waste in Trees to the Value of three Shillings and Four-pence, and suffer Judgment. *Ibid.*

And many Things together may make Waste to a Value, and amount to a Forfeiture. *Ibid.*

(F) By Bankruptcy.

LANDS and Tenements may be forfeited or lost by Bankruptcy; therefore it will be proper to shew, who may be a Bankrupt, what Acts make a Bankrupt, and how Lands and Tenements may be forfeited or lost by Bankruptcy.

Who may be, and what Acts make a Bankrupt.

First, *Who may be a Bankrupt, and what Acts make a Bankrupt.*

A Bankrupt (derived from *Banque*, a Table, and *Route*, the Sign of the Table that was fixed in the Earth) is he or she that has gotten other Mens Goods into his or her hands, and hides in order to deceive his or her Creditors; *4 Inst. 277.* but is more particularly described by the following Statutes.

By Stat. 13 El. c. 7. If any Person who has used the Trade of Merchandize, and sought his Living by Buying and Selling in Grofs, or by Retail, or shall use the Trade of a Scrivener, receiving other Mens Money, and doth depart the Realm, or

D d

begins

begins to keep his or her House, or otherwise absents himself or herself, or suffers him or herself willingly to be arrested, outlawed or imprisoned, without just or lawful Cause, &c. to the Intent to defraud Creditors, shall be deemed a Bankrupt.

In *Smith & al' against Mills*, 2 Rep. 25. The Court considered the several Parts and Branches of the said Statute thus: 1. The Act describes a Bankrupt, and whom he defrauds, viz. the Creditors. 2. To whom the Creditors should complain for Relief, viz. to the Lord Chancellor. 3. How and by what Relief and Remedy is provided, viz. by Force of a Commission under the Great Seal, &c. 4. The Authority of the Commissioners, viz. to sell, &c. that is to say, to every one of the Creditors a Portion, Rate and Rate alike, according to the Quantity of his or their Debt. So that the Intent of the Makers of the said Act expressed in plain Words was to relieve the Creditors of the Bankrupt equally, and that there should be an equal and rateable Proportion observed in the Distribution of the Bankrupt's Goods amongst the Creditors, having Regard to the Quantity of their several Debts, so that one should not prevent the other, but all should be *in equali jure*.

And the Stat. 1 Jac. 1. c. 15. is to the same Effect as the 13 El. c. 7. And adds moreover, That if any Person that has used the Trade of Merchandize, &c. shall willingly and fraudulently procure him or herself to be arrested, or his or her Goods to be attached or sequestred, or does depart from his or her Dwelling-house, or makes or causes to be made any fraudulent Grant or Conveyance of his Lands, Tenements, Goods or Chattels, to the intent to defraud his or her Creditors, or being arrested for Debt, shall lie in Prison six Months or more upon the Arrest, shall be adjudged a Bankrupt.

And the Stat. 21 Jac. 1. c. 19. adds farther, That if Persons using the Trade of Merchandize, &c. (as before) and Scriveners, who shall either by themselves or others obtain any Protection, (except by Privilege of Parliament) [See 7 Ann. c. 12.] or shall by Petition or Bill endeavour to compel their Creditors to take less than their due Debts, or to gain Time for the Payment thereof; or being arrested for Debt, shall after the Arrest lie in Prison two Months, or more, or being arrested for a just Debt of a hundred Pounds, or more, shall escape out of Prison, shall be adjudged a Bankrupt. [See Stat. 10 Ann. c. 15. whereby the Clause of being indebted in a hundred Pounds, and not paying or compounding for the same within six Months after the same shall grow due, and the Debtor arrested, or within six Months after an original Writ sued out and Notice given; or procuring his or her Enlargement by putting in common or hired Bail, shall be adjudged a Bankrupt from the Time of his or her said first Arrest, is repealed; and the Act of 21 Jac. 1. c. 19. and all other Acts, so far forth as they relate to the said Descriptions of a Bankrupt, are made void.]

A single Act is enough to make a Bankrupt.

In short, every Person a Subject born, or Stranger, Alien or Denizen, who shall use the Trade of Merchandize by way of Bargaining, Exchange, Bartery, Chevizance, or otherwise, in Gro's or by Retail, or seeking his Living by Buying and Selling, or that shall use the Trade or Profession of a Scrivener, and that shall commit an Act of Bankruptcy, shall be a Bankrupt.

By Stat. 14 C. 2. c. 24. it seems that Noblemen, Gentlemen and Persons of Quality, if they be not Adventurers in the East-India or Guinea Company, or the Royal Fishery, may be Bankrupts.

A Nobleman having the sole Importing of Cards or Glasses, may be a Bankrupt. *Stone's Reading on Stat. Bank.* 166.

So may a Member of Parliament. *Davis*, p. 6, 7.

So may private Gentlemen who invest their Money in Trade to make a better Interest, tho' they have never been bred up to Trade, nor do not act in Person, nor any wife appear in Trade.

So may Lawyers and Physicians if they Trade or Merchandize.

So may Innkeepers or Innholders, Dealers and Chapmen; *sed vide post*.

So may a Scrivener.

And a Trader leaving off, or who has left off Trade, may be a Bankrupt for his Debts contracted when a Trader. *Comb.* 463. *Palm.* 325. *Vent.* 5. But not those contracted afterwards. *Comb.* 463.

A. whilst a Trader owes 100*l.* to B. and leaves off his Trade, and after that borrows another 100*l.* of B. and afterwards pays one of the 100*l.* not mentioning which, the 100*l.* shall be applied to the first Debt, and he shall not be a Bankrupt for that which remains. *Comb.* 463.

Person who
has left off
Trade.

A. in Trade gets in Debt, leaves off his Trade and lives in the Country upon his Land, he may be a Bankrupt for such Debt. *Palm.* 325.

And if a Man for a certain Time deals in Trade, and afterwards leaves his Trade and Stock in the Hands of another, and has Part of the Profit, and suffers Part of the Loss; if after such Desertion he becomes in Debt, he may be a Bankrupt. *Palm.* 325.

B. who had been a Merchant and had left off Trade, sold such Merchandizes as were only the Effects of his former Trade, and which he could not immediately put off on ceasing to trade. *Per Cur. E.* 21 C. 2. *B. R.* this could not make him a Trader; for the Statute extends only to those who live by Buying and Selling. But in *M.* 23 C. 2. *B. R.* it came on again; when it was proved that *B.* was a *Turkey* Merchant, and traded in 1656; but it was not proved that he imported or exported any Thing after, but that having the Stock of his former Trade on his Hands to a great Value, on the Loan and Credit whereof he obtained divers large Sums of Money; and now *per Cur.* this brings him within the Statute for such Debts as he contracted after 1656, otherwise the Mischief would be great; because Men cannot take Notice when another withdraws his Trade, or when he commands Factors beyond Sea to deal no further with him; but Persons seeing great Quantities of Goods in his Hands are apt to trust him; and therefore it is fit they should be relieved by the Statute. *1 Vent.* 29. *Sed Q. vide ante.*

If a Merchant buys beyond Sea and sells here, or buys here and sells beyond Sea, it is Trading, and he may be a Bankrupt. *T. Jones* 141.

Even if he be a Subject or Alien Resident beyond Sea; for by Trading thither and back he gains a Credit here. *Salk.* 109.

If a Trader be Security for any Person, he may be a Bankrupt. *Palm.* 325. *Stone's Reading* 183.

Bankers, Brokers and Factors may be Bankrupts. *Stat.* 5 G. 2. c. 30.

A Feme Covert sole Trader, by the Custom of *London*, may be a Bankrupt.

But no Adventurer in the *East-India* or *Guinea* Company, or the Royal Fishing Trade, to be a Bankrupt unless he Trades, Trafficks or Merchandizes in another Way or Manner. *Stat.* 14 C. 2. c. 24.

Nor an Innkeeper. *1 Show.* 96, 268. *Comb.* 181. *3 Lev.* 309. For he doth not properly sell what he buys, but utters it at such reasonable Rates as he thinks fit, with Respect to Attendance of Servants, &c. *3 Cro.* 549, 550. *1 Danv. Abr.* 686, 687.

Nor tho' he has a Share in a Ship. *Holt's Rep.* 92.

But if they deal, as in buying Wine, Malt, &c. and selling it to Gentlemen in the Country, there are frequent Instances of their being Bankrupts, under the Titles *Innholder, Dealer and Chapman.*

A Pawnbroker (if he does not otherwise deal) may not be a Bankrupt; for he does not buy or sell for himself, and is only a common Lender of Money at Interest, and the Pledges which he sells are for the Benefit of the Borrower. But if he otherwise Trades he may be a Bankrupt, in which Case he is usually stiled Pawnbroker, Dealer and Chapman. *Davis* 24.

A Taylor who only makes Clothes is not liable to be a Bankrupt, because he only works for Hire; but where he buys and sells the Materials, &c. as the Taylors in *London*, &c. do, he is liable, by the Name of *Taylor and Chapman.*

By *Stat.* 7 Ann. c. 7. Members of the *Bank of England* shall not be adjudged liable to the Statutes of Bankrupts.

By *Stat.* 9 Ann. c. 21. & 3 G. 1. c. 9. Members of the *South-Sea* Company shall not be liable to the Statutes of Bankrupts.

By *Stat.* 5 Geo. 2. c. 30. No Farmer, Grasser, or Drover of Cattle, or Receiver General of Taxes granted by Parliament, shall be deemed a Bankrupt.

By *Stat.* 6 Geo. 1. c. 4. No Person concerned about *Circulating Exchequer Bills* shall be liable to the Statutes of Bankruptcy.

It is not buying or selling of Land, but of personal Things, that may make a Bankrupt, nor is it buying only, or selling only, but Buying and Selling. *Wood's Inst.* B. 2. c. 4.

Not one single Act of Buying and Selling, but where one gets his Livelihood by it. *Ibid.*

Such as live on their manual Labour only, as Husbandmen, Labourers, Handicraftsmen, are not Traders within the Statutes: But such as buy Wares and convert them into saleable Commodities, and to get their Livelihood by Buying and Selling, may

may be Bankrupts within the Statutes; as Shoemaker, Locksmith, Clothier, &c.
3 Cro. 31.

How Lands,
&c. may be
forfeited by
Bankruptcy.

Secondly, *How Land, Tenements and Hereditaments may be forfeited and lost by Bankruptcy.*

A Commission of Bankruptcy issues under the Great Seal, upon a Petition to the Lord Chancellor, &c. by a Creditor whose Debt amounts to the Sum of 100*l.* at least, or by two Creditors whose Debts amount to 150*l.* or upwards, or by three or more Creditors whose Debts amount to 200*l.* or upwards, against any Person or Persons being Bankrupts, of which an Affidavit must be made, and a Bond must be given to the Lord Chancellor in the Penalty of 200*l.* conditioned for the proving his Debt, &c. After the Person is declared a Bankrupt, &c. and is summoned to appear at the Meeting assign'd by the Commissioners, and the Bankrupt's *Trade, Acts* of Bankruptcy, and his *Estate and Debts* are discovered by the Examination of the Bankrupt himself, his * Wife, and other Witnesses; and the Creditors are sworn to the Value of their Debts, &c. according to the *Stat. 13 Eliz. c. 7. 1 Jac. 1. c. 15. 21 Jac. 1. c. 29.* but more particularly according to the *Stat. 5 G. 2. c. 30.* by which a *Certificate* of the Bankrupt's Conformity in all Things is to be made to the Lord Chancellor, &c. Then by Virtue of one or more of those Statutes, the Commissioners may sell all the Bankrupt's Lands, &c. in his own Possession at the Time of his becoming Bankrupt, whether in Fee-simple, Fee-tail, for Life or Years, Freehold or Copyhold, towards Payment of his Debts.

Sale of Bank-
rupt's Lands,
&c.

By *Stat. 13 El. c. 7.* it is enacted, That the Commissioners shall have full Power, at their Discretion, to order and direct as to the Bankrupt's Lands, Tenements, Hereditaments, as well Freehold as Copyhold, or Customary, which he or she had in his or her own Right before he or she became Bankrupt; and also with all such Lands, Tenements and Hereditaments, as such Person had purchased or obtained for Money, or other Recompence jointly with his Wife, Child or Children, to the only Use of the Bankrupt, or of or for such Use, Interest, Right or Title as such Bankrupt then shall have in the same which he or she may lawfully part with, or with any Person or Persons of Trust, to any secret Use of such Bankrupt, and also with his or her Money, Goods, Chattels, Wares, Merchandizes and Debts wheresoever they may be found or known, and cause the said Lands, Tenements, Fees, Annuities, Offices, Goods, Chattels, Wares, Merchandizes and Debts, to be searched, viewed, rented and appraised to the best Value; and by Deed indented, inrolled in one of the King's Courts of Record, to make Sale of the said Lands, Tenements and Hereditaments, and of all Deeds, Writings and Evidences touching only the same belonging to such Bankrupt; and also of all Fees, Annuities, Offices, Goods and Chattels, or otherwise, to order the same for true Satisfaction and Payment of the Creditors, in Proportion to their Debts; and every Direction, Order, Bargain, Sale, and other Things done by the Commissioners, shall be good and effectual in Law against the said Bankrupt, his Wife, Heirs and Children, and such Person and Persons as by such joint Purchase with the Bankrupt have or shall have any Estate or Interest in the Premises, and against all other Person and Persons claiming by, from or under such Bankrupt, by any Act or Acts had, made or done after such Person becomes Bankrupt; and also against the Lords of the Manors, whereof the said Copyhold or Customary Lands be held, their Heirs, Successors and Assigns, and every of them.

Copyhold E-
states.

Provided that all and every Person or Persons to whom any such Sale of Copyhold or Customary Lands or Tenements shall be made, shall, before such Time as they, or any of them, shall enter or take any Profit of the same Lands or Tenements, agree and compound with the Lords of the Manors of whom the same shall be holden, for such Fines or Incomes as heretofore has been most usual and accustomed to be yielded or paid therefore: And that upon every such Agreement or Composition, the said Lords for the Time being, at the next Court to be held at or for the said Manors, shall not only grant unto the said Vendee or Vendees, upon Request, the same Copyhold or Customary Lands or Tenements, by Copy of Court-Roll of the same Manors, for such Estate or Interest as to them shall be sold, and reserving the antient Rents, Customs and Services; but also in the same Court admit them Tenants of the same Copy or Customary Lands, as other Copyholders of the same Manors have been wont to be admitted, and to receive their Fealty accordingly.

* Note, The Wife is only to be examined as to the Estate and Effects, and not as to the Acts of Bankruptcy.

Provided always, that the Commissioners shall on lawful Request of the Bankrupt not only make a true Declaration to the same Bankrupt of the employing and bestowing of his said Lands, Tenements, Offices, Fees, Goods, Chattels and Debts so paid and satisfied to their said Creditors, but also make Payment of the Overplus of the same (if any such shall be) to the said Bankrupt, their Executors, Administrators or Assigns.

And further enacted, That if after any Act of Bankruptcy, and Complaint thereof made to the Commissioners by any Party aggrieved concerning the Premises, knowing, supposing or suspecting any of the Goods, Chattels, Wares, Merchandizes or Debts of such Bankrupt to be in Custody, Use, Occupying, Keeping or Possession of any Person or Persons, or any Person or Persons be indebted to any such Bankrupt, do make Relation thereof to the said Commissioners, or the major Part of them, then they may call before them by Process, &c. every Person or Persons so known, suspected or supposed to have any such Goods, Chattels, Wares, Merchandizes or Debts, in his or their Custody, Use, Occupation, Keeping or Possession, or supposed or suspected to be indebted to such Bankrupt, and upon their Appearance to examine them, and every of them, as well by their Oaths as otherwise, by such Ways and Means as the said Commissioners, or the major Part of them, shall think meet, for or upon the Specialty, Certainty, true Declaration and Knowledge of all and singular such Goods, Chattels, Wares, Merchandizes and Debts of any such Bankrupt, as be supposed or suspected to be in his Custody, Use, Occupation or Possession, and all such Debts as by them, or any of them, shall be supposed or suspected to be owing to any Bankrupt: And if any such Person or Persons, upon such Examination, do not disclose, and plainly declare and shew the whole Truth of such Things as he or they shall be examined of concerning the Premises, to his Knowledge, or do deny to swear, then such Person or Persons so denying to swear, or being examined do not declare the plain and whole Truth concerning the Premises, upon due Proof thereof before the major Part of the said Commissioners, by Witness, Examination or otherwise, shall lose and forfeit double the Value of all such Goods, &c. so concealed, and not wholly and plainly declared and shewed: Which Forfeiture shall be levied by the major Part of the said Commissioners, of the Lands, Tenements, Hereditaments, Goods and Chattels of such Person so denying to swear, or not disclosing the whole Truth as aforesaid, by such Ways, &c. as before appointed for the Bankrupt; and the same Forfeiture or Forfeitures to be distributed or employed to and for the Satisfaction and Payment of the Debts of the said Creditor or Creditors, in such Manner as the Lands, &c. of Bankrupts as aforesaid.

Commissioners to account to the Bankrupt.

Sale of Goods, Chattels, Debts, &c.

And that if at any Time before or after that any Person commits an Act of Bankruptcy, any Person or Persons do fraudulently by Covin or Collusion claim, demand, recover, possess or detain any Debts, Duties, Goods, Chattels, Lands or Tenements, by Writing, Trust or otherwise, which were or shall be due, belonging or appertaining to any such Bankrupt, other than such as he or they can and do prove to be due by Right and Conscience in Form aforesaid, for Money paid, Wares delivered, or other just Consideration or Cause reasonable, to the just Value thereof, before the major Part of the said Commissioners, and the same to proceed (*bona fide*) without Fraud or Covin; that then every such Person or Persons so craftily demanding, claiming, having, possessing or detaining any such Debt, Duty, or other Thing as aforesaid, shall forfeit and lose double as much as he or they shall so claim, demand, detain or possess; which said Forfeiture shall be levied, recovered and employed as aforesaid.

Provided also, that if it happens the Creditors of any such Bankrupt be satisfied and paid their Debts and Duties of or with the proper Lands, Tenements, Goods, Chattels and Debts of the said Bankrupt, or of or with the same and some Part of the Forfeitures of the double Values aforesaid, and that there shall remain an Overplus of the said Forfeitures, then one Moiety of the said Overplus shall be by the said Commissioners, within convenient Time after the Levying thereof, paid to the King, and the other Moiety distributed amongst the Poor.

Provided always, that if any Person who shall be declared a Bankrupt by this Act, shall at any Time after purchase Lands, Tenements, Hereditaments, Free or Copyhold, Offices, Fees, Goods or Chattels, shall descend, revert, or by any Means come to any such Person, being a Bankrupt as aforesaid, before such Time as their Debts due to their Creditors shall be fully satisfied and paid, or otherwise agreed for, that then the said Lands, &c. shall by the major Part of the Commissioners be bargained, sold, extended, Debts paid.

Lands or Goods purchased, descending or coming to a Bankrupt after Bankruptcy and before Debts paid.

extended, delivered and used for and towards the Payment of the said Creditors, in the Manner as the other Lands, &c. of the Bankrupt which he had when declared a Bankrupt.

Lands conveyed before Bankruptcy.

Provided that this Act shall not extend to any Lands, Tenements or Hereditaments, Free or Copyhold, which any Bankrupt shall assure *bona fide*, and not to the Use of the Bankrupt himself only, or of his Heirs; and that the Parties to whose Use such Assurance has or shall be made, be not, at or before the making such Assurance, privy or consenting to the fraudulent Purpose of any such Bankrupt to deceive his Creditors.

Lands conveyed to others, or Debts transferred in other Mens Names.

And by Stat. 1 Jac. 1. c. 15. it is enacted, That if any Bankrupt shall convey, or procure or cause to be conveyed to any of his Children, or any other Person or Persons, any Manors, Lands, Tenements, Hereditaments, Offices, Fees, Annuities, Leases, Goods, Chattels, or Transfer of his Debts in other Mens Names, except the same shall be purchased, conveyed or transferred, for or upon Marriage of any of his or her Children, both the Parties married being of the Years of Consent, or some valuable Consideration, the major Part of the Commissioners may bargain, sell, grant, convey, demise, or otherwise dispose thereof, in as ample Manner as if the said Bankrupt had been actually seised or possessed thereof, or the Debts were in his own Name, of the like Estate and Interest, to his and their own Use, at such Time as he or she became Bankrupt; and that every such Grant, &c. shall be good and available, to all Intents and Purposes against the Bankrupt, his Heirs, Executors, Administrators and Assigns, and such Children and Persons as shall be subject to this Statute, and against all other Persons claiming under such Bankrupt, or such other Persons to whom such Conveyance shall be made by the said Bankrupt, or by his Means or Procurement.

Of Debts due to the Bankrupt.

And for that the Power and Authority given to the Commissioners of Bankrupts, touching the Debts due to the said Bankrupt, is not so full and perfect, as that the full Benefit thereof, in due Course, might be employed to the Use of the said Creditors, as was intended: For Remedy therefore, it was further enacted, That the Commissioners, or the greater Part of them, may grant and assign, or otherwise order or dispose all or any of the Debts due or to be due to and for the Benefit of the said Bankrupt, by what Person or Persons soever, or in what Manner and Form soever, to the Use of the Creditors of the Bankrupt; and that the same Grant, Assignment or Disposition of the said Debts as aforesaid, to be made by the said Commissioners, or the greater Part of them, shall so vest the Property, Right and Interest of the said Debt and Debts, in the Person or Persons of him, her or them, to whom it shall be granted, assigned or ordered by the said Commissioners, or the greater Part of them, as fully to all Intents and Purposes as if the said Bills, Bonds, Statutes, Recognizances, Judgment or Contract whereupon the said Debt or Debts, Deed or Deeds shall arise or grow, had been made to, or with or for the said Person or Persons to whom the same shall be so granted, assigned or disposed by the Commissioners; and that after such Grant, Assignment or Disposition of the said Debts, that neither the Bankrupt, nor any other to whom any such Debt shall be due, shall have Power to recover the same, nor to make any Release or Discharge thereof; neither shall the same be attached as the Debt of the Bankrupt, or such said other Person or Persons to whom the same shall be due by any other Person or Persons, according to the Custom of the City of London, or otherwise; but that the Party or Parties to whom the Debts shall be assigned, shall have like Remedy to recover the same, as fully and lawfully in the Name or Names of the Person or Persons to whom the same shall be so granted, assigned or ordered by the said Commissioners, in all Respects and Purposes as the Party himself might have had.

How the Bankrupt's Lands and Goods shall be divided notwithstanding Judgment, &c.

And by Stat. 21 Jac. 1. c. 19. For the better Division and Distribution of the Lands, Tenements, Hereditaments, Goods, Chattels, and other Estate of the Bankrupt, to and amongst his or her Creditors, it is enacted, That the Commissioners, or the greater Part of them, shall and may examine upon Oath, or by any other Ways or Means as to them shall seem meet, any Person or Persons for the Finding out and Discovery of the Truth and Certainty of the several Debts due and owing to all such Creditor and Creditors as shall seek Relief by the Commission; and that every Creditor having Security for his Debt, by Judgment, Statute, Recognizance, Specialty with Penalty or without Penalty, or other Security, or having no Security, or having made Attachments in London, or any other Place, by Virtue of any Custom there used, of the Goods and Chattels of every such Bankrupt, whereof there is no Execution

cution or Extent served and executed upon any the Lands, Tenements, Hereditaments, Goods, Chattels, and other Estate of such Bankrupt, before such Time as he or she shall or do become Bankrupt, shall not be relieved upon any such Judgment, Statute, Recognizance, Specialty, Attachment, or other Security, for any more than a ratable Part of their just and due Debts with the other Creditors of the Bankrupt, without Respect to any such Penalty or greater Sum contained in any such Judgment, &c.

And if it shall happen that any the Lands, Tenements, Goods, Chattels, Debts, or other Estate of any Bankrupt, be extended after such Time as he or she is become a Bankrupt, by any Person or Persons, under Colour or Pretence of his or their being an Accountant, or any way indebted unto the King, that then the Commissioners may examine upon Oath, whether the said Debts were due to such Debtor or Accountant upon any Bargain or Contract originally made betwixt such Accountant and the said Bankrupt, the said Debtor and Accountant, and his or their Servants: And if such Bargain or Contract was originally made to and with any Person or Persons than the said Debtor or Accountant, or for the Use and Trust of any other Person or Persons, then it shall and may be lawful to and for the said Commissioners, or the greater Part of them, to order and dispose of all such Lands, Tenements, Hereditaments, Goods, Chattels and Debts so extended as aforesaid, to and for the Use of the Creditors which shall seek Relief by the Commission; and that the Order and Disposition of the said Commissioners, or the greater Part of them, shall be good and available against the said Extent, and against all Persons claiming by, from or under the said Extent; and that such Person and Persons, to whom the said Lands, &c. so extended shall be bargained, sold, granted or assigned by the Commissioners, or the greater Part of them, shall have good Remedy to have, demand and recover the same, and against such Person and Persons who shall detain the same.

And for the better Payment of Debts, and discouraging Men to become Bankrupts, it is further enacted, That the Commissioners, or the greater Number of them, may by Deed indented and inrolled within six Months after the Making thereof, in some of his Majesty's Courts of Record at *Westminster*, grant, bargain, sell and convey any Manors, Lands, Tenements or Hereditaments, whereof any Bankrupt is or shall be in any wise seised of any Estate in Tail, in Possession, Reversion or Remainder, and whereof no Reversion or Remainder is or shall be in the King, his Heirs or Successors, of the Gift or Provision of his Majesty, his Progenitors, his Heirs or Successors, to any Person or Persons, for the Relief and Benefit of the Creditors of all such Bankrupts; and that all such Grants, Bargains, Sales and Conveyances, shall be good and available in the Law to such Person or Persons, and their Heirs, against the said Bankrupts, and against all and every the Issues of the Body of such Bankrupts, and against all and every Person and Persons claiming any Estate, Right, Title or Interest, by, from or under the said Bankrupts, after such Time as such Person shall become Bankrupt, and against all and every other Person and Persons whomsoever, whom the said Bankrupt by *Common Recovery*, or other Ways or Means, might cut off or debar from any Remainder, Reversion, Rent, Profit, Title or Possibility, into or out of any the said Manors, Lands, Tenements or Hereditaments.

And that if any Person that now is or hereafter shall become a Bankrupt, have heretofore granted, conveyed or assured, or shall at any Time hereafter grant, convey or assure any Lands, Tenements, Hereditaments, Goods, Chattels, or other Estate, unto any Person or Persons, upon Condition, or Power of Redemption at a Day to come, by Payment of Money, or otherwise, that the said Commissioners, or the greater Part of them, before the Time of the Performance of such Condition, to assign and appoint, under their Hands and Seals, such Person or Persons as they shall think fit, to make Tender or Payment of Money, or other Performance, according to the Nature of such Condition, as fully as the Bankrupt might have done; and that the said Commissioners, or the greater Part of them, shall, after such Tender, Payment or Performance, have Power to sell and dispose of such Lands, &c. so granted, &c. upon Condition, to and for the Benefit of the Creditors, as fully as they may sell or dispose of any the Estate of the Bankrupt.

And by the said Stat. 21 Jac. 1. c. 19. § 9. it is recited, That it often fell out that many Persons before they became Bankrupts conveyed their Goods to other Men upon good Consideration, who still kept the same, and were reputed the Owners thereof, and disposed the same as their own, and enacted, That if at any Time hereafter any Person or Persons shall become Bankrupt, and at such Time as they shall so be-

Sale of Lands
intailed.

And of Lands,
&c. mort-
gaged.

Fraudulent
Sales, and the
Bankrupt's
continuing in
Possession.

come

come Bankrupt, shall, by the Consent and Permission of the true Owner and Proprietary, have in their Possession, Order and Disposition, any Goods and Chattels whereof they shall be reputed Owners, and take upon them the Sale, Alteration or Disposition as Owners; that in every such Case the Commissioners, or the greater Part of them, shall have Power to sell and dispose the same to and for the Benefit of the Creditors, which shall seek Relief by the said Commission, as fully as any other Part of the Bankrupt's Estate.

Appointment
of Assignees.

And by *Stat. 5 G. 2. c. 30.* Commissioners, or the major Part of them, as often as they see Cause, for the better preserving and securing the Bankrupt's Estate, immediately to appoint one or more Assignee or Assignees of the Estate and Effects, or any Part thereof; which Assignee or Assignees, or any of them, shall or may be removed or displaced at the Meeting of the Creditors, so to be appointed for the Choice of Assignees, if they or the major Part of them (whose Debts respectively amount to 10*l.* or upwards) then present, and of such Persons duly authorized, shall think fit; and such Assignee or Assignees as shall be so removed or displaced, shall deliver up and assign all the Estate and Effects of such Bankrupt which shall have come to his or their Hands or Possession, or which shall have been assessed by the said Commissioners unto such other Assignee or Assignees who shall be so chosen by the Creditors as aforesaid; and all the Estate and Effects of the Bankrupt, which shall be delivered up or assigned, shall be to all Intents and Purposes as effectually and legally vested in such new Assignee or Assignees, as if the first Assignment had been made to him or them by the said Commissioners; and if such first Assignee or Assignees shall refuse or neglect by the Space of ten Days next after Notice given of the said Choice of such new Assignee or Assignees, and of his and their Consent to accept such Assignment, signified to the first Assignee or Assignees, by Writing under his or their Hands to make such Assignment and Delivery as aforesaid, every such first Assignee or Assignees shall respectively forfeit the Sum of 200*l.* to be divided and distributed amongst the Creditors towards Satisfaction of their Debts, in such Manner as the Estate of the Bankrupt is or ought to be divided and distributed, and to be recovered by Action of Debt, &c. by such Person or Persons, as such major Part of the Commissioners shall appoint to sue for the same, with full Costs of Suit.

How far these
Statutes ex-
tend.

The *Statutes* do not extend to any Lands, &c. conveyed *bona fide* by the Bankrupt before he became a Bankrupt; nor to the Lands purchased of one that is a Bankrupt, by any Act done, unless a Commission to prove him a Bankrupt is sued forth within five Years after he or she shall become Bankrupt.

But if any Bankrupt shall convey, or cause to be conveyed, to his Children, or to any other Person, Lands or Goods, except the same shall be transferred upon the Marriage of any Child, [See *Stat. 5 G. 2. c. 30. ante*] or upon some valuable Consideration, the Commissioners may dispose thereof.

All fraudulent Conveyances to deceive Creditors are within these Statutes.

Lands, &c. whereof the Bankrupt is jointly seised, may be sold (as to his Moiety) by the Commissioners.

If a Bankrupt hath Land in the Right of his Wife, it may be sold during the Coverture.

The *Dower* of a Bankrupt's Wife cannot be sold.

Otherwise, if she marries one that is a Bankrupt.

Offices of Trust which are annexed to the Person cannot be sold; but Offices of Inheritance, as a Keeper of a Forest, Warden of the *Fleet*, &c. may.

Entering Pro-
ceedings on
Record.

By the said Statute of 5 G. 2. c. 30. Upon Petition, the Lord Chancellor, &c. may order the Commissions, Depositions and Proceedings thereupon to be entred of Record, to enable Purchasers under Commissions, to make out their Right and Title to the Lands purchased.

A Copy of which Record may be given in Evidence, to prove the Commission of Bankruptcy of the Person, in Case of the Death of the Witnesses, or the Loss of the original Proceedings.

Disposal of
personal E-
state.

The Commissioners also, &c. have Power by the aforesaid *Statutes*, to dispose of the Bankrupt's personal Estate, or his Goods and Chattels which he had and was possessed of at the Time of his becoming a Bankrupt, tho' the Bankrupt sells them in Market-overt, for the Sale of the Commissioners shall have Relation to the first Act of Bankruptcy.

But no Debtor of a Bankrupt shall be in Danger for paying a Debt due to the Bankrupt before he had Notice that he was become a Bankrupt, by the 1 Jac. 1. c. 15.

The Assignees may bring Actions for the Recovery of the Bankrupt's Debts in their own Names, or compound with the Debtors to the Bankrupt.

If the Bankrupt makes his Debts payable to other Men, they are as liable as if they were payable to himself.

The Commissioners, or any other Person appointed by their Warrant under the Hands and Seals of the greatest Part of them, may break open the House, Shops, Warehouses, Trunks or Chests of the said Bankrupt, where the Bankrupt, or any of his Goods or his Writings shall be, or be reputed to be, and then seise the Bankrupt and his Goods and Chattels, &c. and send the Bankrupt to Prison.

By Stat. 5 G. 2. c. 30. Where mutual Credit hath been given betwixt the Bankrupt and others, and the Accounts are unbalanced, the Commissioners may adjust the Accounts, and the Balance shall be paid accordingly.

By the above-mentioned Statutes of *Eliz. Jac. 1.* and *5 Geo. 2.* The Commissioners (after the Bankrupt's real and personal Estate is sold) must make Distributions amongst those Creditors who came in before Distribution, to contribute to the Charge of the said Commission, having first allowed the Bankrupt five Pounds *per Cent.* out of the neat Produce of all the Estate discovered by him, so as the said Allowance is not above two hundred Pounds, or a lesser Sum; but not above three Pounds, where the Bankrupt's Estate will not pay every Creditor eight Shillings in the Pound. *2 Rep. 25, 26. Hob. 287.*

But this must be upon Certificate of the Commissioners and Creditors, to the Lord Chancellor, &c. which Certificate must be obtained without Contract or Security given as a Consideration thereof.

This Allowance, or any Privilege or Advantage, shall not extend to any Bankrupt whatsoever, who shall upon Marriage of any of his Children give (when he was not able to pay his Debts) above the Value of 100*l.* or who shall lose in one Day the Sum of 5*l.* or in the whole the Sum of 100*l.* within a Year before he became a Bankrupt, in playing at any Game whatsoever. [See Stat. 5 G. 2. c. 30.]

Aliens and Denizens, &c. may come in as Creditors upon Distribution.

If an Executor becomes a Bankrupt, a Legatee shall be relieved as a Creditor.

A Surety or Bail may come in as Creditor, if he hath paid the Debt.

One that has a Debt *not yet payable*, may be relieved upon Allowance for Payment before the Time.

But if one trusts a Bankrupt after he becomes a Bankrupt, he shall not be relieved as a Creditor. But see Stat. 7 G. 1. c. 31.

A Mortgagee is not a Creditor within the Statutes, and need not contribute to the Charges of the Commission; for he is safe without it.

So he that hath a Pledge of the Bankrupt's Goods before he was a Bankrupt.

But the Goods of another in the Bankrupt's Possession and Disposal, as if they were his own, shall be distributed as the Bankrupt's own Goods, and he must come in as a Creditor.

Those that attach the Goods of a Bankrupt, must also come in as Creditors.

In the Distribution of the Bankrupt's Estate, no more Respect shall be had unto Debts upon Judgments, Recognizances, Specialties with Penalties, &c. than to other Debts.

But the King shall be preferred before a private Person.

If the Debts cannot be fully paid, every one of the Creditors must have a Share, Rate and Rate alike, according to the Quantity of his Debt.

If the Bankrupt happens to die before Distribution, yet nevertheless the Commissioners may proceed to execute the said Commission concerning the Bankrupt's Lands, Tenements, Hereditaments, Goods and Chattels, in such Sort as they might have done if the Offender had been living. But the Commissioners must account to his Heirs, Executors, &c. and pay the Overplus to them in the same Manner as to the Bankrupt when living. See Stat. 13 El. c. 7. 1 Jac. 1. c. 15. 21 Jac. 1. c. 19. 3 G. 1. c. 12. 7 G. 1. c. 31. 5 G. 2. c. 30. All which Statutes shall be beneficially construed for the Aid and Relief of Creditors.

If the Commission is not duly taken out, or if the Commissioners do not pursue their Commission, the Party hath no other Remedy but to put in a *Traverse* contrary to the Finding of the Commissioners, that he is a Bankrupt; and to say that he is not a Bankrupt. *8 Rep. 121.*

As to Commissioners, or those acting under them, pleading the General Issue, &c. vide 1 Danv. Abr. 694.

If the Commissioners will not pay a Creditor his ratable Part, he may have an Action of Debt. But Relief may be had more properly in Chancery.

By Stat. 10 Ann. c. 15. No Acts or Statutes discharging any Bankrupt shall discharge any Partner in Trade with the Bankrupt at the Time he became a Bankrupt; nor one that was jointly bound with the Bankrupt, &c. See Stat. 6 G. 1. c. 22. 7 G. 1. c. 31. 5 G. 2. c. 30. for his Discharge from all Actions.

(G) *By Disseisin.*

Disseisin,
what.

LORD Coke says, A Disseisin is a putting out of a Man out of Seisin. *Co. Lit.* 153. *b.*

And Littleton says, A Disseisin is where a Man enters into any Lands or Tenements where his Entry is not congeable, and ousts him which has the Freehold, &c. *Lit.* §. 279. without Order of Law.

And Coke thereupon says, This Description of a Disseisin, and the (&c.) is understood only of such Lands and Tenements whereunto an Entry may be made, and not of Rents, Commons, &c. *Co. Lit.* 181. *a.*

Disseisor, who.

A Disseisor is he, (and a Disseisorefs is she) who so enters and ousts him who has the Freehold.

Disseisee, who.

And he who is so ousted is the Disseisee.

The Law will not construe it to be a Disseisin when none of the Parties intended it to be so. *Cro. Car.* 803.

Every Entry is no Disseisin, unless there be an Ouster also of the Freehold. *Co. Lit.* 181. *a.* *Carter* 162, 163.

A Disseisin always implies a Wrong. *Co. Lit.* 153. *b.*

A Jointenant, Tenant in Common or Coparcener, cannot be disseised by his Fellow, without an actual Ouster. *Hob.* 120. *T. Raym.* 371.

What Act
shall be said
a Disseisin.

If Baron and Feme purchase Lands in Fee, and after the Baron is attainted of Felony, and the King seises the Land, and after the Lord of whom it is held, upon his Suggestion, hath it delivered to him out of the Hands of the King as his Escheat, this is a Disseisin to the Wife who had a joint Estate with her Husband, for it was delivered out of the Hands of the King by a false Suggestion, and so a Disseisin to the Feme. 4 *Aff.* 4. 2 *Dan.* 624. 1 *Roll. Abr.* 658.

If a Lessee for Years is ousted by the Lessor, this is no Disseisin, yet the Estate of the Lessee is turned into a Right not grantable. *Hob.* 322.

A. seised in Fee, infeoffs B. his Trustee, B. leases, bargains and sells for 100 Years to C. to attend the Inheritance; the Lessee enters, A. afterwards continues the Possession, and makes several Leases, which are expired, and dies; afterwards his Heir leases and levies a Fine *Sur Conusance de droit*, &c. and five Years Non-claim. The Executor of the Lessee for 100 Years assigns off from the Land to E. F. who within five Years after the Fine makes no Claim; this Fine made a Disseisin, and displaced the Lease for 100 Years, and put it to a Right, and it was barred by the Fine and Non-claim. *Carter* 161, 199. A. continuing the Possession after the Lease of 100 Years, was Tenant at Will to the Lessor for 100 Years, (he having entered) and his making of Leases for Years made him a Disseisor at the Election of the Party; but if he had made a Lease for Life, it had been a Disseisin. 1 *Sid.* 337, 458, 459. If a Fine *Sur concessit* had been levied, this had not turned the Estate, viz. the Lease of 100 Years to a Right: But the Fine *Sur Conusance* being a Feoffment upon Record, and an absolute Disseisin had turned it to a Right; and so the Fine and Non-claim for five Years has barred the Lease of 100 Years. 1 *Sid.* 337, 338, 458, 459, 460.

Where the Feoffor after the Feoffment enters and takes the Profits, and makes a Lease to one for Years, the Law does, upon this whole Matter, adjudge it to be a Disseisin; altho' the Intent of the Parties was, that the Feoffee should make a Lease to him for his Life; for this Entry by Tort and taking of the Profits, without the Agreement of the Feoffee, is a Disseisin; *a fortiori*, if he takes upon himself to make a Lease. 2 *Co.* 59. *b.*

Where a Copyholder makes a Lease for Years not warranted by the Custom, yet it is no Disseisin. *Cro. Car.* 304. *pl.* 6.

When a Tenant at Will takes upon him to make a Lease for Years, (which is a greater Estate than he may make) that Act is a Disseisin; and by this Lease for Years made, and the Lessee's entring and paying of the Rent, and he accepting thereof,

of, he is in as Lessee, and the Lessor (*viz. The Tenant at Will who makes the Lease*) is the Disseisor, and has the Reversion expectant upon the Lease for Years; and this Lease between them is an Interest derived out of the Inheritance gained by the Disseisin. It was argued by *Richardson*, That it being but a Lease for Years, it has gained no Reversion to the Lessor; but if it had been a Lease for Life it had. *Cro. Car. 304, 306.*

If a Man leases several Acres for Years, rendring one intire Rent, and the Lessee is ousted of one Acre by a Stranger, and afterwards this notwithstanding pays the intire Rent to the Lessor, yet this shall not continue the Seisin of the Lessor of the Whole, but he is disseised of the said Acre. *Dubitatur, 1 Brownl. 230. 2 Dan. 624.*

A. being seised of a Close, a Stranger enters, and occupies Part of the Close, but *A.* continues in the Possession of the Residue; and whether this shall preserve his Possession in the Whole, being an intire Thing, *Dubitatur, 1 Brownl. 230.*

If a Man has a House, and locks it and departs, and another comes to his House, and takes the Key of the Door into his Hand, and says that he claims the House to himself in Fee, without any Entry into the House, this is a Disseisin of the House. *2 Dan. 624. 1 Roll. Abr. 659.*

If a Man enters into my House by my Sufferance, without claiming any Thing from me, this is not any Disseisin. *11 E. 3. Affise 86. adjudged. 2 Dan. 625. 1 Roll. Abr. 659.*

If the King be seised in Fee of the Manor of *B.* and a Stranger erects a Shop in a vacant Plot of the Manor, and takes the Profits thereof without paying any Rent to the King, and after the King grants over the Manor in Fee, and the Stranger continues afterwards in the Shop, and occupies it as before, yet this Continuance is not any Disseisin, because the first Entry was not any Disseisin. *2 Dan. 625. 1 Roll. Abr. 659.*

If a Stranger receives of my Tenant, by voluntary Payment, without Coercion of Distress, the Rent due to me, this is a Disseisin to me at my Election. *40 Aff. 19. Br. Disseisor 60. 2 Dan. 625. 1 Roll. Abr. 659.*

So if a Man feeds his Cattle on my Common without Right. *Hob. 322. 9 Co. 51. a. 1 Brownl. 197.*

If a Man that has Right to enter into Lands, in coming towards the Land is disturbed from entring, this is a Disseisin. *26 Aff. 17. Fitz. Affise 237. Br. 262. Br. Disseisor 41. 2 Dan. 625. 1 Roll. Abr. 659.*

If *A.* cuts Trees in his own Soil, and *B.* that has Common there, says the Soil is his Soil, and commands him that he cuts nothing, &c. upon which *A.* departs out of the Land, yet this is not any Disseisin to him, for he that has no Right cannot be seised of a Freehold by Parol. *26 Aff. 17. Fitz. Affise 237. Br. 262. Br. Disseisor 41. 2 Dan. 625. 1 Roll. Abr. 659.*

If a Man enters into certain Lands, Parcel of a Manor which is in Ward of the King by reason of the Nonage of *J. S.* and takes the Profits as Owner thereof, and after *J. S.* sues Livery, and after the Intruder continues the Possession, and the taking the Profits as before, yet the Continuance shall not be any Disseisin to *J. S.* because the first Entry was not any Disseisin. *2 Dan. 625. 1 Roll. Abr. 659.*

If a Man enters and ousts a Copyholder of Inheritance of a Manor in the Hands of the King; by this he gains no Estate, but a Possession against all Strangers. *3 Leon. 221. 4 Leon. 30.*

But if a Man enters upon the King's Farmer, he thereby gains an Estate for Years; and if he leases to another, his Lease may maintain an Ejectment. *3 Leon. 206. Godb. 138, 139.*

If there be Tenant at Sufferance, and a Stranger not having any Right to the Land makes a Lease to him by Indenture, rendring Rent, without putting the Tenant at Sufferance out of Possession, and the Tenant pays the Rent to the Stranger, this is not any Disseisin to him that had Right. *2 Danv. 625. 1 Roll. Abr. 659.*

If Lessee for Years hold over his Term, yet he is not any Disseisor, because he comes in by the Act of the Party; but he is called a Tenant at Sufferance. (*1 Roll. Abr. 659, 660. 2 Dan. 626.*) And the Lessor may either take him as such, or have an Action of Entry *Ad Terminum qui præterit* against him as Tenant of the Freehold. *1 Jon. 316, 317. 4 Co. 24. a. b.*

And if a Tenant *pur auter vie* holds over, he is no Disseisor. *4 Co. 24. a. b. But vide Ow. 27, 35. 2 Leon. 45, 46.*

If Guardian by Nurture makes a Lease by Indenture to one, being under the Title of the Infant, rendring Rent to himself, which is paid accordingly, yet this is not any Disseisin to the Infant. 2 *Dan.* 625. 1 *Roll. Abr.* 659.

If Tenant at Will, rendring Rent, and his Son enters generally, occupies the Land, and pays the Rent during his Life, and dies, and his Son also enters and pays the Rent, no Freehold is gained by this Manner of Entry and Occupation, nor is it any Disseisin. 1 *And.* 134.

Who shall be
said a Dis-
seisor or not
where a Man
cannot qualify
his own
Wrong.

If a Disseisor makes a Lease for Years or at Will, and the Dissee enters upon him, and after the Lessee re-enters, claiming his first Estate, yet he is a Disseisor, because he cannot qualify his own Tort. 2 *Dan.* 630. 1 *Roll. Abr.* 662.

Where a Man enters of his own Head, and occupies Land, if the Freeholder re-leafeth to him in Fee, *Nil operatur*, because there is no Privity between them. *Lit.* §. 461. This must be intended of a Tenant at Sufferance; for if a Man enters into Lands of his own Wrong, and takes the Profits, his Words, *To hold it at the Will of the Owner*, cannot qualify his Wrong, but he is a Disseisor. *Co. Lit.* 271. a.

And if a Man enters into my Land, claiming a Lease for Years, he is a Disseisor. 9 *H. 6.* 21. 31. b. 2 *Dan.* 630. 1 *Roll. Abr.* 662.

Lessee for Years at a Day to come enters before his Term commences, and continues Possession afterwards, he is a Disseisor. 1 *Sid.* 8.

If a Man enters claiming as Guardian where he is not Guardian, he is a Disseisor. 9 *H. 6.* 31. b. 28 *Aff.* 11. *Bro. Disseisor* 84. *Br. Affise* 279. 2 *Dan.* 630. 1 *Roll. Abr.* 662.

So if a Man enters into Land, claiming as Tenant by Statute-Merchant when he has no Right, &c. he is a Disseisor. 24 *E. 3.* 31. 2 *Dan.* 630. 1 *Roll. Abr.* 662.

If a Man lease for Years to another and his Heirs, and after the Lessee dies, and his next Heir claiming the Land enters into the Land; tho' this is but a Chattel, so that the Heir hath no Right thereto, yet because he claims but the Term, he is no Disseisor. 11 *E. 3.* 88. 2 *Dan.* 331. 1 *Roll. Abr.* 662.

If a Copyholder leases for Years by Licence of the Lord, and after enters upon the Lessee, and ousts him, this is a Disseisin to the Lord of the Freehold. 2 *Dan.* 331. 1 *Roll. Abr.* 662.

If the King Guardian continues the Possession after the full Age of the Heir, he does not gain the Fee thereby, because he hath Right to continue it till Livery sued. 7 *H. 4.* 43. 2 *Dan.* 631. 1 *Roll. Abr.* 662.

If the Guardian holds himself in after the full Age of the Heir without Cause, he is a Disseisor. 7 *H. 4.* 43. 2 *Dan.* 631. 1 *Roll. Abr.* 663.

But if Lessee for Years holds over his Term, he is no Disseisor. 7 *H. 4.* 43. 2 *Dan.* 631. 1 *Roll. Abr.* 663.

Disseisin of a
Rent.
Denial.

If I have a Rent-Charge issuing out of Land, of which there are several Tertenants, and I distrain upon any of the Land, and one of the Tertenants makes a Rescous without the Consent of the others, yet the others are Disseisors also; for the Distress is a Demand in Law, and the Non-payment a Denial, and so a Disseisin. 39 *Aff.* 4. *Fitz. Affise* 335. All adjudged Disseisors, but he that made the Rescous only awarded to Prison. 2 *Dan.* 622. 1 *Roll. Abr.* 658.

So if there be two Jointenants, and one of them makes Rescous, they are both Disseisors; for the Distress is a Demand in Law, and the Non-payment a Denial and Disseisin; but he that made the Rescous only is the Disseisor with Force. *Co. Lit.* 161. b. *Moor* 53.

If the Grantee of a Rent-Charge demands the Rent, and after distrains, and a Stranger, without the Assent of the Tenant, makes Rescous, yet this is a Disseisin in the Tenant, for the Non-payment was a Denial, and the taking of the Distress has not waived this Disseisin. The Case aforesaid of 39 *Aff.* 4. proves this. 29 *Aff.* 51. (53) *dubitatur.* *Fitz. Affise* 335. *Br. Disseisin* 59. 2 *Danv.* 623. 1 *Roll. Abr.* 658.

If he that ought to have a Rent-Charge comes to the Proctor of the Tenant of the Land out of which the Rent issues, and demands the Rent, and he refuses to pay it, this is a Disseisin. 18 *E. 3.* *Affise* 78. 1 *Roll. Abr.* 658. 2 *Dan.* 623.

Note; The Demand of the Rent must be on the Land. *Co. Lit.* 153. a.

If I have a Rent-Charge issuing out of Land, of which there are several Tertenants a Demand upon the Land, in the Possession of one of the Tenants, and Non-payment, is a Disseisin by all, for all the Rent issues out of every Part. 39 *Aff.* 4. 2 *Dan.* 623. 1 *Roll. Abr.* 658.

When there is a lawful Demand of a Rent-Seck, and the same is not paid, where the Tenant is present or absent, this is a Denial in Law, and consequently a Disseisin. *Co. Lit. 153. b.*

Where a Man is seised of a Rent-Seck, and the Tenant will not pay it, the Party seised of the Rent (or some other by his Direction) must go upon the Land, and demand the Arrears of the Rent; and if the Tenant denies to pay it, this is a Disseisin: So if the Tenant is not there ready to pay it, this is a Disseisin: So if there is no Body upon the Land ready to pay it when demanded, this is a Denial in Law, (for Non-payment is a Denial in Law, whether the Tenant is present or absent. *Co. Lit. 153. b.*) and a Disseisin, for which an Affize lies. *Lit. § 233.*

And where there is a House upon the Land, a Demand either at the House or upon the Land is sufficient. *Co. Lit. 152. a.*

And a Demand needs not be upon the Day, but at any Time after is sufficient. *Co. Lit. 153. a. b.*

There are three Causes of a Disseisin of a Rent-Service, viz. (1) Rescous, (2) Replevin, and (3) Inclosure. *Lit. §. 237.*

Rescous is where the Lord distrains, and the Cattle are rescued from him, or the Tenant or another Man will not suffer him to distrain. *Lit. §. 237.*

Replevin is where a Distress is made, and the Distress is replevied by Writ or Plaint. *Lit. §. 237.* Replevin is derived of *Replegiare*, to re-deliver to the Owner upon Pledges or Surety. *Co. Lit. 161. a.* And *Inclosure* is if the Lands and Tenements be so inclosed, that the Lord may not come within the Lands and Tenements to distrain. *Lit. §. 237.*

And the Cause why such Things so done be Disseisins made to the Lord, is, that by such Things the Lord is disturbed of the Means by which he ought to have come at his Rent, viz. of the Distress. *Lit. §. 237. Co. Lit. 161. a.*

But all these are intended by *Littleton* to be Disseisins after an actual Seisin had, and when the Rent is behind, otherwise none of these are Disseisins at all. *Co. Lit. 161. a.*

Tho' upon a Replevin the Distress is re-delivered by the Sheriff by Course of Law, yet this is a Disseisin, because the Party is thereby disturbed of the Means by which he ought to come to his Rent, viz. of the Distress. *Co. Lit. 161. a.*

There are five Causes of a Disseisin of a Rent-Charge. *Littleton* says four, viz. (1) Rescous, (2) Replevin, (3) Inclosure, and (4) Denial; for Denial is a Disseisin of a Rent-Charge as well as for a Rent-Service. But *Denier* is no Disseisin of a Rent-Service without Rescous or Resistance. And *Coke* says you may add a fifth, viz. Resistance to distrain, Counterpleading and Vouching a Record and Failer thereof. *Lit. §. 238. Co. Lit. 161. b.*

And there are two Causes of a Disseisin of a Rent-Seck, Denial, and Inclosure. *Lit. §. 239.* The Reason wherefore Inclosure is a Disseisin of a Rent-Seck, is because the Grantee cannot come upon the Land to demand it. *Co. Lit. 161. b.*

There is another Cause of Disseisin of all three, that is, if the Lord is going to the Land to distrain, or the Grantee of the Rent-Charge or Seck to demand the Rent, and the Tenant forestalls him in the way with Force and Arms, or menaceth him in such Manner, that he dares not come to the Land, &c. for Doubt of Death, or bodily Hurt; this is a Disseisin, for that the Lord is disturbed of the Means whereby he ought to come at his Rent. *Lit. § 240.*

If a Man distrains for a Rent-Service, and a Stranger rescues the Distress in the Name of the Tenant, this is a Disseisin of Rent. *56 H. 3. 2 Dan. 624. 1 Roll. Abr. 658.*

A Feme Covert shall not be Disseisorefs by the Act of the Baron. *7 E. 4. 7. b.* Who shall be a Disseisor. *Fitz. Disseisin 3. B. 66. 12 E. 4. 9. b. 2 Dan. 626. 1 Roll. Abr. 660.*

He who is present when a Disseisin is made with Force, is a Disseisor with Force; but he who being absent commands a Disseisin, or agrees to it when done with Force, is a Disseisor; but not with Force. *Goulsf. 42. 2.* If he commands or agrees specially to the Disseisin with Force. *Vide Moor 53.*

A Feme Covert may be a Disseisorefs by her actual Entry or proper Act. *Co. Lit. 357. b.*

Tho' her Husband is present. *Co. Lit. 357. b.*

But a Feme Covert cannot be a Disseisorefs by her Commandment or Procurement, nor by her Assent or Agreement subsequent. *Co. Lit. 657. Lit. §. 678. 1 Roll. Abr. 660. Bro. Tit. Disseisin 15, 67. 8 H. 6. 14.*

If Baron and Feme present to a Church where they have no Right, this is the Act of the Husband, and the Wife gains nothing thereby. *March 90.*

By Command. If a Man commands *J. S.* to enter into certain Land in his Name, if he hath Right thereto, or in the Name of his Cousin, if he hath Right; if *J. S.* enters accordingly, yet if the Commander or his Cousin have no Right, he shall not be a Disseisor, but *J. S.* only, for his Command was conditional. *34 Aff. 12. adjudged. Br. Entry Con- geable 72. Fitz. Affise 315. 2 Dan. 631. 1 Roll. Abr. 663.*

So if a Man says to *J. S.* that where his Ancestor died seised of certain Land, he commands him to enter into it in his Name if his Ancestor died seised of a Fee, otherways not: If *J. S.* enters in his Name, yet if the Ancestor of the Commander did not die seised of a Fee, *J. S.* only is the Disseisor, and not he that commanded him, for his Command was conditional. *34 Aff. 12. Fitz. Aff. 315. 2 Dan. 631. 1 Roll. Abr. 663.*

If a Man commands *J. S.* to disseise *J. D.* and he does it accordingly, the Com- mander is a Disseisor as well as *J. S.* *2 Dan. 631.*

If a Man commands his Bailiff to make a Disseisin, and he does it accordingly, the Commander is a Disseisor. *27 Aff. 30. Fitz. Affise 254. 2 Dan. 631. 1 Roll. Abr. 663.*

If a Man counsels another to make a Disseisin, and he does it accordingly, the Counsellor is a Disseisor. *27 Aff. 30. Fitz. Aff. 254. 2 Dan. 631. 1 Roll. Abr. 663.*

The Coadjutors, Counsellors, Commanders, &c. are all Disseisors. *Co. Lit. 180. b.*

If a Man makes a Lease for Years of the Land of another out of the Land, and the Lessee enters, the Lessee only is the Disseisor, and not the Lessor. *P. 10 Ja. B. Contra 23 H. 8. S. 27. 2 Dan. 631. 1 Roll. Abr. 663.*

If a Lessee at Will makes a Lease for Years, and the Lessee for Years enters, the Lessee at Will is the Disseisor, and not the Lessee for Years, for that otherwise the Lease for Years would be void. *1 Roll. Abr. 663. 2 Dan. 631.*

If Tenant at Will or Sufferance makes a Lease for Years, the Lessee at Will and Tenant at Sufferance are the Disseisors, and not the Lessee for Years. *12 E. 4. 12. b. Br. Disseisin 67. Fitz. 4. 2 Dan. 632. 1 Roll. Abr. 663.*

If *A.* disseises one to the Use of *B.* who knows not of it, and *B.* assents to it, in this Case till Agreement *A.* is Tenant of the Land, and after Agreement *B.* is Te- nant of the Land, but both of them are Disseisors. *Co. Lit. 180. b.*

But if done with Force, *A.* is only guilty of the Force. *Moor 53.*

**By Agree-
ment.**

If the Baron disseises another to the Use of the Feme, the Feme is not a Dis- seisors by this Act of the Baron. *14 E. 4. 9. b. Fitz. Disseisin 3. Br. 66.*

So it shall be tho' the Wife agrees to it during Coverture, for her Agreement is void. *2 Dan. 627. 1 Roll. Abr. 660.*

If a Man with Force disseises another to my Use without my Command, and I after agree to the Disseisin, I am a Disseisor; but all the Force is only in the Coad- jutor: But if I agree specially to the Disseisin with Force, then perhaps I shall be charged therewith. *Moor 53. pl. 155. Goulf. 42.*

If one Man disseises another to the Use of a Feme Covert, if the Feme agree s du- ring the Coverture, yet she is not any Disseisors, for her Agreement is void. *2 Dan. 627. 1 Roll. Abr. 660.*

So if the Baron agrees to the Disseisin, this settles an Estate in the Feme, but she shall not be a Disseisors by the Agreement of the Baron. *12 E. 4. 9. b. Fitz. Dis- seisin 3. Br. 66. Br. Agreement 4. 3 Leon. 272. 2 Dan. 627. 1 Roll. Abr. 660.*

The same Law if both agree, yet the Feme is not a Disseisors. *Contra 15 E. 4. 15. b. admitted. Br. Disseisin 12. 2 Dan. 627. 1 Roll. Abr. 660.*

But after the Death of the Baron if the Feme agrees to the Disseisin, she shall be a Disseisors. *12 E. 4. 9. b. Curia. Fitz. Disseisin 3. Br. 66. Br. Agreement 4. 2 Dan. 627. 1 Roll. Abr. 660.*

It is regularly true, that a Feme Covert cannot be a Disseisors by Commandment precedent, or Agreement subsequent. *Co. Lit. 357. b.*

At Election.

If a Man enters into the Land of another, claiming as Guardian where the Lands is not held of him, or where he ought not to be Guardian, tho' he is a Disseisor at the Election of the Heir, yet the Heir may elect him to be no Disseisor, (*28 Aff.*) for such Guardian after Entry grants the Ward over, and the Grantee enters, and he is adjudged a Disseisor, and therefore the first Guardian was no Disseisor by his Election, for if he was a Disseisor, the second Guardian could be no Disseisor to him.

(1 Roll. Abr. 661. 2 Dan. 628. Cro. Car. 303.) And the Infant may either charge him as Disseisor or Accountant. Cart. 162.

If Lessee at Will makes a Lease for Years, this is a Disseisin at the Election of the Lessor at Will that has the Fee, for if he disposes of the Land as if no Disseisin had been, then it is no Disseisin, (P. 9 Car. B. R. *Blunden and Baugh*) adjudged in a Writ of Error *per Cur. Contra, Richardson*; and the Judgment given to the contrary *in Banco* by the Court against *Harvey* reversed accordingly. *Intratur Hill. 7 Car. B. R. Rot. 1106.* where after the Lease for Years made by the Lessee at Will and Lessor at Will joined in a Fine, and declared the Uses of the Fee, and adjudged good. And in the Argument of this Case, another Case was vouched to be adjudged between *Powfely* and *Blackman* accordingly. *Tr. 18 Jac. Rot. 130. B. R. (Where the Mortgagor in Fee, who by Agreement was to hold the Land till Failure, leased for Years, &c. 1 Jon. 316. & Cro. Car. 364. same Case cited. Cro. Jac. 659, 660. 2 Roll. Rep. 242, 243, 284, 285. same Case adjudged. Bridg. 12, 13. same Case.)* But Judgment was given the 20 Jac. where after a Lease for Years made by Tenant at Sufferance upon a Mortgage, the Devise of the Mortgagee was adjudged good, and so no Disseisin at his Election. 1 Roll. Abr. 661. 2 Dan. 629.

In Cro. Car. 303. the Case of *Blunden and Baugh* is reported accordingly. But admitting it a Disseisin, the Lessee at Will becomes Disseisor and Tenant. And at the End of the Case there is a *Nota*, That Sir Robert Heath, C. J. of C. B. *Crawley, J. Denham and Trevor*, Barons, agreed with the Judgment of B. R. and conceived it would be very mischievous if it should be adjudged otherways: But Sir *Humphry Davenport* seemed to doubt, whether the Lessee for Years ought not strictly to be taken for the Disseisor and Tenant. 1 Jon. 315, 316. same Case adjudged accordingly. *Lit. Rep. 297, 370. same Case adjournatur. Lat. 53. Cart. 162. & 3 Mod. 197. same Case cited.* But for which of them should be the Disseisor, *vide Co. Lit. 57. a. 2 Inst. 413. Cro. El. 830. 2 Roll. Rep. 242, 243, 284. Bridg. 14. Ow. 28. 2 Leon. 46. Lit. Rep. 297, 298, 370.* Where it should be no Disseisin, there being no Intention to make one. 1 Leon. 122. 2 Roll. Rep. 284. 1 And. 134. *Styl. 407. Cart. 198. 3 Mod. 196, 197.*

Where Tenant at Will makes a Lease for Years, and the Lessee enters, it is no Disseisin, but at the Election of him who has the Freehold. *Latch 53. Cart. 162. Cro. Car. 302. pl. 6. vide Cro. El. 830. pl. 38. 1 Jones 315. Cro. Car. 220, 221. Br. Disseisin 68. Dalf. 46. (Et vid. where an Entry in Pursuance of a void Lease is to be taken for a Disseisin. Lucas 265.)* The Disseisin must be at the Election of him to whom the Tort is done. Whoever holds by my Agreement is my Tenant at Will, and I have the Estate. Cart. 198.

And such Lessee for Years after Entry is a Disseisor, and a Release or Confirmation to the Tenant at Will afterwards is void, because the Privity is gone. *Cro. El. 830. pl. 38.*

Receiving of my Rents or Feeding of my Common, is but a Disseisin at Election. *Hob. 322.*

If a Man enters into the Land of an Infant by his Assent, this is a Disseisin to the Infant at his Election, for the Infant cannot Prejudice himself by his Assent. 11 E. 3. *Aff. 87. adjudged. 2 Dan. 629. 1 Roll. Abr. 661.*

If A. be seised of Lands in Fee, and a Stranger enters upon him by Colour of a Lease for Years, which is void, and pays the Rent to him, this is not any Disseisin at Election; for if A. after covenants to stand seised to the Use of himself in Tail, the Estate shall well rise. P. 6 Jac. B. *Molineux's Case, per Cur. 2 Dan. 629. 1 Roll. Abr. 661.*

If Tenant for Years surrenders to the Lessor, and yet continues in Possession, paying his Rent to the Lessor, this is no Disseisin to the Lessor but at his Pleasure. *Dy. 62. pl. 43.*

If A. seised in Fee, makes a Deed of Lease, by which he demises it to B. *Habendum a die datus* for Life, with a Letter of Attorney in the Deed to make Livery, and reserving 6 s. 8 d. Rent, and the Attorney makes Livery the same Day of the Date, according to the Form of the Charter, and the Lessee enters, claiming it by Force of the Indenture and Livery, and pays the said Rent to the Lessor, according to the Form of the Indenture; this is not any Disseisin to A. at his Election, tho' *prima facie* he was a Disseisor, yet in as much as he claimed but a Lease, and paid his Rent accordingly, the Lessor may elect that he shall not be a Disseisor. *M. 10 Car. B. R. Bull and Wiat. 1 Roll. Abr. 661, 662. 2 Dan. 629, 630. Cro. Car. 388.*

The

The Court at first seemed *e contra*; but after they gave a peremptory Rule for Judgment for the Plaintiff, upon the Non-attendance of the Defendant, by which they adjudged it to be no Disseisin at Election, where the Case was, That the Heir of the Lessor after the Lease made suffered a common Recovery of the Land upon a *Præcipe* brought against him, without any Entry into the Land; and by Consequence it was adjudged that this Recovery was good. But it seems that they adjudged it upon the last Point of the Recovery. *Et P. 11 Car. B. R. Sir Kenelm Digby and Jordan, per Cur.* upon Evidence at the Bar, resolved, That this is an absolute Disseisin, because the Lessee entered claiming his Estate for Life, and that it had been otherwise if he had claimed as Lessee at Will. *2 Dan. 630. 1 Roll. Abr. 662.*

If *A.* leases the Demesnes of a Manor for Years to *B.* and after assures a Jointure of the same Land to his Wife for her Life, and after aliens the Fee, and the Alienee enjoys the Rent by the Hands of the Termor, and after *A.* dies, and the Wife enters claiming her Jointure, and there keeps Court, &c. and *B.* assents thereto, and attorns to the Wife, and pays to her the Rent; this is a Disseisin to the Alienee or not at his Pleasure, notwithstanding the Continuance of the Possession of the Termor. *D. 2 El. 178, 38. 2 Dan. 630. 1 Roll. Abr. 662.*

If *A.* being seised in Fee of certain Lands, leases them for four Years, and the Lessee enters, and after *A.* grants the same Premises to *B.* *Habendum* from *Midsummer* next for Life, and after that Feast the Lessee attorns, and the Years expire, and *B.* enters, he is a Disseisor, the Grant being void in Law. And there is a Diversity between a Grant made by Agreement of Parties, which stands not with the Rule of Law, and a Grant good in its Commencement, but to be perfected by a subsequent Ceremony, as in Case of a Charter of Feoffment, if the Feoffee enters before Livery, he is not a Disseisor. *2 Co. 55.*

By Officers.

If a Man recovers several Houses in an Assise, and after the Tenant reverses it in a Writ of Error, and a Writ of Execution issues to the Sheriff to put him in Possession of the Houses which he lost by the Judgment, tho' the Tertenants are Strangers to the Recovery, and therefore ought not to be ousted without a *Scire Facias* against them; yet if he does Execution, putting him out of Possession by Force of this Writ, he shall not be any Disseisor, because he has the direct Authority of the Court to do it. *2 Dan. 632. 1 Roll. Abr. 663.*

So if one takes out an Execution upon a Judgment after the Year, without suing out a *Scire Facias*, this Execution is not void, but only voidable, and will justify the Officer that executes it. *3 Lev. 404. adjudged.*

The same Law is in all Cases where the Execution is of a Judgment in which the Demand was of a Thing certain; if the Sheriff make Execution of this Thing, he is no Disseisor. *2 Dan. 632. 1 Roll. Abr. 664.*

But where the Execution is in the Generalty, without mentioning any Thing in particular, there the Sheriff ought to make Execution of the right Thing at his own Peril, otherwise he will be a Disseisor, for he is bound to take Notice thereof, and has no Warrant from the Court to make Execution but of the right Thing. *2 Dan. 632. 1 Roll. Abr. 664.*

By whom and to whom Disseisin may be made.

An Infant of the Age of eighteen Years may be a Disseisor with Force by actual Entry. *12 H. 4. 22. b. 2 Dan. 627. 1 Roll. Abr. 660.*

An Infant may be a Disseisor by actual Entry. *3 H. 4. 7. Br. Assise 46. Br. Agreement 9. Br. Disseisin 3. 2 Dan. 627. 1 Roll. Abr. 660.*

So may a Feme Covert by actual Entry. *9 H. 4. 6. 12 E. 4. 9. b. Cur. 7 E. 4. 7. b. Fitz. Disseisin 3. Br. 66. 2 Dan. 627. 1 Roll. Abr. 660.*

But an Infant shall not be a Disseisor by Agreement to a Disseisin to his Use. *3 H. 4. 17. 12 H. 4. 22. b. Br. Assise 46. Agreement 9. Disseisor 5. F. N. B. 179. G. 2 Dan. 627. 1 Roll. Abr. 660.*

If the Baron and Feme enter into Land in the Right of the Feme, where she has no Right, the Feme is not a Disseisorefs, for this shall be taken to be the Act of the Husband only. *2 Dan. 627. 1 Roll. Abr. 660.*

If a Man takes a Distress for Rent issuing out of the Land of a Feme Covert, and the Baron and Feme make Rescous, they are both Disseisors. *Ibid.*

If the Baron discontinues the Land of his Wife, the Feme being in Possession, and disagreeing to the Feoffment, claiming her first Estate, the Feme is a Disseisorefs thereby. *21 E. 3. 6. b. 2 Dan. 627. 1 Roll. Abr. 660.*

A Lessee for Years cannot be disseised; for none can be disseised but he who has the Freehold. *Cro. Jac. 678, 679. pl. 15.*

A Feme Covert cannot make a Disseisin to the Use of her Husband, 8 H. 6. 14. *b.* *Curia*, (because tho' she gains an Estate by her Entry, yet she has not Power to dispose thereof to another, being Covert, as she ought if she could make a Disseisin to another's Use). *Contra* 21 H. 7. 35. 2 *Dan.* 628. 1 *Roll. Abr.* 660. Who may be a Disseisor to the Use of another.

A Feme Covert cannot disseise a Man to the Use of a Stranger for the Cause aforesaid. *Contra* 21 H. 7. 35. 2 *Dan.* 628. 1 *Roll. Abr.* 661.

A Corporation Aggregate cannot make a Disseisin to the Use of another. 2 *Dan.* 628. 1 *Roll. Abr.* 661.

If a Corporation Aggregate disseises one to the Use of another Man, they are Disseisors in their natural Capacity. *Ibid.*

If a Man brings an Infant with him into the Lands of *J. S.* and there claims the Land to the Use of himself and the Infant, yet the Infant is not any Disseisor, because he made no Claim. *Ibid.*

If *A.* disseises one to the Use of *B.* who knows not of it, and *B.* assents to it, in this Case till the Agreement *A.* is Tenant of the Land, and after the Agreement *B.* is Tenant of the Land. *Co. Lit.* 180. *b.*

The Demandant in a *Præcipe*, and others, disseised the Tenant to the Use of the others, and the Writ abated not, for the Demandant gained no Tenancy in the Land, being but a Coadjutor. *Co. Lit.* 180. *b.*

If one disseises Tenant for Life to the Use of him in Reversion, and after he in Reversion agrees thereto, it is said that he in Reversion is a Disseisor in Fee, for by the Disseisin made by the Stranger the Reversion was devested, which they say could not be revested by the Agreement of him in Reversion, for that it made him a Wrongdoer, and therefore no Relation of an Estate gained by Wrong can help him. *Co. Lit.* 180. *b.*

The Agreement has Relation to the Time of the Disseisin, and if the Disseisor makes a Lease before Agreement, the Party to whose Use, agreeing after, shall avoid the Lease. 2 *Leon.* 223. *per Jeffrys, arguendo, sed Q. & vide Co. Lit.* 272. *a.*

If a Man be disseised of Part of a Corody, this is not any Disseisin of the Whole. 2 *Dan.* 632. 1 *Roll. Abr.* 664.

If the Corody be to take four Loaves and four Flagons of Drink every Week, and he is disseised of the Loaves, this is no Disseisin of the Drink; but if disseised of two Loaves only, this is a Disseisin of all four. 8 *Co.* 50. *a.*

If a Man be disseised of Part of the Profits of an Office, this is not any Disseisin of the whole Office. 2 *Dan.* 632. 1 *Roll. Abr.* 664.

If a Man holds of me 20 s. Rent, and disseises me of 10 s. thereof, this is a Disseisin of the Whole. *Ibid.*

If I am seised of a Manor which extends into several Counties, and one disseises me of an Acre in one County, this is not any Disseisin of the Residue of the Manor. *Ibid.*

A Disseisor's dying seised, unless he has had quiet Possession without Entry or Claim for five Years after the Disseisin, does not take away the Entry of the Disseisee. *Stat.* 32 H. 8. *c.* 33. Where an Entry is taken away.

If a Disseisor makes a Lease for Life, and afterwards levies a Fine of the Reversion with Proclamations, and the five Years pass, so as the Disseisee is for the Reversion barred, the Disseisor shall not enter upon his Tenant for Life. *Co. Lit.* 298. *a.* Of Disseisor and Disseisee.

Where a Man is possessed of a Lease, if he be not dispossessed thereof, (if it be not turned to a Right) tho' another is in Possession, no Fine and Non-claim shall bar; but if it is turned to a Right, then he is barred by a Fine and Non-claim, and cannot assign; tho' if it is not turned to a Right, then he may enter when he will, and it cannot bar him. *Carter* 196. 2 *Inst.* 517. 9 *Co.* 106. *a.* *Cro. Jac.* 60. 5 *Co.* 124. 1 *Vent.* 81. Of Lessor and Lessee.

If Lessee for Years is ousted, and he in Reversion disseised, and the Disseisor levies a Fine with Proclamations, and five Years pass; the Lessor as well as Lessee are barred by their Non-claim, and the Lessor shall not have five Years after the Term expired; and this is by Reason of the Saving in the Statute of 4 H. 7. *Podger's Case*, 9 *Co.* 105. *b.* The Lessor might have entered in the Name of the Tenant for Life, for Years, or by Copy, and also in his own Right, and saved as well their Interests as his own Estate. 9 *Co.* 105. *b.* 106. *a.*

A Lease for Years being *in esse*, another Lease for Years was made to *J. S.* to commence after the End of the first Lease determines, the second Lessee does not enter,

enter, but he in Reversion enters, and makes a Feoffment, and levies a Fine with Proclamations, and five Years pass without Entry or Claim of the second Lessee. Resolved that the second Lessee for Years was barred: But if the first Lessee had been ousted, and a Disseisor had levied the Fine, and he who had the future Interest, viz. the second Lessee, enters not within five Years, it shall not bar him; for the Disseisor's Fine (*he not having entered*) did not devert the future Interest. *Carter* 82, 117. 5 Co. 124. *Cro. Jac.* 60.

Where the Act of the Disseisor shall bind the Heir.

If a Disseisor or other Wrong-doer assigns Dower fairly and justly without Covin, that shall bind the Heir. *Co. Lit.* 35. a. *Perk.* 394, 395, 398. 2 Co. 67. 3 Co. 78. 5 Co. 30. 6 Co. 58. *Plowd.* 54. *Bro.* 15, 59.

Disseisor's Remedies after Re-entry.

Where a Descent shall take away an Entry, *vide* Chap. 2. §. 2.

If one disseise me, and during the Disseisin cut down Timber, Grass, Corn, &c. and afterwards I re-enter, I may bring an Action of Trespass against him and his Servants: But if my Disseisor makes a Feoffment in Fee, Gift in Tail, Lease for Life or Years, and afterwards I enter, I shall not have Trespass against them who came in by Title; for this Fiction in Law, That the Freehold has always continued in me, shall not make them who come in by Title to be Tort-Feasors. 11 Co. 51. a. b. *Keilw.* 1. b. *Hob.* 98. 2 *Roll.* 554. But I shall recover all the mesne Profits against my Disseisor himself, tho' not against those claiming under him. 11 Co. 51. a. *Hob.* 98. 2 *Roll.* 554. Yet in *Holcomb v. Rawlins*, it was adjudged, that the Disseisor was remitted by his Re-entry to his first Possession, and then all who occupied in the mean Time by what Title soever they came in, shall answer to him for their Time; as if a Disseisor had been disseised by another, and the first Disseisor re-enters, he shall in Trespass punish the last Disseisor. *Cro. El.* 540. pl. 3.

Altho' an Action will not lie against the Feoffee of the Disseisor for the Corn or Grass, &c. cut, yet the Disseisor, after his Re-entry, may seise or bring Trover for them; for the Regress of the Disseisor has Relation (as to the Property) to the Continuance of the Freehold in him *ab initio*. 11 Co. 57. b.

(H) By Abatement, Intrusion, Deforcement, Usurpation, and Purpresture.

Abate, what.

ABATER is a French Word, and signifies *Disfruere*, or *Prostruere*, to destroy or prostrate. *Co. Lit.* 134. b.

Abatement, what.

And **Abate** is both an English and French Word, and signifies in its proper Sense to diminish or take away, as an Abator diminishes and takes away the Freehold in Law descended to the Heir, and so it is said to abate an Account, signifying Subtraction or Withdrawing, &c. and to abate the Courage of a Man. In another Sense it signifies to prostrate, beat down or overthrow, as to abate Castles, Houses, and the like, and to abate a Writ; and hereof comes a Word of Art, *Abatementum*, which is an Entry by Interposition. *Co. Lit.* 277. a.

The Difference between Disseisin,

Now the Difference inter *Disseisinam*, *Abatementum*, *Intrusionem*, *Deforcamentum*, & *Usurpationem*, & *Purpresturam*, is this:

Abatement,

A *Disseisin* is a wrongful putting out of him that is actually seised of a Freehold. *Co. Lit.* 277. a.

Intrusion,

And *Abatement* is when a Man died seised of an Estate of Inheritance, and between the Death and the Entry of the Heir, a Stranger does interpose himself and abate. *Co. Lit.* 277. a.

Deforcement,

Intrusion first properly is when the Ancestor died seised of any Estate of Inheritance expectant upon an Estate for Life, and then Tenant for Life dies, and between the Death and the Entry of the Heir a Stranger does interpose and intrude. 2dly, He who enters upon any of the King's Demesnes, and takes the Profits, is said to intrude upon the King's Possession. 3dly, Where an Heir in Ward enters at his full Age without Satisfaction for his Marriage, the Writ says, *quod intrusit*. *Co. Lit.* 277. a. b.

Usurpation,

Deforcamentum comprehends not only these aforementioned, but any Man that holds Land whereunto another Man has Right, be it by Descent or Purchase, is said to be a *Deforceor*. *Co. Lit.* 277. b.

Usurpation has two Significations in the Common Law, one when a Stranger that has no Right presents to a Church, and his Clerk is admitted and instituted, he is said to be an Usurper, and the wrongful Act that he has done is called an Usurpation. 2dly, When any Subject does use without lawful Warrant, Royal Franchises, he is said to usurp upon the King those Franchises. *Co. Lit.* 277. b.

Purprestura, or *Pourprestura*, a Purpresture. *Purprestura est, &c. generaliter quoties Purpresture. aliquid fit ad nocumentum regii tenementi, vel regie viæ (vel aliquarum publicarum) vel civitatis, &c.* And because it is very properly when there is a House builded, or an Inclosure made of any Part of the King's Demesnes, or of an Highway, or a common Street or publick Water, or such like publick Things; it is derived of the French Word *Pourpris*, which signifies an Inclosure, but specially applied, as is aforesaid, by the Common Law. *Co. Lit. 277. b.*

S E C T. VII.

Of acquiring real Estates by Means of Forfeitures and Losses in Criminal Cases.

(A) *Forfeiture in High Treason.*

FIRST, The *Delinquent* forfeits to the King all his Lands, Tenements and Hereditaments in Fee-simple or Fee-tail (or for Life, as to the Profits during the Offender's Life) holden or not holden of any other Uses, Conditions, Entries, &c. (not Rights of Actions where the Entry is taken away) which he had at the Time of the Treason committed, or afterwards, the Right of all others being saved.

There is no Forfeiture of the Lands or Tenements, or Rights in *Anter drobt*, (as in Right of the Church; in Right of a Wife, but only during the Coverture; nor of a Founder of a House of Religion in *Frank-almoign*; for that is annexed to the Blood of the Founder) and in clipping, the Hereditaments are forfeited only for Life.

Secondly, The Delinquent's Wife loses her Dower, not her Jointure. So it is in Petit Treason.

Thirdly, His Blood shall be corrupted, by becoming base as to his Birth, and that his Children shall not inherit to him or any of his Ancestors. In Counterfeiting the Coin or Clipping there is no Corruption of Blood.

Fourthly, All his Goods and Chattels shall be forfeited from the Time of the Conviction. For where Goods and Chattels are forfeited, there shall be no Relation to the Crime committed, as it is in Forfeiture of Lands. *Co. Lit. 37. a. 41. a. 392. a. & b. 3 Inst. 19, 211. 3 Co. 10, 82.*

A Traitor or Felon after the Treason or Felony committed, and before Conviction, may sell his Goods *bona fide*, whether Chattels Real or Personal, for his Maintenance.

But if one, to prevent Forfeiture by Treason, Felony or Outlawry, makes a Gift of all his Goods, and afterwards is attainted or outlawed, these Goods are forfeited. An Executor cannot forfeit the Goods which he has as Executor. *3 Co. 82. 8 Co. 171.*

If one commits Treason, and dies before Attainder, or is slain in actual Rebellion, he forfeits nothing, if not attainted by Act of Parliament. But if the Chief Justice of the King's Bench (who is head Coroner of all England) in Person, upon View of the Body of him that was slain in open Rebellion, makes a Record thereof, and returneth it into the King's Bench, he shall forfeit his Lands and Goods. *3 Inst. 12. 4 Co. 57. H. P. C. 17.*

Those that are hang'd by Martial Law, in Time of War, forfeit no Lands. *Co. Lit. 13. a. 3 Inst. 21.*

See the 7 Ann. c. 21. whereby after the Decease of the Pretender, no Attainder for Treason shall disinherit the Heir, &c.

Mr. Wood in his *Institute of the Common Law*, B. 4. c. 5. says, That in Gavelkind, See Stat. 17 E. 2. c. 16. if the Father is hanged for Treason or Felony, the Sons shall inherit. But as to Treason he must be mistaken, for Mr. Robinson in his *Common Law of Kent*, p. 230. (who cites *Lamb. Peramb. 611. Dav. 37. 1 H. P. C. 360. Wright's Tenures 118.*) says, that the Custom of Gavelkind holds only in Case of Felony, and extends not to Treason; for if a Man be attainted of Treason, his Gavelkind Lands are forfeited to the King.

By the 33 H. 8. c. 20. If any Person shall be attainted of High Treason, the King shall be deemed and adjudged in actual Possession of the Lands, Tenements and Hereditaments, Uses, Rights, Entries, Conditions, Reversions, Remainders, Goods and Chattels, When the King shall be vested of the Lands, &c. forfeited.

Chattels, and all other Things of the Offender so attainted, which the King might lawfully have, or which the Offender might lawfully forfeit, as if he had been attainted by Parliament, without an Office or Inquisition found.

Saving to all others (except of the Offender attainted of High Treason, his Heirs and Assigns, and all other Persons claiming by him, or to his Use, after the Treason committed) all such Rights, Titles, Interests, &c. which any of them ought to have if this Act had never been made.

This Act vests the actual Possession in the King presently by the Attainder, as well in the Life as after the Death of the Person attainted, and as well of Lands in Tail as of Land in Fee-simple.

It also extendeth to all Manner of Attainders by Treason, whether by Confession, Verdict, Process or Outlawry, or Attainder by Parliament. 3 Co. 10.

But as to the Time the King is vested of Lands, &c. forfeited for Felony, *vide post*.

(B) *In Misprision of Treason.*

THE Offender forfeits his Goods and Chattels, and Profits of Land during Life, for his Concealment. But the Wife is dowable. Co. Lit. 392. b. 3 Inst. 36, 218. H. P. C. 269.

(C) *In Petit Treason and Felony.*

Standing
mute.

Challenging
Jurors.

How the For-
feiture differs
from High
Treason.

Custom of
Gavelkind,
what.

IF the Offender stands *mute*, and is adjudged to Penance in Cases of Petit Treason and Felony, he forfeits his Goods and Chattels. So he does if he challenges above thirty-five Jurors. But not if he challenges above twenty and under thirty-six; for no Law gives a Forfeiture for challenging above twenty. Neither is one convicted by the challenging above twenty, as one was by the Common Law by Challenge of three Juries. 3 Inst. 227, 228. H. P. C. 226, 227. Kely. 36.

The Forfeiture is the like as in High Treason as to Lands and Tenements upon Attainder, and as to Goods and Chattels upon Conviction; except that upon Attainder in *Petit Treason or Felony* Lands and Tenements intailed are forfeited only during the Life of the Tenant in Tail, and the Inheritance goes to the Issue. Co. Lit. 37. a. 41. a. 391. a. 392. a. & b. 3 Inst. 212.

The King shall have the Profits of Inheritances that are not holden during the Life of the Person attaint in Felony; but after his Decease, the Inheritances that are not holden extinguish. Again it must be observed, that upon Attainder of Petit Treason the Wife is not dowable, but upon Attainder of Felony she is dowable. 3 Inst. 21.

But by the Custom of *Kent*, if Tenant in Fee-simple of Lands in Gavelkind commits Felony, and suffer Judgment of Death, he shall incur Forfeiture of his Goods, but his Lands of that Tenure shall not be forfeited, nor escheat to the King or other Lord of whom they are holden, but the Heir, notwithstanding the Offence of his Ancestor, shall enter immediately and enjoy the Lands by Descent after the same Customs and Services by which they were before holden, which has given Occasion to the Proverbial Expression,

*The Father to the Bough,
And the Son to the Plough.*

Stat. 17 Ed. 2. de Prærog. Reg. c. 16. or as it is somewhat differently express'd in the Manuscript Copy of the *Consuetudines Kan.* in *Lincoln's-Inn* Library:

*The Father to the Bode,
And the Son to the Londe.*

Nor shall the King have the Year, Day and Waste of Lands in Gavelkind holden of a common Person where the Tenant is executed for Felony, which seems to be but a Consequence of the other Custom, according to the general Rule in *Bracton* 130. a. 131. a. *Non debet Rex de jure habere annum & diem de aliquâ terrâ quæ non*

possit esse eschaeta Dominorum. Robinson's Common Law of Kent, p. 226, 227. cites many Authorities.

Customs which are by Reason of the Land, as Gavelkind and Borough English, General Rule bind the King; but Customs by Reason of the Person or the Goods do not. 6 H. 6. as to Customs. 28. a. Bro. Custom 5.

But to how far this Custom is confined, vide concerning Forfeitures upon Outlawry, post.

Twissden Justice says, in 1 Sid. 138. That he had heard that the Custom of *The Father to the Bough*, &c. was in no other Town or County except in Kent. But Mr. Taylor in his Hist. of Gavelkind 106. mentions, that the Gavelkind Lands in the Liberty of Urchinfeild in Herefordshire partake of the same Privilege. Indeed the same Author says, that it was the Right of all Wales; which is certainly a Mistake, for it appears by Statutum Walliæ, 12 E. 1. that even at the Time when the Lands in that Principality were partible among the Males, the Attainder of the Ancestor for the Felony was a Bar to the Heir: *Si excipiat quod antecessor, vel aliquis in descendendo commisit Feloniam per quam sibi non competit actio, &c. terminetur per recordum Justiciariorum, vel per Inquisitionem Patrie de suspensione, &c.*

To what Places this Custom of Gavelkind is.

In the Stat. de Prærog. Reg. c. 16. it is mentioned to be used in the County of Gloucester by Custom, That after one Year and one Day the Lands and Tenements of Felons shall revert and be restored to the next Heir to whom they ought to have descended if the Felony had not been done: But this Custom differs from that of Kent in one Respect, that the King shall have the Year, Day and Waste; but not so of Lands in Gavelkind. Stamf. de Prærog. 50. a. Robinson's Common Law of Kent 232, 233.

It is said in Chapman's Case, 2 Roll. Rep. 368. That if a Brother in Gavelkind is attaint, the Land shall escheat; tho' otherwise it is, if the Father be attaint; for *The Father to the Bough, and the Son to the Plough*; and the Reason there given is, that the Custom shall be taken strictly. But this is a mistaken Opinion. Mr. Lambard in his Peramb. 611. tho' he admits that some have doubted whether the Brother or Uncle shall have Advantage of this Custom, is notwithstanding of Opinion himself, that whoever the Heir be, he shall enjoy this Privilege, under the Custom, as well as the Son, because the Words of the Custom extend to the Heir in general, and are not restrained to the Son alone. And it is a Distinction unknown to most of the Authorities both antient and modern, the Words of which are general as to all Heirs: *Feloniam antecessoris non impedit seisinam hæredis, nec successionem.* Bract. supra, and 8 Ed. 2. Prescription 50. By the Custom of Kent, if a Man be hanged for Felony, the Lord shall not have the Escheat. And Bacon's Use of the Law 139. That the Land is not forfeitable nor escheatable for Felony. And 1 H. H. P. C. 360. That if the Ancestor be executed for Felony, the Land shall not escheat, but descend to the Heir.

Whether the Brother shall inherit the Gavelkind Lands of his Brother executed for Felony.

And Rot. Claus. 8 Ric. 2. m. 2. Kanc. The King writes to the Sheriff of Kent to redeliver the Gavelkind Lands of a Man executed for Felony, which he had seized *Cum secundum Consuetudinem de Gavelkind, in hoc casu nos habere non debemus annum, diem, neque Vastum, nec Capitales Domini inde Eschaetam; sed proximi hæredes sic Convictorum & suspensorum hæreditatem suam immediate consequuntur feloniam illam non obstante*: And by the same Custom the Wife's Dower of the Moiety of Gavelkind Lands was in no Case forfeitable for the Felony of the Husband, but where the Heir should lose his Inheritance. Consuet. Kanc. in Robinson 283. 8 H. 3. Prescription 60. adjudg'd Lamb. Peramb. 611. Noy's Max. 28. *Dos post feloniam [mariti] peti non potest a muliere, &c. nisi in casu speciali sicut in Kanciâ.* Bract. lib. 4. f. 311.

Dower.

Altho' the Custom of Gavelkind extends not to High Treason, yet it seems it may extend to Petty Treason, for that Offence is by the Law properly comprehended under the word Felony. Co. Lit. 391. a. The Lands escheat to the Lord of the Fee, as in other Felonies. Stat. 25 Ed. 3. c. 2. And Anterfoits attaint of Murder is a good Plea to an Indictment of Petty Treason for the same Death, because it has the same Judgment in Effect, and the very same Forfeiture. 3 Inst. 213.

Whether the Custom of Gavelkind extends to Petit Treason.

Pirates, Robbers and Murderers on the Sea, attainted before Commissioners, by Virtue of the Stat. 28 H. 8. c. 15. forfeit Lands, and incur Corruption of Blood. But not if they are tried before the Lord Admiral in the Court of Admiralty according to the Civil Law. Wood, p. 655.

Piracy.

Mr. Lambard doubts whether the Custom of Gavelkind extends to Piracy, which must be understood of an Attainder before Commissioners by Virtue of 28 H. 8. c. 15. For on a Conviction of Piracy before the Admiral no Forfeiture of Lands is incurred;

Custom of Gavelkind as to Piracy.

the Words of the Statute are, *That such as shall be convicted of any such Offences, &c. shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted for any Treasons, Felonies, Robberies, or other the said Offences done upon the Lands.* Which Words are merely relative, giving only the same Forfeiture for a Felony at Sea as would be incurred by the like Offence at Land; and if Gavelkind Lands are not forfeitable in the latter Case, how can they be in the former? *Robinson 232.*

To what
Time the
Forfeiture re-
lates.

The Forfeiture of Lands relates to the *Time* alledged in the Indictment, for avoiding any Estates, Charges and Incumbrances made by the Felon after the Felony committed. But for the mean Profit of the Lands, it shall relate only to the judgment upon the Indictment. *Co. Lit. 13. a. & b. 390. b.*

If a Felon is convicted by Verdict or Confession, he doth forfeit his Goods and Chattels, real and personal, presently. But Lands and Tenements are not forfeited, nor Blood corrupted, before Attainder, or before Judgment, (as before was said in general) and then it relates to the Time alledged in the Indictment for avoiding Estates, &c. *Co. Lit. 391. a.*

Where Tenant in Fee-simple commits Petit Treason or Felony, and is attainted, the King shall have a Year, Day and Waste in his Lands; or rather a Year and Day in Lieu of Waste; and afterwards it cometh to the Lord by Escheat: But the Lord may compound with the King, and have the Estate presently. It must be a Tenant in Fee-simple, not Tenant in Tail, or for Life; for the King shall have the Profits only of their Lands during their Lives. A Copyhold Estate is of common Right presently forfeited to the Lord of the Manor in Case of Felony. This must be understood of Felonies punishable with Death, not of Petit Larceny. But if a Copyholder for Life is attainted of Felony, and pardoned, he in the Reversion for Life shall have the Estate. [See the *Stat. 24 H. 8. c. 5.* where one indicted or appealed for the Death of another, attempting to murder or rob him, shall forfeit nothing.] *2 Inst. 36, 37, 38. 3 Inst. 111. Coke's Copyb. §. 58.*

When the
Lands, &c.
shall be vested
in the King.

Where an Alien purchases, or where a Person is attainted of Felony, who is not the King's Tenant, and in Cases of *Præmunire*, Alienation in Mortmain, Condition broken, &c. the Inheritance or Freehold of Land is not vested in the King, till Office found by Force of a Commission under the Great Seal, for that is an Office of intitling; not under the Exchequer Seal; an Office found by Force of a Commission from the Exchequer, is only an Office of Instruction, or to instruct the King and his Officers of the Certainty of the Land, &c. by which it may be put in Charge. *5 Co. 52. 3 Cro. 173.*

Of seising
Goods before
Conviction.

By the Statute of *1 Rich. 3. c. 3.* None shall seise the Goods of any Person arrested, before he is convicted or attaint of Felony; upon Pain to forfeit double the Value of the Goods so taken.

The Goods of any Delinquent cannot be seised before they are forfeited; tho' they may be inventoried, and the Town may be charged therewith before Indictment. *Wood, p. 659.*

Forfeiture at
the King's
Will upon
Statute.

Where a Statute says, *Upon Forfeiture to be at the King's Will, of Body, Lands and Goods, &c.* it is not to be extended further than Imprisonment, Lands and Goods. *4 Inst. 66.*

Whether the
Custom of
Gavelkind
extends to Fe-
lonies by Sta-
tute.

Mr. Lambard, Peramb. 61st says, That peradventure this Rule, *The Father to the Bough, and the Son to the Plough*, holds not in Felonies made by Statutes of later Times, because the Custom cannot take hold of that which then was not at all. As Felonies by Statute are now so numerous, this may be a Question of considerable Importance; but it is remarkable, that no other Book either antient or modern making Mention of this Custom takes Notice of this Point; but all say that the Custom extends to Felony, without offering at any Distinction.

Salk 85.

Now Felony is the *Genus* of all Capital Offences under Treason, (except Piracy, which is an Offence by the Civil Law) and tho' the *Species* of this Offence are much increased within Time of Memory, yet they are created in Similitude of the old Felonies, and are to be punished in the same Manner, and no other. And when a Statute makes a new Felony, or says, the Offender shall suffer as in Cases of Felony, it intirely refers itself for the Punishment of the Common Law; and the Word *Felony* being *Vocabulum Artis*, we must have recourse to the Common Law for an Explanation of the Nature of it; which tells us, That it is an Offence punishable with Death, with Forfeiture of Goods, with Corruption of Blood; as a Consequence whereof the Land will escheat to the Lord (*pro defectu heredis*, and not as an immediate Forfeiture) in all Places except in *Kent*, where the Custom is allow'd to have Power to exempt

exempt the Gavelkind Lands from the general Rule, and the inheritable Blood remains as to Tenements of this Nature, notwithstanding the Attainder of the Ancestor. And it is material that the Escheat of the Lands is no Part of the Judgment in Felony, but merely a Consequence implied by the Law on suffering for any Offence of this Kind to which the Custom of *Kent* is a necessary Exception.

If a Court has by Custom Power of holding Pleas, and an old Action is given by Statute in a new Case, it is within the Jurisdiction. 2 *Saund.* 254. *Green* and *Cole*. And the like Law on a Grant of Conusance of Pleas. *Hob.* 48. And it seems that the old Punishment of Felony being applied to a new Offence, our Custom may with a Parity of Reason extend to it. *Robinson's Common Law of Kent*, p. 230, 231, 232.

(D) *Of Felo de se.*

A *Felo de se* forfeits all his Goods and Chattels real and personal which he has in his own Right, and all such Chattels real which he has jointly with his Wife, or in her Right; but not until it is lawfully found by the Oath of twelve Men, before the Coroner *Super visum corporis*, that he is *Felo de se*. [1 *Lev.* 8. *contra.*] He forfeits also Bonds, or Things in Action, belonging solely to himself, and all intire Chattels in Possession, except in the Case of Merchants, where a Moiety only of such joint Chattels as may be severed is forfeited. He does not forfeit any Lands of Inheritance, for he was not attainted in his Life-time; nor the Goods and Chattels which he possessed as Executor or Administrator, nor a Guardianship in Socage or by Nature, because here he hath nothing to his own Use. 3 *Inst.* 55. *Co. Lit.* 84. b. 88. b.

(E) *In Manslaughter.*

THE Offender forfeits his Goods and Chattels on Conviction. *S. P. C.* 185. *Co. Lit.* 391. a. 2 *Inst.* 149.

(F) *In Chancemedley and Se defendendo.*

THE Offender forfeits all his Goods and Chattels, Debts and Duties whatsoever, upon Conviction, but no Freehold or Inheritance. Yet the Offenders have their Pardon of Course. *Co. Lit.* 391. a. 3 *Inst.* 220.

(G) *Upon Outlawry in Treason, Felony, &c.*

THE Offender upon Outlawry in Treason or Felony loses and forfeits as much as if he had appeared, and Judgment had been given against him, as long as the Outlawry is in Force.

Those that tarry till the *Exigent* in Treason, Felony or Petit Larceny, forfeit their Goods and Chattels, tho' they render themselves to Justice, and are acquitted, for it was a Flight in Law. 3 *Inst.* 52, 212, 232. *Finch* 352. 5 *Co.* 110, 111. *H. P. C.* 271.

And upon Attainder of Felony by Outlawry on an Appeal, he shall forfeit only such Lands as he had at the Time of the Outlawry pronounced. For if, hanging the Process, the Defendant conveys away his Land, and afterwards is outlawed, the Conveyance is good, and shall defeat the Lord of his Escheat. But if one is indicted of Felony, and pending the Process against him he conveys away his Land, and after is outlawed, notwithstanding the Conveyance the Lord shall have his Escheat. For in an Appeal the Writ (whereon the Forfeiture is grounded) containeth no Time when the Felony was committed, as an Indictment does; therefore the Escheat in an Appeal can relate only to the Outlawry pronounced, whereas it relates to the certain Time of the Fact set forth in the Indictment. But tho' in an Indictment the Forfeiture shall relate to the Time alledged in the Indictment for avoiding Estates or Incumbrances made by the Felon after the Felony committed, the mesne Profits of the Land shall relate only to the Judgment, as well in Case of Outlawry as in other Cases. *Co. Lit.* 13. a. & b. 390. b. 3 *Inst.* 232.

By Outlawry in Actions all the Offender's Goods and Chattels are forfeited to the King, whether real, as a Term for Years; or personal, as Goods not fixt to the Freehold,

hold, Debts due by Specialty, but not by a simple Contract, Profit of the Lands, as Rents, Corn, (but not of the Land itself) wherein the Offender hath Freehold or Inheritance. But before the Time that the Outlawry appears of Record, the Defendant does not forfeit his Goods and Chattels, nor the Profits of his Lands, if a *Feoffment* is made before Seizure. *Finch* 351. 1 *Lev.* 33. *Noy's Max.* 3.

Gavelkind
Lands.

The Custom of Gavelkind, *The Father to the Bough, and the Son to the Plough*, holds only where the Defendant submits to the Judgment of the Law, and not where he withdraws himself from the Hands of Justice, and will not abide a legal Trial; for if Tenant in Gavelkind, being indicted for Felony, absent himself, and is outlawed after Proclamation made for him in the County, (or if formerly he had taken Sanctuary and had abjured the Realm) his Heir shall reap no Benefit by the Custom, but the Lands shall escheat to the Lord, and the King shall have Year, Day and Waste in them, if holden of another, in like Manner as the Common Law directs, as to Lands which are not subject to the Custom of Gavelkind. (*Robinson's Common Law of Kent*, p. 228. cites many Authorities.) And so it was adjudged in *Canc.* 28 *Eliz.* between *Brocas* and *Savage*, cited in the Margin of the last Edition of *Dyer* 310. b.

"In Itenire W. de Ralegh in Com. Canc. Assisa Mortis Antecessoris, &c. Si Adolphus, &c. ubi dicitur, quod Felonia Antecessoris non impedit seisinam hæredis nec successionem, sed hoc specialiter in Com. Canc. de Tenementis quæ tenentur in Gavelkind si ille qui Feloniam fecerit iudicium sustinuerit." *Bract. lib.* 4. 276. b.

(H) In Petty Larceny.

THE Offender upon Conviction forfeits Goods and Chattels, but no Freehold or Inheritance. [See *Forfeiture upon Outlawry*, &c. ante.] *Co. Lit.* 391. a. 3 *Inst.* 218, 233.

(I) Upon Flight.

IF Flight is found by Indictment *Super visum corporis* before the Coroner in Case of Death, or if the Jury find Flight in Treason, Felony or Petty Larceny upon Acquittal, it is a Forfeiture of the Goods and Chattels which one had at the Time of the Indictment or Acquittal. 3 *Inst.* 218, 233. *H. P. C.* 271. 5 *Co.* 109.

(K) Upon Appeal of Death.

THE Defendant forfeits as in *Felony*, and the Lord shall have his Land by *Escheat*. But the Forfeiture of the Land on Appeal relates to the Judgment only, whereas the Forfeiture on an Indictment of Felony shall relate to the Day on which it was committed. [See of *Forfeiture in Felony*, and upon *Outlawry on Appeal*, before.] *Co. Lit.* 13. a. 390. b.

(L) Drawing a Weapon upon a Judge, or for striking in Westminster-hall, &c. sitting the Courts.

THE Offender forfeits Lands and Tenements, Goods and Chattels. Some say the Profits of the Lands only during Life, others say the Land shall be forfeited during Life. *H. P. C.* 131. 2 *Roll. Abr.* 76, 77.

But for striking or drawing Blood in the King's Palace, where his Royal Person resides, there is no Forfeiture of Lands or Goods. 3 *Inst.* 140, 141, 218.

(M) In Praemunire.

THE Offender forfeits his Lands and Tenements in Fee-simple, and his Goods and Chattels. But Estates in Tail or for Life are forfeited only during Life. *Quære*, Whether an Attainder in a *Praemunire* shall have Relation to the Offence for the Forfeiture of Lands, or only to the Time of the Judgment. It extendeth not to Forfeiture of Fairs, Markets, Rent-Charges, Warrens, Annuities, or other Hereditament that

that is not within the Word *Land*. *Co. Lit.* 129. *b.* 130. *a.* 139. *a.* 3 *Inst.* 126, 218.
3 *Cro.* 172, 173.

(N) *For challenging to Fight for Money won at Play, &c.*

BY *Stat.* 9 *Ann.* c. 14. §. 8. The Offender forfeits his personal Estate.

(O) *By Papists.*

BY *Stat.* 1 *Geo.* 1. c. 55. Papists not taking the Oaths, &c. or in Default thereof not registering their Names and Estates, forfeit the Fee-simple and Inheritance of all such Lands, &c. not registred, or fraudulently registred, wherein they or any in Trust for them were seised; and the full Value of the Inheritance of all such Lands, &c.

(P) *By Artificers exercising or teaching their Trades in foreign Parts.*

BY *Stat.* 5 *Geo.* 1. c. 27. If any Artificer in Wool, Iron, Steel, Brass, or any other Metal, Clock-maker, Watch-maker, &c. shall exercise or teach his Trade in a foreign Country, and shall not return into this Realm within six Months after Warning by the Ambassador, Envoy, &c. or by one of the Secretaries of State, and from thenceforth continually inhabit within this Realm, he shall be incapable of taking any Legacy, or of being Executor or Administrator, or of taking any Lands, &c. and shall forfeit all his Lands, Goods, &c. to his Majesty's Use, and shall be deemed Alien, &c.

C H A P. III.

The different Ways of Acquiring or Conveying Personal Estates in particular.

S E C T. I.

Of Acquiring or Conveying Personal Estates by Act in Law, by Act of the Party, or by a mix'd Act.

Personal Things, either in Action or Possession, may be acquired or transferred three Ways: By Act in Law, by Act of the Party, or by a mix'd Act, consisting of both. *Hale's Anal.* §. 26.

(A) *The Acquisition of Property by Act in Law.*

THIS Acquisition by *Act in Law* may be many Ways, viz. 1. By *Succession*, whereby Properties are transferred to the Successors of such a Corporation by Law or Custom, which has a Power to receive Personal Things in a Politick Capacity; as 1. A sole Corporation, by Custom. 2. An Aggregate Corporation, by Common Law.

2. By *Devolution*, viz. To the Executor. 2. To the Ordinary. 3. To the Administrator. 4. To the Husband by the Intermarriage, *i. e.* As to Personal Things in Possession, but not as to Personal Things in Action.

3. By *Prerogative*, whereby they are given to the King, or to such as have the King's Title by Grant or Prescription, as Waif, Stray, Wreck, Treasure-Trove.

4. By *Custom*, as in the Case of Heriot-Custom and Heriot-Service, Mortuaries, Heir-Looms, foreign Attachment, Assignment of Bills of Exchange.
5. By *Judgment*, and Execution thereupon, which in the Case of the King extends as well to Things in Action that have a Certainty in them (as Debts) as to Things in Possession; and this by (1) *Fieri Facias*, or (2) *Elegit*.
6. By *Sale in Market-overt*. *Hale's Anal.* §. 27.

(B) *The Acquisition of Property by Act of the Party.*

A Acquisition of Property by Act of the Party may be three Ways, viz. 1. By Grant, 2. By Contract, or 3. By Assignment.

And herein is considerable, 1. That in the King's Case it extends as well to Things in Action as in Possession; for Debts may be assigned to him, or by him. 2. In the Case of other Persons, only Things in Possession are assignable. *Hale's Anal.* §. 28.

(C) *The Acquisition of Property by a mix'd Act, partly by Act of Law, and partly by Act of the Party.*

THUS Things in Action as well as in Possession are transferrable two Ways:

1. By *Act of the Party* with *Custom* co-operating. Thus Bills of Exchange are assignable.
2. By *Operation of the Law*, concurring with the *Act* or *Default of the Party*; as Forfeitures of several Kinds, viz. 1. By Outlawry in Personal Actions. 2. By being put to the *Exigend* in the Case of Felony. 3. By Attainder of Treason or Felony.
4. By Motion to the Death of any Person, as Deodand. *Hale's Anal.* §. 28.

These (according to Lord C. J. *Hale*) are the various Ways whereby Things Personal either in Possession or Action may be acquired or transferred, with their Divisions and Subdivisions, &c. which are put here, being very necessary for the Understanding this Subject: But to dispose the Matter more conveniently I have chosen the following Heads and Divisions, &c. which will have Reference to this Section, as to which Acquest, &c. is an Act in Law, an Act of the Party, or a mix'd Act.

S E C T. II.

Of Acquiring or Conveying Personal Estates by Gift.

Gift, what.

A Gift is a Transferring the Property in a Thing from one to another without a valuable Consideration. For to transfer any Thing upon a valuable Consideration, is a Contract or Sale.

He who gives any Thing is called the *Donor*; and he to whom it is given is called the *Donee*.

Gift, how made.

By *Gift*, the Property of Goods may be passed by *Word* or *Writing*.

By the Common Law all Chattels real or personal may be granted or given without Deed, except in some special Cases, and a free Gift is good without a Consideration, *Perk.* 57. *Hob.* 230. if not to defraud Creditors, *vide Stat.* 13 *El.* c. 5. *post.*

But by the *Stat.* 29 *Car.* 2. c. 3. No Leases, Estates or Interests either of Freehold, or Terms of Years, or any uncertain Interest, not being Copyhold or Customary Interest, of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall at any Time be assigned, granted or surrendered, unless it be by Deed or Note in Writing, signed by the Party so assigning, granting or surrendering the same, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.

If a Man makes a general Gift of all his Goods, without Exception of Apparel or other Things of Necessity, as Bedding, &c. tho' it is by Deed, this may reasonably be suspected to be fraudulent to deceive Creditors, &c. and tho' there may be a true Debt owing, &c. a Gift of all one's Goods in Satisfaction of the Debt, &c. is void against other Creditors, &c. tho' good against the Giver, his Executors or Administrators,

strators, or any Man to whom afterwards he shall sell or convey them, for tho' it may be a Gift upon valuable Consideration, yet it may not be done *bona fide*, as the Statute of the 13 *Eliz. c. 5.* requires. (*Bac. L. Tracts* 146. *Shaw's Bac.* 260, 261. 3 Co. 80, &c.)

By which Statute, for avoiding and abolishing of feigned, covinous and fraudulent Stat. 13 El. Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and c. 5. Executions, as well of Goods and Chattels, &c. contrived to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, to the Hindrance of the due Course and Execution of Law and Justice, &c. it is enacted, That every Feoffment, Gift, &c. of Lands, &c. Goods and Chattels, or of any Lease, Rent, Common, or other Profit or Charge out of the same, by Writing or otherwise, which shall be made to or for any Intent or Purpose before declared and expressed, shall be deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them, whose Actions, Suits, Debts, &c. by such fraudulent Devices and Practices as aforesaid, are, shall or might be in any wise disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate, and of none Effect.

And that the Parties to such feigned, covinous or fraudulent Feoffment, Gift, &c. or being privy and knowing of the same, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, as true, simple and done, had or made *bona fide*, upon good Consideration; or shall alien or assign any the Lands, &c. Goods, Leases or other Things before-mentioned, to him or them conveyed as aforesaid, or any Part thereof, shall incur the Penalty and Forfeiture of one Year's Value of the said Lands, &c. Leases, Rents, Commons, or other Profits, of or out of the same, and the whole Value of the said Goods and Chattels, and also so much Money as are or shall be contained in any such covenous and feigned Bond; one Moiety to the King, and the other to the Party aggrieved, to be recovered by Action, &c. and also being thereof lawfully convicted shall suffer Imprisonment for one half Year without Bail or Mainprise. Provided that this Act shall not extend to common Recoveries;

Nor to make void any Estate or Conveyance by Reason whereof any Person shall use any Voucher in a Writ of *Formedon*;

Nor to any Estate or Interest in Lands, &c. Leases, Rents, Commons, Profits, Goods or Chattels, had, made, conveyed or assured, which Estate or Interest is or shall be upon good Consideration, and *bona fide* lawfully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate, not having, at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as aforesaid.

Upon which Statute an Information was brought against *Twyne*, in *Pas. 24 El.* (3 Co. 80.) in the Star-Chamber, for making and publishing a fraudulent Gift of Goods. The Case was thus: *Pierce* was indebted to *Twyne* in 400 *l.* and was also indebted to *C.* in 200 *l.* *C.* brought an Action of Debt against *Pierce*, and pending the Writ, *Pierce* being possessed of Goods and Chattels of the Value of 300 *l.* in secret made a general Deed of Gift of all his Goods and Chattels real and personal whatsoever to *Twyne* in Satisfaction of his Debt; and notwithstanding that, *Pierce* continued in Possession of the said Goods, and some of them he sold; and he shorn the Sheep, and marked them with his own Mark: And afterwards *C.* had Judgment against *Pierce*, and had a *Fieri Facias* directed to the Sheriff, who came to execute it, but divers Persons, by Command of *Twyne*, with Force resisted the Sheriff, claiming them to be *Twyne's* Goods by Force of the said Gift; and openly declared by the Commandment of *Twyne*, that it was a good Gift, and made on a good and lawful Consideration; and whether this Gift on the whole Matter was fraudulent and of no Effect by the said Statute, or not, was the Question. And it was resolved to be a fraudulent Gift within the said Statute, for it had the Signs and Marks of Fraud:

1. Because the Gift is general, without Exception of his Apparel or any Thing of Necessity; for it is commonly said, *Quod dolosus versatur in generalibus.*
2. The Donor continued in Possession, and used them as his own; and by Reason thereof he traded with others, and defrauded and deceived them.
3. It was made in secret, *Et dona claud' sunt semper suspiciosa.*
4. It was made pending the Writ.

5. Here

5. Here was a Trust between the Parties, for the Donor possessed all, and used them as his proper Goods, and Fraud is always apparelled and clad with a Trust, and a Trust is the Cover of Fraud.

6. The Deed says, That the Gift was made honestly, truly and *bona fide*; *Et clausula in consuet' semper inducunt suspicionem.*

And it was also resolved, that notwithstanding here was a true Debt due to Twyne, and good Consideration of the Gift, it was not within the Proviso of the said Statute, whereby it is provided, that the Act shall not extend to Estates, &c. Goods or Chattels made on a good Consideration and *bona fide*; for tho' it is on a true and good Consideration, yet it is not *bona fide*, for no Gift shall be deemed to be *bona fide* within the said Proviso which is accompanied with any Trust: As if a Man be indebted to five several Persons in the several Sums of 20*l.* and has Goods of the Value of 20*l.* and makes a Gift of all his Goods to one of them in Satisfaction of his Debts; for by giving all his Goods there seems to be a secret Trust and Confidence that the Donee shall deal favourably with the Donor in Respect of his Poverty, either to permit him, or some other for him, or for his Benefit or Use, to have Possession of them; and is contented that he shall pay him his Debt when he is able, this shall not be called *bona fide* within the said Proviso; and therefore when any Gift shall be made in Satisfaction of a Debt, let it be made, 1. In a publick Manner before Neighbours, and not in private, for Secrecy is a Mark of Fraud. 2. Let the Goods and Chattels be appraised by good People to the very Value, and the Gift made in particular in Satisfaction of the Debt. 3. Presently after the Gift let the Donee take Possession of them, for the Continuance of the Possession in the Donor is a Sign of a Trust, but the Words of the Proviso, *on a good Consideration, and bona fide*, do not extend to every Gift made *bona fide*; for there are two Manners of Gifts on a good Consideration, *viz.* Consideration of Nature or Blood, and a valuable Consideration. As to the first in the Case put before, if he who is indebted to five several Persons in 20*l.* each, in Consideration of natural Affection gives all his Goods to his Son or Cousin, in that Case, forasmuch as others should lose their Debts, &c. which are Things of Value, the Intent of the Act was, that the Consideration in such Case should be valuable; for Equity requires, that such Gift which defeats others, should be made on as high and good Consideration as the Things which are thereby defeated are; and it is to be presumed that the Father, if he had not been indebted to others, would not have dispossessed himself of all his Goods, and subject himself to his Cradle; and therefore it shall be intended that it was made to defeat his Creditors: And if Consideration of Nature or Blood should be a good Consideration within the said Proviso, the Statute would serve for little or nothing, and no Creditor would be sure of his Debt.

And every Gift made *bona fide*, is either on a Trust between the Parties, or without any Trust.

Every Gift on a Trust is out of the said Proviso; for that which is betwixt the Donor and Donee, called a Trust *per nomen speciosum*, is in Truth, as to all the Creditors, a Fraud, for they are thereby defeated and defrauded of their true and due Debts.

And every Trust is either expressed or implied; an express Trust is, when in the Gift, or upon the Gift the Trust by Word or Writing is expressed: A Trust implied is, when a Man makes a Gift without any Consideration, or on a Consideration of Nature or Blood only.

And when a Man being greatly indebted to sundry Persons, makes a Gift to his Son, or any of his Blood, without Consideration, but only of Nature, the Law intends a Trust between them, *viz.* That the Donee would, in Consideration of such Gift being voluntarily and freely made to him, and also in Consideration of Nature, relieve his Father or Cousin, and not see him want who had made such Gift to him.

But a valuable Consideration is a good Consideration within this Proviso; and a Gift made *bona fide*, is a Gift made without any Trust either expressed or implied; by which it appears, that a Gift made on a good Consideration, if it be not also *bona fide*, is not within the Proviso; nor a Gift made *bona fide*, if it be not on a good Consideration; but it ought to be on a good Consideration, and *bona fide*.

If a Deed of Gift of Goods and Chattels be delivered to the Donee, the Goods and Chattels are in the Donee presently, before Notice or Agreement (*i. e. tho' he be absent and knows nothing of it, nor has any wife agreed to it*); but the Donee may make

make Refusal *in pais*, and by that the Property and Interest will be de vested, and such Disagreement need not to be in a Court of Record. 3 Co. 26, 27.

Such Gift is by Act of the Party, and the Property vests in the Donee till he disagrees. A Gift may also be by Act of Law, as when a Woman is married, all her Goods and Chattels are given to her Husband by the Marriage; or when one is made Executor, the Law gives all the Goods and Chattels of the Testator to the Executor; of which see more in the following Sections.

S E C T. III.

Of acquiring or conveying Personal Estates by Sale.

A Sale is the Transferring the Property of a Thing from one to another upon a Sale, what: valuable Consideration.

He who sells the Thing is called the *Vendor* or *Bargainor*; and he to whom it is sold is called the *Vendee* or *Bargainee*.

A Sale must be upon a valuable Consideration, but a Gift may be without. *Noy's Max. 87.*

By Sale, any Man may convey his own Goods to another; and altho' he may fear Execution for Debts, yet he may sell them out-right for Money, by the Common Law, at any Time before the Execution served. *Bac. L. Tracts 156. Shaw's Bac. Vol. 2. p. 261.* But now by *Stat. 29 Car. 2. c. 3. §. 16.* No Writ of *Fieri Facias*, or other Writ of Execution, shall bind the Property of the Goods against whom such Writ of Execution is sued forth, but from the Time that such Writ shall be delivered to the Sheriff, &c. to be executed. Who may sell.

But if there be any Reservation of Trust between the Parties, that on paying the Money the Vendor shall have the Goods again, the Sale is not good, for such a Trust proves a Fraud to prevent the Creditors from taking the Goods in Execution. *What is a good Sale or not. Bac. L. Tracts 156, 157. Shaw's Bac. Vol. 2. p. 261.*

A Debtor to the King by Bond, sold a Lease for Years for a valuable Consideration; the Sale binds the King, because it was but a Chattel, for the King's Debtor shall not be in a worse Condition than a Felon or Traitor, who may sell his Goods and Chattels after the Felony or Treason committed, and before Conviction, for his Maintenance. 8 Rep. 171. 3 Rep. 82.

If a Man agrees for Wares, he must not carry them away before he has paid for them, unless a Day of Payment is allow'd him.

If the Bargain is, that you shall give me five Pounds for my Horse, and you give me a Penny in Earnest, which I accept, this is a perfect Sale.

If I say I will sell my Horse for five Pounds, and you say you will give me five Pounds, and presently go to tell out the Money to pay for him, I cannot sell my Horse to another, but if you do not pay me presently, it is no Contract. *Noy's Max. 87. Hob. 41.*

If I sell my Horse for Money, I may keep him till I am paid.

And if a Horse dies in my Stable after I have sold him, and before I have delivered him to the Buyer, I may notwithstanding have an Action for my Money, because the Property was in the Buyer. *Noy's Max. 88.*

But by *Stat. 29 Car. 2. c. 3. §. 17.* No Contract for the Sale of any Goods, Wares and Merchandize, for the Price of ten Pounds or upwards shall be good except the Buyer actually receives Part of the Goods sold, or gives something in Earnest to bind the Bargain, or in Part of Payment, or some Note or Memorandum thereof in Writing be made and sign'd by the Parties to be charged with the Contract, or by their Agents thereunto lawfully authorized.

And by said Statute, §. 4. No Action shall be brought upon any Agreement that is not to be performed within the Space of a Year from the making of the said Agreement, unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof shall be put in Writing and sign'd by the Party to be charged therewith, or some other Person thereunto by him lawfully authorized.

Observe from both the said Sections, that if any Agreement is for Goods, &c. under the Price of ten Pounds, and they are not delivered *within the Year*, it is void unless put in *Writing*, tho' Earnest be given. But as to Agreements that are not to be performed

formed within a Year, if no Day is set, or the Time is uncertain, (as to pay a Sum at the Day of Death, &c.) they are good notwithstanding the Statute, for it doth not appear to the contrary but that the Payment may be within the Year.

How a Sale
in a Market-
overt of
Goods, &c.
tho' stolen,
&c. shall bar
the Owner.

The Common Law held it for a Point of great Policy, and necessary for the Commonwealth, that Fairs and Markets-overt should be replenished, and well furnished with all Manner of Commodities vendible in Fairs or Markets, for the necessary Sustentation and Use of the People. And to that End the Common Law ordained (to incourage Men thereto) that *all Sales and Contracts of any Thing vendible in Fairs and Markets-overt, should not only be good between the Parties, but should bind those who had Right thereto.* 2 Inst. 713.

Such Sale is good tho' the Thing vendible be stolen, taken in jest, or borrowed of the right Owner, or it be carried to the Market by a Felon or Trespasser. *Bac. L. Tracts 157. Shaw's Bac. 261.* But as to Goods stolen in *Wales* and sold in a Fair or Market there, *vide Stat. 34 & 35 H. 8. c. 26. post.*

Who are ex-
cepted or not.

But the foregoing Rule admits of many Exceptions and Observations.

1. It shall not bind the King for any of his Goods sold in Market-overt by any Person; but the Sale by a Stranger in Market-overt binds Infants; Feme Coverts who have Right either in their own Right, or as Executors or Administrators; also Ideots, *Non compos mentis*, Men beyond Sea, and in Prison, who have Right. 2 Inst. 713.

2. The Sale is not good tho' the Fair or Market be overt, unless the Sale be made in a Place that is overt and open, and not in a Back-room, Warehouse, &c. 2 Inst. 713. As if a Sale of Plate be in a Shop of a Goldsmith, either behind a Hanging, or behind a Cupboard upon which his Plate stands, so that one who stands or passes by the Shop cannot see it, it will not change the Property. Nor if the Sale be not in the Shop, but in the Warehouse or other Place of the House, for that is not in Market-overt, and no one would search there for his Goods. 5 Co. 83. b.

3. Altho' it be in an open Place, yet overt in this Case implies apt and sufficient, 2 Inst. 713. *i. e.* it must be a Sale in a Market or Fair where Things of that Nature are usually bought or sold in, otherwise the Sale will not alter the Property.

As for Example, If a Man steals a Horse and sells him in *Smithfield*, the true Owner is barred by this Sale; but if he sells the Horse in *Cheapside*, *Newgate* or *Westminster* Market, the true Owner is not barred by this Sale, because these Markets are usually for Flesh, Fish, &c. and not for Horses. *Bac. L. Tracts 157.*

Or if Plate be stolen and sold openly in a Scrivener's Shop on the Market-Day, this Sale does not change the Property, but the Party may have Restitution; for a Scrivener's Shop is not a Market-overt for Plate, because no Person would search there for such a Thing, *& sic de similibus*, &c. But if the Sale had been openly in a Goldsmith's Shop in *London*, (where every Day except *Sunday* is a Market-Day) so that any Person who stood or passed by the Shop might see it, in that Case it would change the Property. 5 Co. 83. b.

4. It must be a Sale, and not a free Gift, without any valuable Consideration: For Fairs and Markets were not instituted for Gifts, but for Sales. 2 Inst. 713.

5. If the Buyer knows whose Goods they were, and that the Seller thereof has at most but a wrongful Possession, this shall not bind him who has Right. 2 Inst. 713.

6. If they be sold by Covin between two on Purpose to bar him that has Right, such Sale does not bar him. 2 Inst. 713.

7. If a Sale be made of Goods by a Stranger in a Market-overt, whereby the Right of *A.* is bound, yet if the Seller acquires the Goods again, *A.* may take them again, because he was the Wrong-doer, and he shall not take Advantage of his own Wrong. 2 Inst. 713.

8. There must be a Sale and Contract; and therefore a Sale to a Man of his own Goods in Market-overt binds not; and likewise a Sale in Market-overt by an Infant of such Tendernefs of Age as it may appear to the Buyer that he is within Age, or by a Feme Covert, if the Buyer knows her to be a Feme Covert, (unless for such Things as she usually trades for, or by the Consent of her Husband) does not bind. *Et sic de similibus.* 2 Inst. 713.

9. The Contract must be originally and wholly made in the Market-overt, and not to have the Inception out of the Market, and the Consummation in the Market. 2 Inst. 713, 714.

10. By the Common Law, a Sale in Market-overt altered the Property tho' no Toll was paid either in Respect of the Freedom of the Fair or Market, wherein no

Toll

Toll at all was to be paid, or for that many were discharged of Payment of Toll, as the King, and some of his Subjects by Charter, and some by Tenure, as Ancient Demefne, &c. where Toll of others was to be taken. 2 *Inst.* 74. But *vide* the Statutes 2 & 3 *Pb. & M. c. 7.* & 31 *El. c. 12. post.*

11. The Sale must not be in the Night, but between the Rising and Setting of the Sun; for he who has a Fair or Market either by Grant or Prescription, has Power to hold it *per unum diem, seu duos, vel tres dies*, &c. where (*dies*) is taken for *dies solaris*; for if it should be taken *dies naturalis*, then might the Sale be made at Midnight. And yet a Sale made in the Night is good between the Parties, but not to bind a Stranger that has Right. 2 *Inst.* 714.

12. If a Person who is robbed of Goods pursues his Appeal freshly, and convicts the Felon, tho' the King's Officer who seised them lawfully, or any other Person sells them in Market-overt, the King shall make Restitution of his Goods notwithstanding the Sale in Market-overt, because by the fresh and diligent Suit and Pursuit of Record, the Goods were so protected, and by the King's Seizure, that the Property of the same being *tanquam in Custodia Legis*, cannot be altered by Sale in Market-overt. 2 *Inst.* 714. *Vide Stat. 21 H. 8. c. 11. as to Restitution, and 3 Inst. Tit. Restitution.*

In London every Day except Sunday is a Market-Day, and every Shop is a Market-overt for such Things only which by the Trade of the Owner are put there to Sale.

But by several Statutes Properties in Horses, Goods, &c. are particularly preserved in the Owner, notwithstanding a Sale in a Market-overt.

By Stat. 34 & 35 H. 8. c. 26. If any Goods or Chattels be stolen by any Person or Persons, and sold in any Fair or Market in Wales, no such Sale shall change the Property thereof from the Owner of the same, but that he may seize, take and have the same again upon Proof thereof made.

And by the Statute of 2 & 3 *Pb. & M. c. 7.* after reciting, 'That stolen Horses, Mares and Geldings, by Thieves and their Confederates were for the most part sold, exchanged, given or put away in Houses, Stables, Backsides, and other secret and privy Places of Markets and Fairs,' (*hereby the common People were deceived, but in Law this did not change the Property, as before mentioned in the third Exception and Observation*) 'and the Toll also privily paid for the same, whereby the true Owners thereof were not able to try the Falshood and Covin betwixt the Buyer and Seller of such Horse, Mare or Gelding, was by the Common Law of this Realm without Remedy.'

It is enacted, 'That the Owner, Governor, Ruler, Farmer, Steward, Bailiff or Chief Keeper of every Fair and Market-overt within this Realm, and other the Queen's Dominions, shall before the Feast of Easter next, and so yearly, appoint and limit out a certain and special open Place within the Town, Place, Field or Circuit where Horses, Mares, Geldings and Colts have been, and shall be used to be sold in any Fair or Market-overt, in which said certain and open Place as is aforesaid, there shall be by the said Ruler or Keeper of the said Fair or Market, put in and appointed one sufficient Person or more to take Toll, and keep the same Place from Ten of the Clock before Noon until Sun-set of every Day of the aforesaid Fair or Market, upon Pain to lose and forfeit for every Default forty Shillings.'

'And that every Toll-gatherer, his Deputy or Deputies, shall, during the Time of every the said Fairs and Markets, take their due and lawful Tolls for every such Horse, Mare, Gelding or Colt, at the said open Place to be appointed as is aforesaid, and betwixt the Hours of Ten of the Clock in the Morning and Sun-set of the same Day if it be tendered, and not at any other Time or Place, and shall have presently before him or them at the taking of the same Toll the Parties to the Bargain, Exchange, Gift, Contract or putting away of every such Horse, Mare, Gelding or Colt, and also the same Horse, Mare, Gelding and Colt so sold, exchanged or put away; and shall then write, or cause to be written in a Book to be kept for that Purpose, the Names, Surnames and Dwelling-places of all the said Parties, and the Colour, with one special Mark at the least of every such Mare, Gelding or Colt, on Pain to forfeit at and for every Default contrary to the Tenor hereof forty Shillings.'

'And the said Toll-gatherer, or Keeper of the said Book, shall within one Day next after every such Fair or Market, bring and deliver his said Book to the Owner, Governor, Ruler, Steward, Bailiff or Chief Keeper of the said Fair or Market, who

The Days and Places of Markets-overt.

Statutes relating to Sales in Fairs and Markets.

Place for a Horse-fair or Market.

Toll-taker and Keeper of the Fair or Market.

Taking Tolls;

Toll-taker to have before him the Parties, and the Horse, &c. and make an Entry in a Book,

and deliver the Book to the Owner of the Fair or Market.

- who shall then cause a Note to be made of the true Number of all Horses, Mares, Geldings and Colts sold at the said Market or Fair, and shall there subscribe his Name, or set his Mark thereunto, upon Pain to him that shall make Default therein to lose and forfeit for every Default forty Shillings, and also to answer the Party grieved by Reason of the same his Negligence in every Behalf.
- And that the Sale, Gift, Exchange or putting away in any Fair or Market-overt of any Horse, Mare, Gelding or Colt, that is or shall be thievishly stolen, or feloniously taken away from any Person or Persons, shall not alter, take away nor exchange the Property of any Person or Persons to or from any such Horse, Mare, Gelding or Colt, unless the same Horse, Mare, Gelding or Colt shall be in the Time of the said Fair or Market wherein the same shall be so sold, given, exchanged or put away, openly (1) ridden, led, walked, driven or kept standing by the Space of one Hour together at the least, betwixt Ten of the Clock in the Morning and the Sun-setting, in the open Place of the Fair or Market wherein Horses are commonly used to be sold. *(This is in * Affirmance of the Common Law)* And (2) not within any House, Yard, Backside, or other privy or secret Place; and (3) unless all the Parties to the Bargain, Contract, Gift or Exchange, present in the said Fair or Market, shall also come together and bring the Horse, Mare, Gelding or Colt so sold, exchanged, given or put away to the open Place appointed for the Toll-taker, or for the Book-keeper where no Toll is due, *(which is † added, for Toll is not due nor payable by all Persons in Fairs and Markets, to the End that the Book-keeper may be equivalent in those Cases to the Toll Receivers)* and (4) there enter, or cause to be entred, their Names and Dwelling-places in Manner as is aforesaid, (5) with the Colour or Colours, and one special Mark at the least of every the same Horses, Mares, Geldings or Colts in the Toll-taker's Book, or in the Keeper's Book for that Purpose, whereunto Toll is due as is aforesaid, and (6) also pay him their Toll, if they ought to pay any; and if not, then the Buyer to give one Penny for the Entry of their Names, and executing the other Circumstances afore rehearsed, to him that shall write the same in the said Book.
- And if any Horse, Mare, Gelding or Colt, that is or shall be thievishly stolen or taken away, shall be sold, given, exchanged or put away in any Fair or Market, and not used in all Points, according to the Tenor and Intent of this Statute, that then the Owner of every such Horse, Mare, Gelding or Colt, shall and may by Force of this Statute seize or take again the said Horse, Mare, Gelding or Colt, or have any Action of Detinue or Replevin for the same; any Sale, Gift, Exchange or putting away of any such Horse, Mare, Gelding or Colt, other than according to this Statute, in any wise notwithstanding.
- The one Half of all which Forfeitures to be to the King and Queen's Majesty, her Heirs and Successors, and the other to him or them that will sue for the same before the Justices of Peace, or in any of the King and Queen's Majesty's ordinary Courts of Record, by Bill, Plaint, Action of Debt or Information, in which Suits no Protection, Effoin or Wager of Law shall be allowed.
- And that the Justices of Peace of every Place and County, as well within Liberties as without, shall have Authority in their Sessions within the Limits of their Authority and Commission to inquire, hear and determine all Offences against this Statute, as they may do any other Matter triable before them.
- Provided, that in every such Fair and Market where any Toll is, nor shall be due, nor leviable by Reason of the Freedom, Liberty or Privilege of the said Fair or Market, the Keeper or Keepers of the Book touching the Execution of this present Act, shall take nor exact but one Penny upon and for every Contract, for his Labour in Writing the Entry concerning the Premises, in Manner and Form as is before declared.
- But neither the Rules of the Common Law nor the above Statute had so good Effect as was expected; therefore,
- By an additional Statute of 31 *El. c. 12.* after reciting, 'That thro' the Counties of this Realm Horse-stealing was grown so common as neither in Pasture or Closes, nor hardly in Stables, the same were in Safety from stealing, which ensued by the ready Buying of the same by Horse-Courfers and others in some open Fairs or Markets far distant from the Owner, and with such Speed as the Owner could not by Pursuit possibly help the same, &c. it is enacted, That no Person shall in any Fair or

Six Points to save the Property of the right Owner, &c.

1. Riding publicly.

* 2 Inst. 715.

2. Not in a private Place.

3. Parties together.

† 2 Inst. 716.

4. Entry of their Names.

5. And Colour and Marks.

6. Pay Toll, &c.

The Horse to be used, &c. in all the said Points, or the Sale is void, and the Owner to have the Horse, &c.

Penalties how recovered.

Offences where cognizable.

Fee for entering the Contract.

Causes of Horse-stealing.

or Market sell, (a) give, exchange or put away any Horse, Mare, Gelding, Colt or Filly, unless (1) the Toll-taker there, (or where no Toll is paid) the Book-keeper, Bailiff or Chief Officer of the same Fair or Market, shall and will take upon him perfect Knowledge of the Person that so shall sell, or offer to sell, give or exchange any Horse, Mare, Gelding, Colt or Filly, and of his true Christian Name, Surname and Place of Dwelling and Residence, and (2) shall enter all the same his Knowledge into a Book there kept for Sale of Horses, (3) or else that he so selling or offering to sell, give or exchange, or put away any Horse, Mare, Gelding, Colt or Filly, shall bring unto the Toll-taker, or other Officer aforesaid of the same Fair or Market, one sufficient or credible Person that can, shall or will testify and declare unto and before such Toll-taker, Book-keeper or other Officer, that he knows the Party that so sells, gives, exchanges or puts away such Horse, Mare, Gelding, Colt or Filly, and his true Name, Surname, Mystery and Dwelling-place, and (4) there enter or cause to be entered in the Book of the said Toll-taker, or Officer, as well the true Christian and Surname, Mystery, and Place of Dwelling and Residence of him that so selleth, giveth, exchangeth or putteth away such Horse, Mare, Gelding, Colt or Filly, as of him that so shall testify or avouch his Knowledge of the same Person; and (5) shall also cause to be entered the very true Price or Value that he shall have for the same Horse, Mare, Gelding, Colt or Filly so sold.

This is an Act of Addition consisting of six Points, for the Saving of the Property in the right Owner.

1. Knowledge of the Seller.

2. Entry of Name, &c.

3. Voucher.

4. Entry of Name, &c.

And 5. Value.

And that no Person shall take upon him to vouch, testify or declare, that he knoweth the Party that so shall offer to sell, give, exchange or put away such Horse, Mare, Gelding, Colt or Filly, unless he do indeed truly know the same Party, and shall truly declare to the Toll-taker, or other Officer aforesaid, as well the Christian Name, Surname, Mystery and Place of Dwelling and Residency of himself, as of him of and for whom he maketh such Testimony and Avouchment.

And that no Toll-gatherer, or other Person keeping any Book of Entry of Sales of Horses in Fairs or Markets, shall take or receive any Toll, or make Entry of any Sale, Gift, Exchange or putting away of any Horse, Mare, Gelding, Colt or Filly, unless he knows the Party that so sells, gives, exchanges or puts away any such Horse, Mare, Gelding, Colt or Filly, and his true Christian Name, Surname, Mystery and Place of his Dwelling or Residency, or the Party that shall and will testify and avouch his Knowledge of the same Person so selling, giving, exchanging or putting away such Horse, Mare, Gelding, Colt or Filly, and his true Christian Name, Surname, Mystery and Place of Dwelling or Residency, and shall make a perfect Entry into the said Book of such his Knowledge of the Person, and of the Name, Surname, Mystery and Place of the Dwelling or Residency of the same Person, and also the true Price or Value that shall be *bona fide* taken or had for any such Horse, Mare, Gelding, Colt or Filly so sold, given, exchanged or put away, so far as he can understand the same, and then give to the Party so buying or taking by Gift, Exchange or otherwise, such Horse, Mare, Gelding, Colt or Filly, requiring and paying two Pence for the same, a true and perfect Note in Writing of all the full Contents of the same, subscribed with his Hand, on Pain that every Person that so shall sell, give, exchange or put away any Horse, Mare, Gelding, Colt or Filly, without being known to the Toll-taker or other Officer aforesaid, or without bringing such a Voucher or Witness, causing the same to be entered as aforesaid; and every Person making any untrue Testimony or Avouchment in the Behalf aforesaid, and every Toll-taker, Book-keeper, or other Officer of Fair or Market aforesaid, offending in the Premises contrary to the true Meaning aforesaid, shall forfeit for every such Default the Sum of five Pounds; but also that every Sale, Gift, Exchange, or other putting away of any Horse, Mare, Gelding, Colt or Filly, in Fair or Market, not used in all Points according to the true Meaning aforesaid, shall be void: The one half of all which Forfeitures to be to the Queen's Majesty, her Heirs and Successors, and the other half to him or them that will sue for the same before the Justices of Peace, or in any of her Majesty's ordinary

Voucher.

No Entry to be made, but upon the Disjunctive in the first Clause.

Note to be given to the Buyer.

Forfeiture.

Where recoverable.

(a) A Gift, without valuable Consideration in Mark-overt, alters no Property. This Statute restrains the very Sale, and makes it void, if not pursued; and this Part is in the Disjunctive, unless either the Toll-taker or Book-keeper shall and will take upon him perfect Knowledge, &c. or else that he so selling, or offering to sell, &c. shall bring, &c. one sufficient and credible Person, &c. that shall avouch, &c. who vulgarly is called a Voucher: And this Part of the Act extends to all Sales of Horses in Market-overt, whether the Horse, &c. be stolen or not stolen. 2 Inst. 717.

Offences
where cogni-
zable.

6. Claiming
in six Months.

Goods
pawn'd.

' Courts of Record, by Bill, Plaint, Action of Debt or Information, in which no
' Effoin or Protection shall be allowed.'

' And that the Justices of Peace of every Place and County, as well within Liber-
' ties as without, shall have Authority in their Sessions, within the Limits of their
' Authority and Commission, to inquire, hear and determine all Offences against this
' Statute, as they may do any other Matter triable before them.'

' And that if any Horse, Mare, Gelding, Colt or Filly shall be stolen, and after
' shall be sold in open Fair or Market, and the same Sale shall be used in all Points
' and Circumstances as aforesaid, that yet nevertheless the Sale of any such Horse,
' Mare, Gelding, Colt or Filly, within six Months next after the Felony done, shall
' not take away the Property of the Owner from whom the same was stolen, so as
' Claim be made within six Months by the Party from whom the same was stolen, or
' by his Executors or Administrators, or by any other by any of their Appointment,
' at or in the Town or Parish where the same Horse, Mare, Gelding, Colt or Filly
' shall be found, before the Mayor or other Head-Officer of the same Town or Parish,
' if the same Horse, Mare, Gelding, Colt or Filly shall happen to be found in any
' Town Corporate or Market-Town, or else before any Justice of Peace of that
' County near to the Place where such Horse, Mare, Gelding, Colt or Filly shall be
' found, if it be out of Town Corporate or Market-Town, and so as Proof be made
' within forty Days then next ensuing, by two sufficient Witnesses, to be produced
' and deposed before such Head-Officer or Justice, (* who by Virtue of this Act
' shall have Authority to minister an Oath in that Behalf) that the Property of the
' same Horse, Mare, Gelding, Colt or Filly so claimed, was in the Party by or for
' whom such Claim is made, and was stolen from him within six Months next before
' such Claim of any such Horse, Gelding, Mare, Colt or Filly, but that the Party
' from whom the said Horse, Mare, Gelding, Colt or Filly was stolen, his Execu-
' tors or Administrators, shall and may at all Times after, notwithstanding any such
' Sale or Sales in any Fair or open Market thereof made, have Property and Power
' to have, take again and enjoy the said Horse, Mare, Gelding, Colt or Filly, upon
' Payment, or Readiness or Offer to pay to the Party that shall have the Possession
' and Interest of the same Horse, Mare, Gelding, Colt or Filly, if he will receive
' and accept it, so much Money as the same Party shall depose and swear before such
' Head-Officer or Justice of Peace, (who by Virtue of this Act shall have Authority
' to minister and give an † Oath in that Behalf) that he paid for the same *bona fide*,
' without Fraud or Collusion, any Law, &c. to the contrary notwithstanding.'

' And that not only all Accessaries before such Felony done, but also all Accessaries
' after such Felony, shall be deprived and put from all Benefit of their Clergy as the
' Principal by Statute heretofore made is or ought to be.'

By the twelve Points of the Common Law, and the twelve additional Points by
said two last mentioned Statutes, the Property of a Horse is so preserved, that if the
Owner understands and pursues them, it is almost impossible that the Property of the
Horse, &c. either stolen or not stolen, should be altered by any Sale in a Market-
overt by him that is *Male fidei possessor*. 2 Inst. 719.

And by the Statute against Brokers, 1 Jac. I. c. 21. §. 4. it is recited, ' That
' forasmuch as there were not any Garments, Apparel, Household-Stuff, or other
' Goods of any Kind whatsoever the same be of, either being stolen or robbed from
' any, or badly or unlawfully purloined or come by, but upstart Brokers, under Co-
' lour and Pretence they be Freemen of the City of London, or inhabiting in West-
' minster, where they pretend to have the like Overt-Market as the City of London,
' and thereby presuming to be lawful for them to use and set up the same idle and
' needless Trades, being the very Means to uphold, maintain and imbolden all Kind
' of lewd and bad Persons to rob and steal, and unlawfully to get and come by true
' Mens Goods, knowing and finding that no sooner the same Goods can be stolen or
' unlawfully come by, but that they shall and may presently utter, vend, sell and
' pawn the same to such Kind of new upstart Brokers for ready Money; for Remedy
' whereof, and for the avoiding of the said Mischiefs and Inconveniencies, and for re-
' pressing and abolishing of the said idle and needless Trades and upstart Brokers,
' and the avoiding of Thefts, Robberies and Felonies, and bad People, and for the

* None can examine Witnesses in a new Manner without Act of Parliament. 2 Inst. 719.

† No Man can give an Oath in a new Case without Act of Parliament. 2 Inst. 719.

‘ Repressing of such Kind of Nourishers and Aiders of Thieves and bad People, and
 ‘ for the Defence of honest and true Mens Properties and Interests in their Goods,
 It is enacted, ‘ That no Sale, Exchange, Pawn or Mortgage of any Jewel, Plate,
 ‘ Apparel, Household-Stuff, or other Goods of what Kind, Nature or Quality soever
 ‘ the same shall be of, and that shall be wrongfully or unjustly purloined, taken,
 ‘ robbed or stolen from any Person or Persons, or Bodies Politick, and which at any
 ‘ Time hereafter shall be sold, uttered, delivered, exchanged, pawned or done away
 ‘ within the City of London or Liberty thereof, or within the City of Westminster in
 ‘ the County of Middlesex, or within Southwark in the County of Surry, or within
 ‘ two Miles of the said City of London, to any Broker or Brokers, or Pawntakers,
 ‘ by any Way or Means whatsoever directly or indirectly, shall work or make any
 ‘ Change or Alteration of the Property or Interest of and from any Person and
 ‘ Persons, or Body Politick, from whom the same Jewels, Plate, Apparel, Household-
 ‘ Stuff or Goods, were or shall be wrongfully purloined, taken, robbed or stolen;
 ‘ any Law, Usage or Custom to the contrary notwithstanding.’

‘ And for the better maintaining of true and honest Dealing, and for the eschewing
 ‘ and avoiding of Falshood, Fraud and Deceit in such Kind of Brokers and Pawn-
 ‘ takers, it is further enacted, That if any Person or Persons, or Bodies Politick,
 ‘ from whom any Jewels, Plate, Apparel, Household-Stuff, or any Kind of Goods
 ‘ whatsoever, shall be wrongfully purloined, taken stolen or robbed, shall require and
 ‘ demand of any such Broker or Pawntaker, to declare whether any such Goods be
 ‘ come to his or their Possessions, and to declare, shew and manifest the same, and
 ‘ how and by what Means he had them, or came by the same, and how, when and
 ‘ to whom he hath delivered, conveyed, or bestowed and imployed the same; and
 ‘ that such Broker, upon any such Request and Demand to be made, shall deny and
 ‘ refuse to disclose, tell or manifest the same truly and justly, shall forfeit unto the
 ‘ true Owner or Owners of such Jewels, Plate, Apparel, Household and other Goods,
 ‘ from whom the same were wrongfully purloined, taken, stolen or robbed, double
 ‘ the Value thereof that shall be denied and refused to be disclosed, told and mani-
 ‘ fested as aforesaid; the same double Value thereof to be recovered by the true
 ‘ Owner or Owners of such Goods from whom the same were wrongfully purloined,
 ‘ taken, robbed or stolen, to be recovered by Action, &c.’

S E C T. IV.

Of Acquiring or Conveying Personal Estates by Marriage.

BY Act in Law Estates may be acquired by Marriage. Agreements between a
 Man and a Woman before their Marriage, are generally extinguished by the
 Marriage: Wherefore it is usual for the Husband to covenant to other Persons to the
 Use of the Wife, as for her Jointure, &c.

But when there is no Agreement or Settlement before Marriage, if the Woman is
 seized in Fee, the Man by the Marriage gains a *Freehold* in her Right. *Co. Lit. 351. a.*
 And may make a Lease thereof for twenty-one Years or three Lives.

He also gains a *Chattel Real*, as a Term for Years, &c. which he may dispose of
 by Grant or Lease in her Life-time, or as he pleases if he survives her. But if she
 survives him it remains with her, for he cannot charge it with a Rent, &c. nor dispose
 of it by Will unless he survives her. *Dr. & Stud. Dial. 1. c. 7. Co. Lit. 46. b. 184. b.*
299. b. 300. a. 351. a.

But by Marriage the Husband has an absolute Gift of all Chattels Personal in Pos-
 session of the Wife in her own Right, whether he survives her or not. *Dr. & Stud.*
Dial. 1. c. 7.

But if the Chattels Personal be *Choses in Action*, as Debts by Obligation, Contract,
 &c. the Husband shall not have them, unless he and his Wife recover them. *Co. Lit.*
351. b.

Nor Personal Goods, which the Wife has in *auter droit*, as Executrix or Admini-
 stratrix, are not given to the Husband by Marriage, tho’ he survives his Wife: But
 they go to the Administrator *De bonis non*, &c. for if they should go to the Husband,
 the Creditors, &c. of the Deceased would be wronged. *Co. Lit. 351. b.*

See more concerning Husband and Wife in the next Chapter.

S E C T.

S E C T. V.

Of Acquiring, &c. Personal Estates by Executorship.

(A) *Who are Executors, and how they are appointed.*

GOODS may be acquired by Executorship, to wit, by Act in Law, by the Property's devolving to the Executor.

Executors,
who.

Executors are Persons appointed by a Testator (*i. e.* the Person who makes a Will or Testament) to execute or perform his Will after his Decease.

How appoint-
ed.

Which Appointment may be by exprefs Words, or by Words of Circumlocution, that amount to a direct Appointment.

(B) *By whom Executors may be appointed, or not.*

King.

THE Bishops, Lords and Commons, assented in full Parliament, that the King, his Heirs and Successors, might lawfully make their Testaments, and that Execution should be done of the same, whereof some Doubt was before made. 4 *Inst.* 335.

Queen.

The Queen, the Wife of the King, may make Executors. 2 *Roll. Abr.* 912.

A Feme Covert may make an Executor of Things in Action due to her. 1 *Roll. Abr.* 912.

A Feme Covert cannot make an Executor without the Assent of her Husband, for the Administration of her Goods of Right belongs to her Husband. 4 *Co.* 51. b. 1 *Roll. Abr.* 914. This must be intended of Things in Action, to which the Husband by taking Administration to her might intitle himself. *Went. Off. of Ex.* 286, 287.

Feme Covert.

But a Feme Covert Executrix may make an Executor of the Goods which she has as Executrix without her Husband's Assent. 1 *Roll. Abr.* 912, 914. 3 *Danv.* 359, 365. *Went. Off. of Execut.* 286, 287.

A Woman, with the Consent of her Husband, may make an Executor of Things which the Husband shall not have by her Death. 1 *Roll. Abr.* 914. 3 *Danv.* 364.

Felon.

A Man attainted of Felony cannot make Executors. 1 *Roll. Abr.* 912.

But a Man against whom an *Exigent* for Felony is awarded, (tho' by it he loses all his Goods) may make Executors to reverse it. 5 *Co.* 111. for there he is not attainted.

Outlaw.

And a Man outlawed in a Personal Action may make Executors, for he may have Debts upon Contract not forfeited to the King. 1 *Roll. Abr.* 912.

(C) *How many may be appointed.*

HE that may make one Executor may make two, three or more; but all of them in the Eye of the Law are but one Executor, in which Respect most Acts done by or to any one of them are Acts done by or to all. 1 *West's Symb.* 637. 1 *Roll. Abr.* 914, 924.

A Man may make an Executor for Part of his Goods, and another Executor for the Rest. 1 *Roll. Abr.* 914.

A Man made his Wife his sole and whole Executrix of all his Cattle, Corn and moveable Goods, and did not mention what should be done concerning the Residue of his Estate; the Question thereupon was, Whether the Wife be absolute Executrix *quoad* all his Estate, or only particular Executrix *quoad* his Cattle, Corn and moveable Goods, and not *quoad* his Leases, and his Debts? And thereupon the Judges all agreed, That one may make several Executors; the one *quoad* Things Real, the other *quoad* Things Personal, and may divide their Authority; yet *quoad* Creditors, they are all Executors, and as one Executor: But *Jones* and *Croke* conceived, as this Case is, That she is sole and absolute Executrix for the whole Estate, as well Leases as Debts and other Things; for when he says, that she shall be his sole and whole Executrix of his Cattle, Corn and moveable Goods, it is but an Enumeration of the Particulars, and no Exclusion of any, especially when he does not make any other Executor for the Residue, and *Catalla* in *Latin* extends to all Things, and it may be intended that

so was the Intent of the Testator, when he did not make any other Executor. But *Berkley* conceived, that she is a special Executrix *quoad* the Things enumerated, and no general Executrix. *Per quod adjornatur. Cro. Car. 293.*

If a Man makes *A.* and *B.* his Executors, but wills that *A.* shall not meddle until he has paid *B.* all Money due to the Testator; in such Case *A.* is not Executor, nor can by Virtue of the Will administer until he has paid all such Money. *Moor 11. pl. 44. 3 Leon. 2, 3.*

(D) *For what Time Executors may be appointed.*

AN Executor may be made to a fix'd Time, upon Condition, (as if the Executor will find Sureties to perform the Will) or to some certain Part of the Estate, or to some certain Act. *Wood, B. 2. c. 6. p. 320.*

If one makes an Infant his Executor, and appoints, that during his Nonage *J. S.* shall have the Disposition of his Goods, *J. S.* is Executor during that Time. *Cro. El. 164.*

(E) *Who are capable or not of being Executors.*

ALL that are capable of making a Testament are capable of being Executors. *1 West. Symb. §. 635. Cro. Car. 9.*

But some that cannot make a Testament are capable of being Executors. A Mayor and Commonalty may be Executors. *1 Roll. Abr. 915. 3 Danv. 365.*

An Infant in *Ventre sa mere* may be Executor. *1 West's Symb. §. 635.*

But when he is born he cannot act as such till seventeen Years of Age; and therefore the Ordinary must grant Administration *Durante minori etate* till that Age. *4 Inst. 335.*

A Woman Covert may be also an Executrix.

So may a Person excommunicated, outlawed or attainted; or an Alien, &c. *Cro. Eliz. 683. Cro. Car. 8, 9.*

Popish Recusants convict shall not be Executors or Administrators. Nor a married Woman being a Popish Recusant convict (the Husband not being convicted) that does not conform, &c. by the Space of one Year before her Husband's Death, shall not be capable of being Executrix or Administratrix to her Husband, and enjoying any Part of her Husband's Goods. *Per Stat. 3 Jac. 1. c. 5.*

Nor those that execute an Office, &c. after they have neglected or refused to take the Oath mentioned in *Stat. 13 W. 3. c. 6. & 1 G. 1. c. 13.*

Nor Artificers exercising or teaching their Trades in foreign Parts, by *Stat. 5 G. 1. c. 27.*

When the King is made an Executor, he appoints certain Persons to take the Execution of the Will upon them, against whom such as have Cause of Suit may bring their Action, and appoints others to take the Account; and so was done when *Katherine*, Queen Dowager, Mother of *H. 6.* made her Will, and appointed him Executor thereof. *4 Inst. 335.*

(F) *Of accepting or refusing an Executorship.*

A Person appointed Executor, if he has not intermeddled with Testator's Effects, may refuse the Executorship; and after he has once refused the Executorship, can never afterwards intermeddle; nor after he has once legally accepted it, he can never after refuse it; for he cannot accept and refuse too. So if an Executor is cited by the Ordinary to prove the Will, and he appears and refuses to prove the Will, he cannot afterwards accept and intermeddle with the Estate. *9 Rep. 37, 38. vide Stat. 21 H. 8. c. 5.*

If an Executor administers before Refusal, he cannot afterwards refuse. *Went. Off. Ex. 26, 27. Salk. 308.*

If he uses any Action for the Debt of the Testator, it shall be an Administration. *1 Roll. Abr. 917. 8 H. 6. 36. Br. Administration 25.*

In what Cases a Person may refuse an Executorship or not.

What Acts will be an Administration to make a Consent to an Executorship.

If he takes the Goods of the Testator, and converts them to his own Use, it is an Administration. 1 *Roll. Abr.* 917. 20 *E. 4.* 17. *Br. Administration* 35.

But if he takes the Goods of the Testator taken from him by Wrong in his Life, it is no Administration. 1 *Roll. Abr.* 917. 20 *E. 4.* 17. *Br. Administration* 35.

If he happens of any Thing which was the Testator's, it is an Administration. 1 *Roll. Abr.* 917.

If Executors grant any of the Chattels of the Testator, it is an Administration in Law. 1 *Roll. Abr.* 917.

If an Executor releases to a Debtor of the Testator, it is an Administration in Law. 1 *Roll. Abr.* 917. 11 *H. 4.* 84. *Br. Debt* 65. *Br. Executor* 57. And he cannot afterwards refuse the Executorship. 2 *Brownl.* 58.

So if he makes an Acquittance of any Debt of the Testator. 1 *Roll. Abr.* 917. 8 *H. 6.* 36. *Br. Administration* 25.

If certain Goods are devised to an Executor, and he takes them without the Assent of the other Co-executor, it is an Administration, because a Devisee cannot take Goods devised without the Assent of the Executor. 1 *Roll. Abr.* 917. 11 *H. 4.* 84. *Br. Executor* 57.

But it is otherwise if he takes them with the Assent by the Delivery of the other Executor. 1 *Roll. Abr.* 917. 11 *H. 4.* 84. *Br. Executor* 57.

If the Executor seises of the Goods of the Testator, it is an Administration. 1 *Roll. Abr.* 917. 8 *H. 6.* 36. *Br. Administration* 25. *Stokes and Porter.* 1 *And.* 11. *Moor* 14. *N. Bend.* 74. *Dy.* 166.

And if he seises the Goods of another Man to the Intent to administer them, this will be an Administration, tho' the Goods are after taken from him by the Owner. *Dubitatur*, 1 *Roll. Abr.* 917. 8 *H. 6.* 35. *b.* *Br. Administration* 25.

If the Testator was Tenant at Will of certain Goods, and after his Death his Executor seises the Goods, supposing them to be the Testator's, to have them administered, and afterwards the Owner of the Goods takes them out of his Possession, yet this shall be an Administration in Law, for his Intent appeared. *Dubitatur*, 1 *Roll. Abr.* 917. 8 *H. 6.* 35. *b.* *Br. Administration* 25.

But if the Executor, being Commissary, sequesters the Goods of the Testator as Commissary, this is no Assent to the Executorship. 1 *Roll. Abr.* 917. 20 *H. 6.* 1. *b.* *Fitz. Executor* 15.

If an Executor proves the Will, it seems that this is an Administration in Law, so that he cannot after plead *Ne unques Executor*. *Dubitatur*, 1 *Roll. Abr.* 918. 26 *H. 8.* 8. *a.* *Br. Executor* 5. *Adminiftrator* 2.

Of Refusal or
Consent
where there
are many
Executors.

Thus it is where there is but one Executor; but where there are many Executors named, and all are cited by the Ordinary to prove the Will, and only some of them appear and refuse the Executorship, and afterwards one of the Executors proves the Will, and takes upon him the Executorship, this suffices for them all, and they who refused may at any Time join with him or them, and intermeddle with the Estate, as well as any of the Rest. *Perk.* 485. 9 *Rep.* 37, 38. *Noy's Max.* 102.

And if the acting Executor dies, and makes an Executor, the surviving Executors may act, for their Refusal before the Ordinary is void in this Case, but where all refuse, no one can ever after come in and prove the Will; for the Testator now dies Intestate and without an Executor, so that the Ordinary may grant Administration *Cum Testamento annexo*, or sequester the Goods in the mean Time till the Administration is granted. *Co. Lit.* 113. *a.* *Noy's Max.* 102. 9 *Rep.* 37, 38, 39.

If a Man makes two Executors, and they refuse to act, two others shall be his Executors: And in this Case, if the first two Executors administer, the two last shall not be Executors, nor named in Actions; but it is otherwise if the two first refuse. 1 *Roll. Abr.* 914.

But if a Man makes two Executors and dies, and one of them before Probate of the Will releases an Action to a Debtor of the Testator; this is a Consent to the Executorship, so that he cannot after refuse to administer. 1 *Roll. Abr.* 918.

And where there are two Executors, and one of them proves the Will in the Name of both against the Consent of the other; this is not any Administration for him who did not consent to the Probate, but he may plead *Ne unques Execut'*, &c. for the Probate doth not make him Executor, if he does not administer. 1 *Roll. Abr.* 918. 26 *H. 8.* 8. *a.* *Br. Adminiftrator* 2. *Executor* 5.

If there be two Executors, and one of them only proves the Will, and the other by his Delivery and as his Servant takes and sells the Goods, this is no Administration by him who acted as Servant. *Cro. Eliz.* 858.

In Case where one accepts, and all the Rest refuse, he must bring *Actions* in all their Names, and one may release the Action, for the Possession of one is the Possession of all of them; but an Action must be brought against him or them that act or administer, and he that first cometh shall first answer. *Perk.* 485. *Noy's Max.* 102, 103. *Off. of Ex. c. 9.*

But every Intermeddling with the Goods of the Deceased is not an Acceptance of the Executorship to make one chargeable as Executor: As if one does an Act of Charity or Humanity, by locking up the Goods of the Deceased that they be not wasted, by burying the Deceased, tho' he sells his Goods to do it; or if one does take away his own Goods that were in the House of the Deceased, or use some of the Goods of the Deceased in the necessary Occasions of the Family, or take the Goods by Letters *ad Colligendum*, &c. These Acts will not amount to an Acceptance of the Executorship if the special Matter be pleaded. *Dyer* 166, 167. *Noy's Max.* 102, 103. *1 Roll. Abr.* 918.

How far Acts of Charity or Humanity are not Acceptance of Executorship.

When an Executor has accepted the Executorship, he cannot assign it over. *Vangb.* 182. *1 Roll. Abr.* 918.

Regularly one Executor cannot sue the other at Law, but he may have Relief in Equity.

(G) *The Executor's Interest in the Goods, &c. of the Testator.*

THE Interest of an Executor arises at Common Law by Virtue of the Testament which is Temporal, and which gives him all the Chattels Real and Personal of the Testator, which are likewise Temporal; for the Probate of the Ordinary is only a Confirmation. *Plowd.* 280. *9 Co.* 37, 38. *Noy's Max.* 103.

The Law gives him not only those in Possession, as Leases for Years, and Charters and Evidences concerning them, Arrears of Rent due at the Death of the Testator, Rent-Charge, Grants of next Advowsons and Presentations of the Testator's Inheritance becoming void in his Life-time, Relief due to the Testator, Corn cut or growing, &c. where the Testator had such an Estate as might in Possibility have continued till the Corn, &c. was ripe, (as where the Testator had an Estate for his Life of another, or in the Right of his Wife, &c.) Gold, Silver, Jewels, Plate, Household-Stuff, Cattle, Implements of Husbandry, Apprentices for Years by Custom, &c. but also those Things that lie in Action, as Rights and Interests upon Judgments, Statutes, Recognizances, Obligations and Bonds, and all other Debts due to the Testator, (if they are not bequeathed) because on the other Hand the Law subjects the Executor to every Man's Claim and Action which he had against the Testator for the same. *Co. Lit.* 209. a. 388. a. *Noy's Max.* 103, 104. *Cro. Car.* 515. *3 Danv.* 366.

For this Reason the Executor is said to be the Testator's Assignee, and to represent the Person of the Testator. *Co. Lit.* 209. b. 210. a.

But for personal Wrongs done by the Testator to the Person, Goods or Land of another, he does not represent him, because personal Actions die with the Person. *Noy's Max.* 104. *9 Co.* 89.

B. possessed of a Lease for Years, devised the Benefit thereof to A. his Wife for six Years, and that J. his Son, if he came home, should have the Residue of the Term, but if he did not come home within six Years, then W. his Son shall have it till J. came home, and died, and after W. died within the six Years, and after J. did not come home within the six Years; tho' this was but a Possibility to have the Term (*viz.*) if J. did not come home within the Years, and W. died before the Possibility happened, yet his Executors shall have it, for it was a Possibility fixed in the Testator, and only to be perfected by the Act of God without any Act of the Parties; for this is not like a Lease to be named by J. S. for there is not any Perfection before the naming. *Sheriff v. Wratham*, *1 Roll. Abr.* 916. *Cro. Jac.* 509.

What Things shall go to the Executor or Administrator.

So if a Termor devises his Term to one and the Heirs Male of his Body, and if he dies without Issue Male, then to J. S. And J. S. dies in the Life of the first Devisee, yet the Possibility that he had to have the Term by the Devise shall go to his Executor for the Cause aforesaid. *Price and Atmore*, *1 Roll. Abr.* 916. But this Case is differently reported in *4 Leon.* 246. *Moor* 831. & *1 Bulst.* 191. where it is said, that the

the Termor by his Will made his Wife Executrix, and devised the Term to her, and if she died before the Term ended, that the same should remain to his Son and the Heirs Male of his Body. The Executrix entred and claimed as Legatee, and assigned the Term over; the Son died in the Life of the Wife, and his Executor entred. *Per Cur.* This Entry was not lawful, for the Son had but a Possibility, and no Interest; for by the Devise of the whole Term the whole Interest was in the Wife, and when it was in her, it could not remain over; otherwise if the Land had been granted to her for Life, and if she died, that it should remain as before. And in 4 *Leon.* there is a Note, That 25 *Eliz.* it was resolved in C. B. that such a Possibility could not be released: And 29 *Eliz.* in *Hammington's Case*, that it could not be granted.

This Case in *Cro. Jac.* 510. is cited, and denied to be Law, but the Court conceived the Resolution in *Lampet's Case*, 10 *Co.* 51. *b.* to be good Law in this Point. In which Case a special Verdict was found, that *J.* Lord *L. & al.* were seised in Fee, and demised the Premises to *J. M. jun.* for a Term of 5000 Years, who entred and was possessed, and devised the same to *J. M.* his Father for Life, and after his Decease to his Sister *Eliz.* and the Heirs of her Body, and made his said Father Executor, and died. The Father accepted the Executorship, entred, and was possessed; *Eliz.* married *W. T.* both of whom released the Residue of the Term to said *J. M. sen.* who demised the Premises to *M. S.* the Defendant for ten Years; said *W. T.* died, and said *Eliz.* married *W. L.* *J. M. sen.* died, said *W. L.* and *Eliz.* entred, and demised to *R. L.* the Plaintiff, who entred and was possessed till *M. S.* the Defendant ejected him. Now whether the said Grant or Release to *J. M.* the Father, then being possessed of the whole Term, can bar the said *Eliz.* because she has but a Possibility, and neither Interest or Right in Possession, Reversion or Remainder, was the principal Question, (10 *Co.* 47. *a.*) Upon which it was resolved, that the said Release had barred the said *Eliz.* to claim any Thing in the said Lease after the Death of the said *J. M. sen.* 48. *a.*

And these Resolutions were likewise made:

1. That when a Man possessed of Land for Years devises the Use or Profits, or the Land itself to one for Life, and afterwards to another during the Residue of the Term, the Devise of a Chattel after the Death of the first Devisee, is good. 47. *a.*
2. The executory Devise after the Death, &c. is good, tho' the Term itself (and not the Use or Occupation) was devised to the first for Life, &c. and afterwards to others. 47. *b.*
3. That the first Devisee after Assent made by the Executor could not bar the executory Devise, altho' a Possibility. 47. *a.*
4. The Assent of the Executor to the first Devisee should enure to the other, altho' he has it by executory Devise and not by Remainder.
5. When the Devise is *ut supra* to the Executor for Life, and afterwards to another, &c. and the Executor enters generally, he shall have it as Executor, which is his first and general Authority, and not as Legatory without Claim or Demonstration of his Election, altho' the Testators were not indebted to any. 47. *b.*
6. Such Executor's Interest might not be granted to a Stranger during the Life of the first Devisee. 47. *b.*

The said Release has extinguished the future Interest of the said *Eliz.* for divers Reasons:

1. Because it is a future Interest in a Chattel, which as it may be more easily created than a Freehold, so it may be more easily determined. 48. *b.*
2. It is a Maxim in Law, that *Land in Fee-simple may be charged by one way or other*: And it is another Maxim in Law, that *every Right, or Title or Interest, in præsenti or futuro, by the joining of all who may claim any such Right, Title or Interest, may be barred or extinguished.* 48. *b.* Upon the first Maxim it was concluded, that if at the Common Law the Donor and Donee in Tail had joined in a Grant of a Rent-Charge, and afterwards the Donee had died without Issue, and the Land had reverted to the Donor, he should hold it charged, and yet he had but a Possibility at the Time of the Charge made; but all those who had Estate or Interest *in præsenti* or *futuro* joined in the Charge; *a fortiori*, if they had joined in a Lease for Years, and the Donee had died without Issue, the Lease is good against the Donor. So upon the second Maxim, if *J. M. sen.* and *Eliz.* had joined in a Deed of Assignment to another, it had utterly barred the said *Eliz.* for no other had Interest either *in præsenti* or *in futuro*, but those who joined in the Grant. So where the Husband of *Eliz.* releases to him in Possession, both consented to it, one in releasing, the other in accepting

accepting of it: And in the Case when both join in the Grant, it is the Grant of him who had the Term, and the Release or Confirmation of the other. 49. a.

3. *Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit Lex actum originale*, when to the Perfecting of an Estate or Interest divers Acts or Things are requisite, the Law has more Regard to the original Act, *Quia cujusque rei potissima pars est principium*, for that is the fundamental Part on which all the others are founded. In this Case three Things are requisite to the Perfecting the Interest of *Eliz.* (1) The Devise, (in which is included the Death of the Devisor) this is the fundamental Part. (2) The Assent of the Executor, which appears was given. And (3) The Death of the first Devisee. 49. a.

4. If the said *Eliz.* had died before the first Devisee, the Executors or Administrators of the said *Eliz.* would have had the Residue of the said Term after the Death of the first Devisee, which is a Proof that *Eliz.* herself might have released such Interest which by her Death might have come to her Executors or Administrators. 51. b. Note; *This is the Point particularly referred to in Cro. Jac. 510. which the Court held to be good Law, and denied the Case of Price and Almore before-mentioned to be Law.*

5. The Legacy or Devise to *Eliz.* is *in esse* and present, altho' the Interest is *in futuro*; and therefore the Legacy or Devise may be discharged, and by Consequence the Interest itself, for *qui destruit medium destruit finem.* 51. b.

6. It would be inconvenient that such Manner of Perpetuity should be made of a Chattel, when of an Inheritance neither by Act executed by the Common Law, nor by Limitation of an Use, nor by Devises in last Wills, any Perpetuity can be established; and if it should be allowed, it would be Cause of Contentions, Suits and other Inconveniencies. And it was observed, that these Leases for so many Hundreds and Thousands of Years (which were made in Truth to deceive or defeat the King or other Lords of their Wards or other lawful Duties) are many Times unfortunate, and subject to be lost at Outlawry or other Forfeitures; and if the Owner thereof dies Intestate, the Ordinary shall grant Administration, whereby Women will lose their Dowers, Men their Tenancies by the Curtesy, and many other Inconveniencies, in Subversion of the Common Law, will from thence ensue; and therefore it would be of all others the most dangerous to make a Perpetuity of them. 52. b.

If *A.* leases land to *B.* for eighty Years, if he so long lives, and if he dies within the Term, that then immediately after his Death the Land will remain to his Executors for twenty-one Years, and after the Lessee dies Intestate, yet his Administrator shall have the Term for twenty-one Years, for the Administrator is within the Intent of the Grant. 1 Roll. Abr. 916.

If a Man makes *B.* and *C.* Executors, and devises to them *Residuum bonorum, &c.* Where upon after Debts and Legacies paid; and after *B.* dies, the Surplusage shall not survive, for one of the it shall be supposed that the Testator intended an equal Share to his Executors, and Executors the decreed for the Administration of *B.* accordingly, but much to the Dissatisfaction of the Bar, for where the Intention is secret and not declared, it must give way to the legal Intent. 1 Chanc. Ca. 238. 2. Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other.

For the Resolutions since have been otherwise in Equity; and it seems well settled that the Survivor shall have the Whole by Law; as where a Man devised Goods to *A.* and *B.* and the Executor assented to the Legacy; and *A.* died, and his Executor sued in the Spiritual Court for *A.*'s Share, there being no Survivorship in such Case by the Ecclesiastical Law; whereupon *B.* sued a Prohibition, and declared; and upon Demurrer and Argument it was adjudged the Prohibition should stand; for by the Assent of the Executor the Interest was vested in the Legatees, and became a Chattel in them, governable by the Rules of the Common Law. 2 Lev. 209.

A. devised the Surplus of his Estate, after his Debts paid, to *B.* and *C.* *B.* died: Adjudged in the Delegates, and decreed by the Lord North, and confirmed by Jefferies Lord Chancellor, that this was a joint Devise, and should survive to *C.* And the Lord Chancellor's Opinion was, that if *B.* and *C.* had been made Executors, and *B.* had possessed a Moiety of the Goods, and died, it would have been all one. 1 Vern. 482.

So where a Man devised all the Rest and Residue of his Goods, Chattels and Personal Estate to two Persons, their Executors and Administrators, and one of them died; and on a Bill brought by his Executor against the surviving Devisee, it was held, that the Survivor should take the Whole to his own Use, and should not be a Trustee, as to the Moiety, for the Representative of him who is dead; and that they

were to be considered as Jointenants where Survivorship takes Place, as well in Cases of Chattels as in Cases of Inheritance. *Abr. Ca. Eq. 343.*

A. made his Will, and after several Legacies gave and devised all the Rest, Residue and Remainder of his Personal Estate to three Persons, whom he made his Executors; one of them died in the Life-time of the Testator; and the only Question was, whether the two surviving Executors should have the Whole, or whether the third Part should be distributed according to the Statute amongst the next of Kin. And the Master of the Rolls, on Time taken to consider of the Case, and citing most of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two surviving Executors should take the Whole. *Abr. Ca. Eq. 243.*

What Things
an Executor
or Administra-
tor shall have
as Assignee.

If a Devise be of a Legacy to one and his Assigns, and the Devisee dies before Payment, his Administrator shall have it as Assignee. *1 Roll. Abr. 915. 3 Danv. 367.*

If the Condition of an Obligation be, that if the Obligor pays 20*l.* to such Person as the Obligee by his last Will in Writing shall appoint it to be paid, then the Obligation to be void; and the Obligee appoints no Person to whom it shall be paid, but makes his last Will, and makes Executors thereby, yet the Obligor shall not pay the 20*l.* to the Executors, because the Condition has Reference to his Nomination; and here it appears that this was to be paid to an Assignee in Deed, to be made by the Obligee by his Appointment, and not to an Assignee in Law. *Moor 855. Hob. 9. 14. Godb. 192. adjudged. Lit. Rep. 173, 174. the like Point dubitatur.*

And *per Coke*, there is a Diversity where the Condition is to pay 10*l.* to the Assignee of the Obligee, and where to the Obligee or his Assigns; for in the last Case it vests as a Duty in the Obligee, and shall go to his Executors. *Godb. 192.*

But where one was bound to stand to the Award of two Arbitrators, who award that the Party shall pay to a Stranger or his Assigns 200*l.* before such a Day, the Stranger before such a Day dies, and *B.* takes Letters of Administration, and if the Obligor shall pay the Money to the Administrator, or that the Obligor should be discharged, was the Question. And it was the Opinion of the whole Court, that the Money should be paid to the Administrator, for he is Assignee: And by *Gawdy* Justice, if the Word *Assignee* had been left out, yet the Payment ought to be made to the Administrator; *quod Coke affirmavit. 1 Leon. 316.*

If the Condition of an Obligation be to pay 10*l.* *per Ann.* after the Death of the Obligee, to the Executors of the Obligee, for the Use of his Children, and he dies without making any Executors, the Money shall be paid to his Administrators. *Heth. 115, 116. Lit. Rep. 156. adjournatur.*

If a Lessee for Years of a Shop assigns it to *B.* and covenants with *B.* not to sell Wheels for Coaches to the Prejudice of *A.* or his Assigns, and after *A.* dies, and Administration is granted to his Wife, who continues the Trade in the Shop, and *B.* after sells Wheels for Coaches, to the Prejudice of the Administrator, he hath broke his Covenant, for the Administratrix is an Assignee to have Benefit of this Covenant. *1 Roll. Abr. 916.*

When the Sur-
plus of the
Personal Es-
tate belongs
to the Execu-
tor, or he is
to be a Tru-
stee for the
next of Kin to
the Testator.

J. M. by Will devised particular Legacies to his Children and Grandchildren, and 12*l.* a-piece to *M.* and *S.* whom he made Executors, for their Care; the Surplus of the Personal Estate being 5000*l.* and upwards, the Question was, Whether the Surplus should be a Trust for the Children, or go to the Executors; and it was decreed a Trust for the Children. *Mich. 1687. Per Jefferies Lord Chancellor, 1 Vern. 473.* Same Case cited, *2 Vern. 649.* and said to be affirmed in the House of Lords. Upon which Case the Author of *The Gen. Abr. of Ca. in Eq. p. 243.* observes, That since this Case there has been Variety of Resolutions both in Chancery and the House of Lords on this Head, notwithstanding which this Matter seems as undetermined as any in Equity; for tho' the Law casts the whole Personal Estate on the Executor, yet as the Intention of the Testator is chiefly to be regarded in a Will, if it appears by a strong and necessary Implication, that the Executor was not to have it to his own Use, Equity will decree him a Trustee for the next of Kin to the Testator; and therefore it seems agreed, that if Strangers or distant Relations are made Executors, and Legacies are given them for their Care and Trouble, that they shall not have the Surplus; but where the Executors are as nearly related as those who Claim as next of Kin, and they have had all Legacies given them, tho' perhaps some of them greater, and some of them less, great Doubt had been; in which Instances it has (as appears by

by the Cases) been determined according to the Intention of the Testator, collected not only from the Words of the Will, but likewise from collateral Proof of Testator's greater Kindness, &c. which upon these Occasions has been admitted sometimes for the Executor, and sometimes for the next of Kin.

Mrs. S. was Executrix of A. her former Husband, and after married Mr. S. who by his Will in 1686 devised to his Wife the Plate and Goods she brought him in Marriage, and two Silver Salvers, in Lieu of the Plate that had been changed away; and made her Executrix, and died, leaving a Daughter by a former Wife, and his Wife *ensient* of a Daughter, and there being no Devise of the Surplus of the Personal Estate, the Question was, Whether she would take it as Executrix to her own Use, or be liable to Distribution. And my Lord Keeper decreed the Surplus to the Wife, as well for that this Will was made before the Case of *Foster and Munt*, (*i. e. the last Case*) as also for that in this Case nothing is devised to the Wife but what was her own before, and as she was Executrix to her former Husband, but principally, because where a Wife is made Executrix, it is to be presumed she was not made so to have barely an Office of Trouble, but of Benefit to take the Surplus. 2 Vern. 675, 676.

B. married one Mrs. A. Sister to W. A. who was possessed of a Personal Estate to the Value of about 2000 l. and made his Will in Writing the very Day before his Death, and thereby devised several Legacies to his Relations, and amongst the Rest gave the Plaintiff his Sister about 1000 l. and gives 70 l. to Mr. S. and his Wife and their four Children, to buy them Mourning; and gave to Mrs. S. (one of the Daughters of Mr. S.) 500 l. and gives his Horse and Furniture to one of the Defendants by his Christian Name and Surname, and his Clothes, to be disposed of by his Executors; and then concludes, as to the 700 l. I am intitled to in the *South-Sea Company*, and the Rest of my Personal Estate, I will that the same should be sold for Payment of my Debts and Legacies, and I make Mr. J. and Mr. T. S. my Executors, and dies. The Executors were two of the Children of Mr. S. and intitled to their Proportion of 70 l. devised for Mourning, and one of them to the Horse and Furniture, but were no ways related to the Testator. The Surplus of the Personal Estate came to about 600 l. and the Bill was brought against the Defendants the Executors to have an Account thereof; and that it might be paid to the Plaintiff, whose Wife was the only Sister and next of Kin to the Testator. And for the Plaintiffs it was insisted, that the Executors were mere Strangers, no ways related to the Testator, and that they had particular Legacies left them for Mourning out of the 70 l. and one of them had a Horse and Furniture expressly devised to him; and that therefore it was not reasonable that they should go away with the Surplus of the Personal Estate. On the other Side it was insisted, that the Defendants being Executors, they represented the Testator; that they stood in his Place, and were intitled to whatever he left undisposed of; that this was the ancient Law for many Ages, and therefore the legal Title being in them, they ought not to be defeated of it without a manifest Intention of the Testator to the contrary; that here appeared no such Intent in the Will, for they are not named either by Christian Name or Surname, or so much as by the Name of their Office, till the very Close of the Will; nay it was in Proof, that the Testator did not so much as consider whom he should make his Executors, till he had disposed of all the Legacies; that the giving one of them his Horse and Furniture, was only to exclude the other, who, by being Executor with him, would have been equally intitled to it, and could not be construed a Legacy to shut them out of the Surplus, since it rather regarded the other Executor than the Plaintiff, the next of Kin; that they had it fully in Proof, that the Testator being asked, whether he would not give his Sister more? answered, he would not; that being asked, who should have the Surplus, or what should become of the Surplus? he said, his Will should stand as it was, and that he had a very great Regard for the Defendants Family, and was to have married their Sister: That these Proofs being in Affirmance of the Disposition which the Law made to the Executors might be read; and that several Resolutions, since the Case of *Foster and Munt*, had pared away the Authority of that Case, and therefore prayed that the Bill might be dismissed. My Lord Chancellor was clearly of Opinion, that the Proofs being in Affirmance of the Disposition, ought to be read; and said, that they were so full as to make an End of this Case; that without a strong and violent Implication, the Executors ought not to be defeated of the *Residuum*; that here was no such Implication in this Will, but rather the contrary; that to make Sense of the last Clause, it must be construed as a Devise of the

South-

South-Sea Stock, and the Rest of his personal Estate, to his Executors; for it immediately follows, *And I make J. and T. S. my Executors*; which could have no Relation to the Direction for Sale, unless by giving them the Surplus which should arise by Sale; and as there appeared no strong or violent Implication to induce any other Construction, he could not give into so great a Change of the Law, but must decree for the Executors, and accordingly did so. *Abr. Ca. Eq. 246, 247. 2 Vern. 736, 737.*

C. made his Will to the Effect following: *I dispose of my Estate after mentioned, and what else I have in the World, in Manner and Form following*; and then gives several Legacies to his Relations, amounting to near the Value of his Estate, (as appeared by a Calculation of his own Hand-Writing made by him about that Time) and appointed his Mother and N. Executors, and gave them 20*l.* and intreated them to take the Trouble of getting in his Estate; the Testator lived ten Years after, and acquired an additional Estate, and died, not having altered nor new published his Will; and on a Bill brought by the Legatees against N. the surviving Executor, to account, it was decreed, that the surviving Executor was but an Executor in Trust for the Legatees, and that the new acquired Estate should go to the Legatees in Proportion to their Legacies. *2 Vern. 148, 149.*

So where A. L. made his Will, and his Wife Executrix, and lived twenty Years after the Will, and acquired an Estate, the Surplus was decreed to be distributed. *2 Vern. 677.*

But where a Man devised his Library of Books to A. (except ten Books, such as his Wife should chuse, as Plays, Romances, Sermons, but not Law-books) and made her Executrix. It was held by my Lord Keeper, that she should not by this Devise be excluded from the Benefit of the Surplus of the Personal Estate. *Abr. Ca. Eq. 245.*

So where one not of Kin, but a Stranger, was made Executor, and had considerable Legacies given him, altho' it was decreed by Sir Peter King in the Mayor's Court in Favour of the Testator's two Brothers, that the Surplus should be distributed, yet upon Appeal to the House of Peers, that Decree was reversed; not barely as it stood upon the Will, but that parol Proof ought to be received in Favour of the Executor's Title, consistent with the Will; and the Proof being full as to the Testator's frequent Declarations, that his Executor, tho' a Stranger, should have the Surplus, it was decreed accordingly. *Abr. Ca. Eq. 245. 2 Vern. 648.*

A. possessed of a long Term for Years by Will devised it to his Wife for Life, and after her Death to the Child she was then *ensient* with; and if such Child died before it came to twenty-one, then he devised one third Part of the same Term to his Wife, her Executors and Administrators, and the other two Thirds to other Persons, and made his Wife Executrix of his Will, and died; and the Bill was brought against her by the next of Kin to the Testator, to have an Account and Distribution of the Surplus of his Personal Estate not devised by the Will; and the two Questions were made, 1st, Whether the Devise to the Wife of one third Part of the Term was good, because it happen'd she was not then *ensient* at all; and so the Contingency, upon which the Devise to her was to take Place, never happened. The other Question was, Whether this Term, being Part of the Personal Estate, and expressly devised to her for Life, with such other contingent Interest on the Death of the supposed *ensient* Child before twenty-one, should shut her out from the Surplus of the Personal Estate which belonged to her as Executrix, and so the Surplus go in a Course of Administration to be distributed amongst the Plaintiffs as next of Kin. As to the first Part, my Lord Keeper delivered his Opinion, that tho' the Wife was not *ensient* at the Time of the Will, yet the Devise to her of such third Part of the Term was good; and as to the other Point dismissed the Plaintiff's Bill, and so let in the Executrix to the Surplus of the Personal Estate, notwithstanding the Devise to her of Part as aforesaid. *Abr. Ca. Eq. 245.*

B. B. by Will gave several Legacies therein specified, to all her next of Kin by Name; and likewise gave particular Legacies to M. and P. two Dissenting Ministers, and made them her Executors, but did not make any express Disposition of the Surplus of the Personal Estate; and the Executors were decreed to account and distribute the Surplus amongst the next of Kin to the Testator. *2 Vern. 361.*

So where A. made B. his Executor, and gave him 20*l.* for Mourning, and B. not being of Kin to Testator, the Surplus of the Personal Estate was decreed to be distributed. *Abr. Ca. Eq. 244. 2 Vern. 676.*

So where D. gave 100*l.* Legacy, and the Interest of 300*l.* to his Wife for her Life, and made her and B. Executors, and gave to W. 20*l.* for Mourning; the Surplus was decreed to be distributed. 2 *Vern.* 677.

A. devised Lands to be sold for Payment of his Debts, and wills that the Surplus shall be deemed Part of his Personal Estate, and go to his Executors, and gives to his Executors 100*l.* a-piece as a Legacy; and the Question was, Whether the Executors should have the Surplus to their own Use, or should distribute according to the Statute of Distributions. For the Executors it was insisted, that the Surplus should be Part of his Personal Estate, and go to them, and that he meant them to their own Use; and his giving them a Legacy of 100*l.* a-piece cannot alter the Case, for the Surplus perhaps might be nothing, and therefore he gave them the 100*l.* that they might at all Events be sure of something, and not to exclude them of the Benefit of the Surplus; and this being a Devise of the Surplus after Debts and Legacies paid, cannot be a Trust in them, for then all their Trust is performed when Debts and Legacies are paid. On the other Side it was said, that the Words in the Will, that the Surplus should be Part of his Personal Estate (and go to his Executors) were only intended to exclude the Heir, who else would have had it, and not to give any greater Interest to his Executors than they would have had otherwise; and of the same Opinion was my Lord Chancellor, and decreed accordingly. *Abr. Ca. Eq.* 244, 245.

And the Heir shall have the Glass Windows, the Wainscot that is fixed by Nails or Screws, Furnaces of Lead or Brass fastened to the Walls, or in the Ground, Lead fixed to the House, Doors within or without that are hanging, Locks, Keys, tho' the Executor hath the Lease for Years of the House; also the Heir must have the Trees, and the Deeds belonging to the Inheritance. *Noy's Max.* 107. 4 *Co.* 63, 64. 11 *Co.* 50. 3 *Danv.* 366.

The Executors shall not have the Deeds which concern the Inheritance, but the Heir. 1 *Roll. Abr.* 915. 3 *Danv.* 366.

And if they are in a Chest, the Executors shall have the Chest, and the Heir the Deeds. *Ibid.*

If a Chest with Deeds be shut, the Heir shall have the Chest also; but if it be not shut, the Executor shall have the Chest. *Ibid.* cite 41 *E.* 3. 2. *Fitz. Detinue* 40. *Br. Charters de terre* 13. 14 *H.* 4. 30. *Fitz. Detinue* 35. The Words in *Roll* are *soit enclose—ne soit enclose*.

If the Testator recovers in *Detinue* for Deeds in a Box, the Executor shall have the Execution of this and the Damages and Colts, and not the Heir. 1 *Roll. Abr.* 915. 3 *Danv.* 366.

But if the Testator recovers a special Deed, the Heir shall have Execution of this and of the Damages, if the Deed cannot be had. *Ibid.*

If a Man delivers a Deed to another to re-deliver to him and his Heirs, not having any Title to the Land, his Heir shall not have this Deed, but his Executors, because this was but a Chattel in him without Land. *Ibid.*

If a Man buys several Fishes, as Tenches, Breams, Carps, &c. and stores his Pond with them, and dies, the Executor shall not have the Fish, but the Heir, who has the Water. 1 *Roll. Abr.* 916. *Co. Lit.* 8. a. They shall go with the Inheritance, because they were at Liberty, and could not be gotten without Industry, as by Nets and other Engines, otherwise it is if they were in a Trunk, or the like. *Co. Lit.* 8. a.

If a Man dies seised of a Park, the Heir shall have the Deer, and not the Executor. 1 *Roll. Abr.* 916. *Co. Lit.* 8. a. So in Case of a Warren or Dove-house, the Conies and Doves shall go to the Heir. *Co. Lit.* 8. a.

If one has a Lease for three Lives to him and his Assigns, this is no Chattel, nor shall go to the Executor or Heir, but to him that first enters and claims it as an Occupant in Case no Assignment was made in the Life of the Lessee. *Wentw. Off. of Ex.* 77. But see before concerning *Occupancy*, p. 17. and the Statutes relating thereto, p. 21.

Where one is seised in Right of his Wife of Land, and is attainted of Treason or Felony, the Profit thereof accruing to the Crown is but a Chattel; and tho' the King grants it to one and his Heirs, yet it shall go to his Executors. *Wentw. Off. of Ex.* 78.

If one possessed of Land for a Term of Years only, grants a Rent out of the same to A. and his Heirs, or the Heirs of his Body, yet the Rent shall go to his Executors and not to any Heirs, for being derived out of a Chattel, it cannot be any Freehold or Inheritance, but a mere Chattel. *Went. Off. of Ex.* 29.

So if one feised in Fee leases for Years, reserving a Rent, and devises the Rent to *A.* and *A.* dies, his Executor, and not his Heir, shall have it. *Dyer* 5. *b.*

In ancient Time the Heir was permitted to have an Action of Debt upon a Bond made to his Ancestor and his Heirs, but the Law is otherwise at this Day. *Co. Lit.* 8. *a.*

Paraphernalia.

The Wife after the Death of her Husband must have her *Paraphernalia*, (*i. e.* her wearing Apparel which is necessary and convenient for one of her Station and Character) and not the Executors of her Husband. But she shall not have excessive Apparel, the Executors shall have them. *1 Roll. Abr.* 911. *3 Danv.* 358.

If the Husband delivers to the Wife a Piece of Cloth to make a Garment, and dies, altho' it was not made into a Garment in the Life-time of the Husband, yet the Wife shall have it, and not the Executors of the Husband, because it was delivered to her for this Intent; but against the Debtee of the Husband the Wife shall have no more Apparel than is convenient. *1 Roll. Abr.* 911. *3 Danv.* 358.

And a Chain of Diamonds and Pearl worth 370*l.* being usually wore by a Woman who was the Daughter of an Earl of *Ireland*, and a Baron of *England*, and the Wife of a Knight and Serjeant at Law of the King, shall be *Bona Paraphernalia*, so that the Husband cannot devise them from the Wife, but the Devise shall be void. *Lord Hastings* and *Dowglas*, *Trin.* 8 *Car. B. R.* Upon a special Verdict, the Defendant having married the Wife of Sir *John Davis*, who used the Chain in the Life of Sir *John*, *Hil.* 9 *Car. B. R.* it was argued *per Cur'*, and *Richardson* and *Croke* thought the Wife should not have them, tho' no Debts, because of the Devise, *viz.* that she should not have them against the Will of her Husband, because they were not necessary for her, tho' convenient. But *Jones* and *Barkely* *contra*, because convenient for her to wear; but *Jones* thought she should not have them as *Paraphernalia*, but by the Law of Reason and Convenience. But all the Court agreed she should have her necessary Apparel as *Paraphernalia*, and the Husband could not devise them from her, because necessary that she should not go naked, &c. *1 Roll. Abr.* 911, 912. *3 Danv.* 358. See same Case *Cro. Car.* 343. *1 Jon.* 332.

Four Gold Chains, twenty-eight Dozen of Gold Buttons, and an Agate, were allowed to be *Paraphernalia* of a Viscountess. *Moor* 213. *2 Leon.* 166.

But after all that has been said concerning the Interest of an Executor, if one makes his Will, and appoints an Executor, and gives him 10*l.* or no Legacy, [*Qu.*] nor makes any Disposition of the Residue of his Personal Estate after Debts and Legacies paid, this Residue shall not go to the Executor, but shall be distributed to the nearest Kin to the Testator, or their Representatives; for the Testator is esteemed to die intestate as to that Residue, and therefore an Administration shall be granted *quoad* the Residue. [*Qu.*]

(H) An Executor's Power.

THE Power which an Executor has is wholly by the Will; and therefore he may release an Action, Debts or Duties, or do any Thing as Executor before the Probate of the Will, if he afterwards proves it, but before Probate he cannot bring Actions for Debt, &c. due to the Testator, for he must shew the Testament proved under the Seal of the Ordinary, at least when he declares, he may take the Goods and Chattels to himself, or give Power to another to seise them for him; yet he cannot make a Testament of the Goods he has as Executor before the Property is altered; neither can Executors make a Division of the Goods amongst themselves till the Property is altered. *Plowd.* 277, 278, 280. *5 Co.* 28. *9 Co.* 38. *Co. Lit.* 292. *b.* *Noy's Max.* 103. *Wentw. Off. of Ex.* 49.

If an Obligee releases to the Executor of the Obligor before Probate of the Will, it is a good Release if he proves the Will after. *1 Roll. Abr.* 917.

If an Executor before Probate of the Will brings an Action of Debt upon an Obligation due to him as Executor, but when he declares he shews it in Court proved, it being proved after the Action brought, yet the Action is well brought, because he was Executor before Probate, tho' by Law he is not permitted to sue before Probate; yet this being proved, the Impediment is removed *ab initio*, for by his shewing the Will to the Court he hath satisfied the Ceremony which the Law requires. *1 Roll. Abr.* 917.

An Infant Executor after seventeen Years of Age has as much Power as another Executor of full Age; but he is disabled to do any Thing to his own Hurt, and therefore

therefore if he releases a Debt before he receives it, the Release is void, tho' it might have been good upon Payment; and if an Infant before seventeen Years of Age assents to a Legacy before the Debts are paid, the Assent is void; or if he do any Act that will be a *Devastavit*, or a Wasting of the Goods, in another Executor of full Age, it shall not bind him, he cannot sell a Lease for Years, which he hath as Executor, before he is twenty-one Years of Age, if he does, such Sale shall be void. 5 Co. 27, 29. Cro. Car. 490. Co. Lit. 264. b.

A Feme Covert Executrix may do any lawful Act which another Executor may do, but she cannot Prejudice her Husband by releasing a Debt before it is paid, by assenting to a Legacy before the Debts are paid, &c. yet the Husband may do it. 5 Co. 27.

If the Goods of the Deceased are kept from the Executor, he may sue for them in the Spiritual Court, or at Common Law.

If one seised of a Messuage in Fee-simple, Fee-tail or for Life, hath Goods in his House, and makes his Executors, and dies, his Executors shall have free Entry, Egress and Regress, to carry the Goods out of the House (to whomsoever it doth belong) in a reasonable Time. Lit. §. 69.

One Executor may sell a Lease for Years, and the Sale shall bind the other. 1 Roll. Abr. 924.

(1) Of Assets.

Assets, (from the French Word *Asses*, enough) are all the Goods and Chattels which belonged to the Testator at the Time of his Death in any Part of the World, and which comes to the Hands of the Executor. Assets are sufficient Goods and Chattels to make the Executor chargeable (as far as the said Goods and Chattels extend) to a Creditor or Legatee; if a Stranger takes Goods out of his Possession, yet they are Assets in his Hands. Assets in the Hands of one Executor are Assets in the Hands of all the Executors; but such Things as are not valuable, or not to be sold, (as Presentation to a Church actually void, &c.) shall not be accounted Assets. The Goods of other Men in the Hands of the Executor shall not be Assets. *Terms de la Ley*, Tit. *Assets*. Co. Lit. 338, 374. b. *Noy's Max.* 104.

If the Cattle of the Testator do breed after his Death, the Young shall be Assets. So Wool growing on the Sheeps Backs, Goods and Chattels mortgaged to the Testator, and not redeemed, or the Money wherewith it was redeemed, shall be Assets. *Off. of Ex. c. 9. p. 119.*

If Lands are only devised to be sold, the Money and Profits of the said Lands shall not be accounted any of the Testator's Goods. 5 Co. 34.

If a Man devises Lands to be sold by *J. S.* for Payment of his Debts and Legacies, and makes *J. S.* his Executor, and dies, the Money made by *J. S.* upon the Sale of the Land shall be Assets in his Hands. 1 Roll. Abr. 920. 1 Lev. 224. *Hard.* 405.

But it is otherwise where the Land is devised to be sold by the Executors and others, for there the Money shall not be Assets, for they are not trusted therewith as Executors.

If Lands are devised to Executors for three Years for Payment of Debts, it is Assets in the Hands of the Executors; but if Lands are devised to be sold for Payment of Debts, it is no Assets before sold. 1 Brownl. 34. 2 Brownl. 47. *Wentw. Off. of Ex.* 105.

If a Man devises Lands held in Socage to be sold by his Executor, and that the Money thereof coming shall be disposed in Legacies specially expressed in the same Will, if the Executor after his Death sells the Land for Money, this Money shall be Assets in his Hands to the Legacies. 1 Roll. Abr. 920. But not for Payment of Debts. 1 Leon. 87. 2 Leon. 119. *Wentw. Off. of Ex.* 105.

So if a Devise be of such Land to his Executor, upon Condition to sell it, and with the Money thereupon accruing, and also with his Personal Estate to pay his Debts, and gives Power by the same Will to his Executor to sell it accordingly, &c. and after the Executor sells it accordingly, the Money received upon the Sale shall be Assets to the Debts. 1 Roll. Abr. 920.

Also all Goods and Chattels, Debts, &c. that are recovered by the Executor by Action at Law or Suit in Equity after the Death of the Testator, shall be accounted Assets, but not before they are recovered; for if the Executor do never recover, or get

get a Debt into his Possession, he shall never be charged, provided he hath used his utmost Endeavour to recover it, and cannot do it. 1 Co. 98. Off. of Ex. c. 6. p. 92. 1 Roll. Abr. 920.

Damages also recovered for Goods taken away in the Life of the Testator shall be Assets. Lit. §. 192. Co. Lit. 124. a.

If an Obligee or Creditor is made Executor, the Debt is Assets, but he may pay himself before any other in equal or inferior Degree. If the Obligee or Creditor makes the Obligor or Debtor Executor, it is a Release of the Debt even in the Case of an Infant. Co. Lit. 264. b. Off. of Ex. c. 2. p. 43, 63.

But his Debt shall be Assets for so much to other Creditors, if there is not Assets besides. 2 Roll. Abr. 920, 921.

If Money due to the Testator is paid to a Stranger by Consent of the Executor, it is Assets in his Hands immediately; and if without such Consent, and he after brings an Action for it against the Receiver, (by which he agrees to the Receipt) and recovers, it will be Assets immediately without Execution, for the original Debtor is thereby discharged. Salk. 207.

If the Debtee makes the Debtor and a Stranger Executors, by which the Debt is extinct in the Hands of the Debtor, yet it shall be Assets in his Hands to Debts, for this is extinct but by the Will. 1 Roll. Abr. 920. Wentw. Off. of Ex. 45. Telv. 160.

So if the Debtee makes the Debtor Executor, and dies, by which the Debt is extinct in the Hands of the Debtor, yet it shall be Assets, for that this is extinct but by the Will. 1 Roll. Abr. 920, 921. Wentw. Off. of Ex. 45. Telv. 160. Salk. 304.

If the Testator was indebted to the King in 13 l. and the King seized the Goods of the Testator in the Hands of the Executor for the said Debt, and after the Executor pays the 13 l. and hath the Goods re-delivered, the Value of the Goods above the Sum of 13 l. shall be Assets to other Debts. 1 Roll. Abr. 921.

If Executor of Lessee for Years enters, and receives the Profits, yet no Part thereof will be Assets unless what is over and above the Rent, but is received by Executor as Tertenant, and appropriated to the Use of the Lessor. 1 Salk. 79.

If A. takes a Bond in Trust for B. and dies, this is not Assets in the Hands of the Executors of A. 1 Salk. 79.

So if the Obligee assigns over a Bond, and covenants not to revoke it, and dies, this is not Assets in the Hands of the Executors of the Obligee. 1 Salk. 79.

If Money is brought into the Prerogative Court, and there delivered to the Executor as due to the Testator, and presently after in the same Court, by Order thereof, and the same Day he pays it to a Creditor of the Testator, and after such Payment and upon the same Day another takes out a Writ upon Plene Administravit pleaded, this Money will be taken to be Assets, tho' perhaps by special Pleading the Defendant might have been aided. Dyer 208.

A Bond of the Testator in the Hands of an Executor is not Assets till recovered, because but a *Chose in Action*; but if an Executor releases the Debt, he has made it Assets in his Hands to the Value of the whole Bond. Ow. 36.

Pound.

Goods distrained or impounded are not Assets in the Hands of an Executor. Cro. Eliz. 23.

If an Executor puts in Suit a Bond of 100 l. for Performance of Covenants, and the Parties submit to an Award, and it was awarded that the Obligor shall pay 70 l. in full Satisfaction, and that the Executor shall release, which is done accordingly, the Executor shall be taken to have Assets to the Value of the whole 100 l. and tho' by the Award compelled to release, it was his own Act to submit to the Arbitrament. 3 Leon. 53.

If a Trespasser take Goods in the Life of the Owner, so that they were never more than a *Chose in Action* to his Executor or Administrator, they are not Assets till recovered; otherwise if taken after his Death. Cro. Eliz. 810.

If A. for Money due from the King takes a Debenture in the Name of B. and A. makes C. his Executor, and dies, and C. procures B. to release and surrender this, and for the same Money C. takes a new Debenture to himself, this is no Assets in the Hands of B. nor *Devastavit* in C. the Executor. Goulf. 115.

If an Executor being of full Age, upon Receipt of all Principal and Interest due releases the Bond, it is no *Devastavit*, and Assets only for the Money received, because nothing done but what in good Conscience ought to be. Cro. Car. 491.

If a Man makes A. his Executor during the Minority of B. and makes B. his Executor after his full Age, and after B. comes to full Age, and takes upon him the

Executorship

Executorship of the Will, the Goods of the Testator which are in *Specie* in the Hands of *A.* after the Executorship of *B.* are Assets in the Hands of *B.* tho' *B.* never had the Possession thereof, for he may have Trover and Conversion for them against him. 1 *Roll. Abr.* 921.

If an Executor after he comes of full Age proves the Will, and releases all Actions to him who was Administrator during his Minority, and who then had Goods in his Hands of the Testator's, this is Assets in the Hands of the Executor, for the Law presumes he hath received as much as he released. But it was said, that if an Executor releases an Account, and it was uncertain what he should recover, it is not Assets; but if it can appear or be proved that so much was due, it is Assets. *Cro. Eliz.* 43.

If an Executor of his own Wrong to whom 20 *l.* is owing seizes Goods to the Value of twenty Pounds, intending to pay himself a Debt of that Value, this shall be Assets in his Hands, to make him chargeable to any Creditor or Legatee, if he alters the Property of any Thing belonging to the Testator, as by laying down his own Money in Lieu of it, it belongs to him; if one recovers against an Executor a just Debt of an hundred Pounds, and the Executor compounds for sixty Pounds, he shall not be allow'd a hundred Pounds, to defraud other Creditors. 5 *Co.* 30. 8 *Co.* 132, 133.

Tho' a Plantation be an Inheritance, yet being in a foreign Country, it is a Chattel to pay Debts, and a Thing that is Testamentary. 2 *Vent.* 358.

By *Stat. 29 Car. 2. c. 3.* An Estate for the Life of another shall be Assets in the Hands of the Heir or Executors, and Trusts in Fee-simple shall be Assets in the Hands of Heirs.

Assets shall be always intended till the Executor alleges the Want of them in Excuse. 9 *Co.* 90, 94.

After all the Debts and Legacies are paid, that which remains belongs to the Executor by Virtue of his Executorship, but the Interest which the Executor hath as Executor in the Goods of the Testator before Probate of the Will, and before such Payments, is different from the Interest which every one hath in his own proper Goods, for then an Executor, as Executor, cannot by Will give away the Goods, but his Executor also shall be Executor to the first Testator. [*Qu.* of a mere or nude Executor.] Neither can the Goods which a Man hath as Executor be liable to pay his own Debts; but if an Executor alters the Property from the Testator to himself, by paying a Debt to the Value of such particular Goods named by him, *Dyer* 185, 187. or by paying the Rent, and receiving the Profits of a Lease, or Part of the Profits received equal to the Rent, the Goods and Profits received equal to the Rent are his own. 5 *Co.* 31.

(K) *The Office and Duty of an Executor,*

IS first to *bury* the Testator in a decent Manner, according to his Rank and Character, but with Regard to his Estate left after Debts paid; for funeral Expences that are unreasonable ought not to be allow'd out of the Testator's Estate. Whatever the Executor lays out extravagantly, if there is not enough to pay Debts, he must bear it at his own Expence. Burial.

Funeral Charges that are necessary must be paid before Debts and Legacies. *Dr. & Stud. Dial.* 2. c. 10. 1 *Roll. Abr.* 926.

2. The Executor must prove the Will before the Ordinary, either by common Form by his own Oath, or by Witnesses besides his own Oath, if any that have Interest call him to do it; and tho' a Will is proved in common Form, or *per Testes*, it must be exhibited in the Office belonging to the Ecclesiastical Court, to be kept by the Register; and a Copy thereof in Parchment is to be delivered to the Executor under the Ordinary's Seal, which Copy in Parchment so sealed is called the Probate, but it is rather the Certificate of the Probate. 2 *Inst.* 488. *Perk.* 486. 9 *Co.* 37, 38. Probate.

A Will may be proved before the Ordinary which contains Goods and Lands, tho' formerly a Prohibition used to be granted as to the Lands. If there is a Devise of Lands and Tenements of Freehold in the Testament, it is proper also to prove the Will by Witnesses in the Court of Chancery. 1 *Vent.* 207. 6 *Co.* 23.

The Probate of the Will, with Respect to Goods and Chattels, is necessary; for tho' as to Freehold Lands devised it is not at all material to prove the Will before the Ordinary, yet as to Goods and Chattels it is necessary to give the Executor Power to bring

bring Actions, and to confirm the Acts which he did as Executor before Probate. 1 Roll. Abr. 917. Noy's Max. 103.

If all the Goods of the Deceased, which comprehends Specialties, as Bonds, Statutes, &c. (Qu. of a Lease for Years) be within the same Diocese in which the Testator lived and died, the Executor must prove it before the Bishop of the Diocese, or his Commissary, or before the Archdeacon, or his Official, according as the Composition has been made with the Bishop, or as Prescription directs. Dyer 305. 1 Roll. Abr. 908, 909.

But sometimes the Executor has been obliged to shew how an Archdeacon, &c. has Power to prove a Will, whereas the Power of the Bishop, or his Commissary, will be allow'd of Course. Perk. 491, 492.

Debts without Specialty are to be accounted Goods in that Diocese where the Debtor lives. Vide Canon. 92.

If all the Goods and Chattels lie in a peculiar Jurisdiction, then the Will ought to be prov'd before him that is Judge of the Peculiar. If some Part of the Goods is in a Diocese, and Part in a Peculiar of the same Diocese, there must be two several Probates. [Qu.] Cro. Jac. 718, 719.

But if the Goods are within two Peculiars within the same Diocese, then the Will must be proved before the Archbishop of the Province. And so before the Archbishop, if there are bona Notabilia, i. e. if the Testator had Goods and Chattels at the Time of his Death of the Value of five Pounds, or more, lying in another Diocese besides that wherein he lived and died. 1 Lev. 78.

In some Places Lords of Manors have the Probate of the Wills of their Tenants within the Manor by Custom Time out of Mind. 5 Co. 73. 9 Co. 37. Therefore it is to be observ'd, that if Probates of Wills or Letters of Administration are denied in the King's Courts, and thereof an Issue joined, it shall be tried by a Jury, and not by Certificate of the Ordinary, because this Power of the Ordinary was not originally of Ecclesiastical Cognizance. 2 Inst. 231. 9 Co. 31, 40, 41.

By the 21 H. 8. c. 5. The Fees for Probate of Testaments are limited, and the Ordinary may convene Executors to prove the Testator's Will, and to bring in an Inventory.

By the 23 H. 8. c. 9. A Man is not to be cited out of his Diocese, or peculiar Jurisdiction, to prove a Will, or to take Letters of Administration, unless there are bona Notabilia.

Inventory.

3. The Executor should make an Inventory of all the Goods and Chattels of the Deceased at the Time of his Death, with their Value, and of all Debts due to him, which ought to be made and appraised in the Presence of the Executor, or by two or more of the Creditors, or two of the next of Kin, or in their Default by two or more of the Neighbours or Friends to the Deceased; and then the Executor must deliver the same upon Oath to the Ordinary, unless the Ordinary gives him Time to bring in the Inventory, or upon good Cause dispenses with it. Until the Inventory is made and brought into the Office of the Ordinary, it shall be presum'd that the Executor hath Assets to pay all the Debts of the Testator. [Qu.]

Debts and Legacies.

1. Debts.

4. It is the Executor's Office and Duty to pay Debts and Legacies. A Bond or other Security for Payment is to be accounted Payment. Hob. 250. 2 Vent. 358.

All Debts must be paid before Legacies; in Payment of Debts this Order must be observ'd:

1. After the Charge of the Funeral, Inventory, Opposition by a Caveat and the Probate, the King is to be preferred for his Due upon Record and Specialty. Off. of Ex. c. 12. p. 179. 1 Roll. Abr. 927. Bac. L. Tracts 161.

2. Then the Forfeitures for not burying in Woollen are to be allow'd out of the Estate of the Deceased before any Statute, Judgment, or other Debt, Legacy, or any other Duty whatsoever. Per Stat. 30 Car. 2. c. 3.

3. All Money due for Letters to the Post-Office shall be paid before any Debt due to a private Person. Per Stat. 9 A. c. 10.

4. Afterwards Debts due to private Persons upon Judgments against the Testator in any Court of Record, without any Consideration of first or last. 4 Co. 60. 5 Co. 28.

But by Stat. 4 & 5 W. & M. c. 20. Judgment not doggetted shall not affect Lands or Tenements as to Purchasers or Mortgagees, or have any Preference against Heirs, Executors or Administrators, in their Administration of their Ancestors, Testators or Intestates Estates.

Yet

Yet amongst Judgments, he that first sueth Execution shall be preferred, but before Execution it is at the Election of the Executor to pay whom he will first.

5. Then *Statutes* or *Recognizances*, those forfeited before those that are for Performance of Covenants, &c. not broken; otherwise amongst *Statutes* and *Recognizances* the Executor may give Precedency, as he pleases, before Execution. 4 Co. 60. 5 Co. 28, 29. *Off. of Ex. c. 12. p. 201, &c. Contra Cro. Jac. 734, 822.*

6. Then Debts due for *Arrearages of Rent* upon Leases, &c. in Writing, (tho' some say upon parol Leases too) because it favours of the Realty in Regard of the Profits received, for the Lessor may distrain and pay himself, whether the Executor will or no. *Off. of Ex. c. 12. p. 209, 210, 211. 2 Vent. 184. Bac. L. Tracts 161. 3 Lev. 267.*

7. Then Debts due upon *Specialties*, as Obligations, Bills Penal, or single Bills sealed without Penalty. *Off. of Ex. 204, &c.*

And 8thly, Debts due upon *Bills* or *Notes* unsealed, or verbal *Contracts*; for there is no Difference betwixt Notes and Shop-Books, &c. Some prefer a Debt due for Wages of Servants, that are within the Statute of Labourers, before Debts due upon Shop-Books. 1 Roll. Abr. 927. 9 Co. 87, 88, 89, 90.

In such an Action where the Testator might wage his Law, the Executor is not bound to pay; therefore they are not chargeable in an Action of Debt, as they may be in an Action of the Case, where no Wager of the Law is allow'd, except in *Detinue*.

Note, That amongst Debts that are of equal Degree, the Executor may always pay himself first. *Plowd. 543. Off. of Ex. p. 204. &c.*

But an Executor of his own Wrong cannot retain, as before mentioned. 5 Co. 30. 2 Vent. 180.

And those Creditors that at first commence their Suit are to be paid first. [Qu.] If not those that first get Judgment and Execution against him; those Debts that are due are to be paid before those that are not due, or before those whose Day of Payment is to come. *Noy's Max. 104. Dr. & Stud. Dial. 2. c. 10. 1 Roll. Abr. 926, 927. Bac. L. Tracts 161.*

Yet (notwithstanding what has been said concerning the Commencement of Suit first, and those whose Day of Payment is to come) Executors will sometimes confess Judgment presently to a Friend for his Debt, (for he is not bound to stand Suit) and plead dilatory Pleas (to wit, such confessed Judgment) to a Stranger's Debt, that his Friend may be first paid upon Execution.

But if Judgment for a hundred Pounds is suffered to stand to an Agreement, and the Plaintiff compounds for sixty, the Judgment for the whole Sum will not be allow'd to keep off other Creditors, as before-mentioned. 8 Co. 133. 9 Co. 110.

If no Suit is begun, the Executor may make a voluntary Payment of the whole Debt to any one Debtor in equal Degree, tho' he hath no Assets left to pay unto another any Part of his Debt. Debts due to the King otherwise than by Matter of Record, as for Sale of Timber, Amerciaments in his Courts-Baron, &c. are like the Debts due to a Subject. *Sed vide Stat. 33 H. 8. c. 39.*

The same Order throughout is to be observed by Executors of Executors.

If the Executor pays in any other Order, he must pay the Debts of a higher Degree out of his own Estate, if he hath not Assets to pay all the Creditors.

After all the Debts are paid in such Order as directed, the Executor must pay 2. Legacies; *Legacies. Dr. & Stud. Dial. 2. c. 11. 8 Co. 136. 9 Co. 88.*

And herein the Executor may prefer himself if any Legacy is given to him, tho' there is nothing left to discharge the other Legacies. Afterwards he may pay what Legacies he pleases first, tho' there is not enough to satisfy all the Legatees, or he may pay to each of the Legatees a Part of their Legacies in Proportion with the other Legatees, if there is not enough to pay every one his whole Legacy. This is the fairest way; for it is not here as in the Case of Debts due from the Testator; the Executor may not know the Number of the Debts, and therefore shall be allow'd to pay those which come to his Knowledge first; but here the Legacies are all known as soon as the Will is open'd. *Plowd. 545. Off. of Ex. c. 12. p. 204, &c. 2 Vent. 358, 360.*

But if there is a Specifick Legacy, or any particular Thing given in *Specie*, as a Lease, a Horse, a Silver Cup, &c. this must be delivered accordingly before any other Legacy, if there are Assets. *Off. of Ex. c. 19. p. 317.*

If there is enough to pay all the Legacies, they must be all paid.

If one binds himself and his Executors in an Obligation, &c. to perform a certain Thing, and in his Will gives divers Legacies, and dies, leaving Goods sufficient only

to

to pay this Obligation when it is forfeited, this Obligation shall be no Bar to the Legacies, because it is uncertain whether it may ever be forfeited. 1 Roll. Abr. 928.

The Executor therefore may make a Delivery upon Condition (*viz.*) to return the Legacy, if the Obligation, &c. is ever forfeited, and the Penalty recovered. 2 Vent. 358.

If there is not enough to pay Debts, or more above Debts, the Legatees must lose their Legacies.

By Stat. 29 Car. 2. c. 3. No Executor or Administrator shall be charged on a special Promise to answer Damages out of his own Estate, unless some Note thereof be in Writing, and sign'd by the Party to be charged, or some other by him authorized.

Account.

5. The Executor must pass his Account before the Ordinary concerning the Goods and Chattels of the Testator. 9 Co. 39, 40.

The Inventory shews what is his Charge, and the Account must be his Discharge for so much as he can prove to be laid out in Payments for funeral Charges, making the Inventory, Probate of the Will, Debts and Legacies; this Account will discharge him of all Suits in the Spiritual Court, but will not discharge him of Suits at Common Law for there each Particular must again be prov'd.

By Stat. 1 Jac. 2. c. 17. Executors must not be called to an Account *ex officio*, &c.

By Stat. 4 & 5 Ann. c. 16. An Action of Account lies against the Executor or Administrator of a Guardian, Bailiff, Receiver, &c. and the Auditors shall examine the Parties upon Oath, and shall be allow'd as the Court shall judge reasonable, by the Party on whose side the Ballance shall be.

Overseers of a Will.

If one maketh Overseers in his Will, they have no Power to execute the Will, or to intermeddle with the Goods; they may give Counsel and Advice, and if Executors will not be prevailed on to do their Duty, the Overseers may complain of them in the Spiritual Court. Off. of Ex. c. 1. p. 13, 14.

Waste by Executor.

Lastly, If an Executor does waste or mis-employs the Estate of the Deceased, or sells the Goods of the Testator at an Under-value, tho' by Submission to Arbitrators, or does not observe the Law which directs him in the Management thereof, by paying what ought not to be paid, or by not observing the right Order of Payment, or doth any Thing by Negligence or Fraud against his Trust, it is a *Devastavit* or *Waste*; and he shall be charged so much upon the *Devastavit* returned by the Sheriff *De bonis propriis* upon his own Goods, as if it were for his own proper Debt. *Terms de la Ley*, Tit. *Devastavit*. *Noy's Max.* 104. Off. of Ex. c. 13. p. 226, &c. 8 Co. 133.

Where there are many Executors, the Fraud or Negligence of one shall not be chargeable upon the Rest. Off. of Ex. c. 13. p. 231. 1 Roll. Abr. 929, 930.

If the wasting Executor dies, his Executors or Administrators are chargeable. (See Stat. 4 & 5 W. & M.)

But it is not so with Administrators, for they have but one Authority, which must be executed by all join'd together. Off. of Ex. c. 13. p. 232. *Contra* 1 Roll. Abr. 920.

Executor de son tort, who.

An Executor *de son tort*, is he that is neither lawful Executor nor Administrator, and yet acts as an Executor.

As when he takes into his Hands the Goods of the Deceased, and uses or converts them to his own Use, and alters the Property by Gift, Sale, &c. tho' he has Letters *Ad colligendum bona defuncti*, for the Ordinary himself has no Power to give or sell them. *Terms de la Ley*, Tit. *Administrator*. 1 Roll. Abr. 918. 5 Co. 32. a. 33. b.

Or where he has a Writ *Ad colligendum* granted by the Commissary, in which Authority is given *Ad vendendum & venditioni exponendum bona intestati peritura, & que sine detrimento servari non possunt & ad compotum inde reddendum*; by Force of which he sells Grain; this is such an Administration by which the Defendant should be charged of his own Wrong, for the Ordinary himself could not do this. 1 Roll. Abr. 918. *Went. Off. of Ex.* 250.

Or if he delivers the Goods of the Deceased to Creditors or Legatees in Satisfaction of their Debts or Legacies; or receives any Debt due to the Deceased, and gives a Release for the same; or releases any Debt due to the Deceased before it is paid; or pays any Debt due from the Deceased, except it be with his own Money. *Noy's Max.* 102. 5 Co. 31, 32, 33. 8 Co. 135. 9 Co. 39. 1 Roll. Abr. 918.

If Lessee for Years in Reversion dies intestate, and his Wife assigns the Term, and after takes out Administration, and assigns to another, the first Assignment is void,

void, for upon such Term no Entry would be made, nor could there be an Executor *de son tort* thereof. *Moor* 26.

But where such Termor dies Intestate, and one enters and possesses himself thereof, he thereby becomes Executor *de son tort*. *Style* 406, 432. 2 *Mod.* 274.

If an Executrix makes a fraudulent Gift of all her Testator's Goods, and yet continues the Possession thereof, and marries, and dies, and the Husband being possessed of Part thereof pays Legacies, he is chargeable as an Executor *de son tort*. *Cro. Eliz.* 405.

If Lessee for Years dies Intestate, and one enters, he thereby becomes an Executor *de son tort*, and if he commits Waste an Action of Waste lies against him. 3 *Lev.* 35.

If a Woman after the Death of her Husband takes more of her Apparel than is convenient, she is Executrix of her own Wrong. 1 *Roll. Abr.* 918. *Vide post. as to her Paraphernalia.*

A Woman Executrix administers, and takes Husband, and they are after divorced *Causa præcontractus*, and the Wife appeals from the Sentence, and pending this Appeal the Husband administers the Goods, and the Wife dies, the Appeal not being determined, and the Administration of the Goods is granted to another, whether the Husband may be charged as Executor of his own Wrong for the said Administration, *Dubitatur*, 1 *Roll. Abr.* 918.

An Executor *de son tort* cannot retain to satisfy his own Debt, yet upon *Plene Administravit* he may give in Evidence Payment of just Debts, and tho' in an Action brought by the rightful Executor or Administrator he cannot plead Payment of Debts, &c. to the Value, yet upon the General Issue pleaded, such Payments shall be recouped in Damages. *Carth.* 103, 104.

A. makes a Will, and J. S. Executor thereof, and after makes a latter Will, and thereof makes J. D. Executor, and dies, and after J. S. proves the first Will in the Prerogative Court, and there this is allowed, decreed and published for a Will, and after J. S. administers the Goods of the Testator, by Force of this, for half a Year after, and within this Time, B. who was bound by Obligation of 100*l.* to the Testator, pays the Money to J. S. he not having Knowledge of any other last Will, and thereupon J. S. gives a Release, and after the Probate of the first Will is repealed, and the Will itself disannulled, and the last Will proved, * this Payment made and Release is no Bar of an Action upon the said Obligation by J. D. the last and true Executor, because it does not lie in the Power of the Ordinary to make another Executor than he who is made Executor by the Testator himself; and tho' it be mischievous to him who pays the Money, and the Executor who proved the Will before he knew of the last Will, yet the Mischief would be as great on the other Part, if the Ordinary should have Power to make another Executor than he who is the true Executor made by the Testator, and he should have Power to dispose of the Estate of the Testator. Adjudged upon the Advice of all the Judges, *M.* 16 *Car.* 2. *B. R. Greves* and *Weigham*; for the Ordinary has no Power to grant Administration, or to give any other Power to dispose of the Estate of the Testator, where he had made an Executor. 1 *Roll. Abr.* 919.

If an Executor *de son tort* possesses himself of Goods of an Intestate, and sells them, and after takes out Administration, this Sale is good by Relation. *Moor* 126.

An Intestate's Widow took his Goods into her Hands, and by the Direction of his Son sold them, and the Son after took out Administration, and paid the just Debts of the Intestate upon Specialties, as far as all the Intestate's Goods amounted to. An Action was afterwards brought against the Wife as Executrix *de son tort*, who pleaded *Plene Administravit*, and shew'd the special Matter in Evidence; upon which it was adjudged that she should not be charged, but that the Plaintiff should be barred; for this Action being brought after the Administration committed, and when she was chargeable for those Goods to the Administrator, and when the Administrator had fully satisfied in paying the Debts of the Intestate as far as all the Goods of the Intestate amounted unto, it is not Reason she should be charged against the Plaintiff, for then she should be double charged, *viz.* to the Administrator, and also to the Creditors; also it is not Reason that more should be satisfied out of the Goods of the Intestate unto the Creditors than the Goods of the Intestate amounted unto, and so much being satisfied by the Administrator, they should not have more; but if the Action had been brought against her before the Administrator had fully administered all in Debts, peradventure it might have been otherwise, for she having gained Goods into her Hands, is chargeable for

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them

The Power of
an Executor
de son tort.

* But see
Plowd. Com.
282. b. *Fitz.*
Executors 41.

them as Executor *de son tort* Demesne, until she gives Satisfaction for them to the true Administrator, or she herself satisfy for the true Debt to the Value; whereupon it was adjudged for the Defendant. *Cro. Car.* 88, 89.

Who shall be chargeable as Executors.

An Executor of his own Wrong shall be bound to pay Legacies as well as Executors of Right.

If a Woman Executrix takes Husband who wastes the Goods, and the Wife dies, by the Common Law there is no Remedy against the Husband; but in this Case by the Ecclesiastical Law the Husband shall be punished and compelled to make Execution.

And if an Executor wastes the Goods, and dies, his Executor shall not be charged for them; for *Actio personalis moritur cum persona*. 1 *Roll. Abr.* 919, 920. not even in the Case of the King. 2 *Lev.* 110. 1 *Vent.* 292. *sed vide Stat.* 30 *Car.* 2. c. 7. & 4 & 5 *W. & M.* *post.*

If an Executor of his own Wrong wastes the Goods, and dies, his Executor shall not be charged. 1 *Roll. Abr.* 920.

If an Executor *durante minore etate* wastes the Goods after the Age of the Infant, he shall be charged upon the special Matter, and not as an Executor of his own Wrong, because he had a lawful Authority to that Time. *Noy* 86.

Altho' an Executor *de son tort* is not chargeable to Creditors further than he has received, yet for his tortious Intermeddling the rightful Executor may have an Action against him, and shall recover Damages, tho' not according to the Value of the Goods, because what he has lawfully paid shall be recouped. *Skin.* 274. *Carth.* 104. 1 *Vent.* 349.

So that if a Man dies Intestate, and a Stranger takes the Intestate's Goods, and uses or sells them, he is an Executor of his own Wrong, and must be sued as Executor; for no one can be an Administrator of his own Wrong, no Action lying against an Administrator by Common Law. 5 *Co.* 33, 82, 83. *vide Stat.* 31 *Ed.* 3. c. 11.

But if there is a legal Executor who has proved the Will, or if a legal Administration is granted before the Stranger intermeddled, a Stranger cannot be an Executor of his own Wrong, but is a Trespasser against the Executor, &c. because the rightful Executor may be charged, and the Goods taken by the Stranger out of his Possession are Assets in his Hands: Yet tho' there be an Executor or Administrator, if the Stranger takes the Goods, claiming to be Executor, pays and receives Debts, &c. he may be charged as Executor of his own Wrong by such express Administration, but all lawful Acts which he doth as Executor of his own Wrong are good, and he must answer only as far as he acts. 5 *Co.* 33, 34.

An Executor of his own Wrong cannot retain for his own Debt against another Creditor, because then the Creditors would strive amongst themselves to seize the Goods of the Testator. 5 *Co.* 30.

By the *Stat.* 4 & 5 *Eliz.* c. 8. If one obtained Goods or Debts of an Intestate, or any Release or Discharge of any Debt or Duty to him belonging, by procuring by Fraud Administration to be granted to a Stranger of mean Estate, and without a valuable Consideration from him, taking such Grant and Release, he shall be chargeable as Executor of his own Wrong, so far as the Value of the Goods or Debts so obtained or released shall amount unto, but may deduct Money owing to him from the Intestate, and other Payments by him made, which lawful Executors or Administrators ought to have made.

And by *Stat.* 30 *Car.* 2. c. 7. reciting, That the Executors and Administrators of such Persons who had possessed themselves of considerable Personal Estates of other dead Persons, and converted the same to their own Use, had no Remedy by the Rules of the Common Law to pay the Debts of those Persons whose Estate had been converted by their Testator or Intestate, which had been found very mischievous, and many Creditors defeated of their just Debts, altho' their Debtors left behind them sufficient to satisfy the same, with a great Overplus, *it is enacted*, That all and every the Executors and Administrators of any Person or Persons, who as Executor or Executors in his or their own Wrong, or Administrators, shall waste or convert any Goods, Chattels, Estate or Assets of any Person deceased, to their own Use, shall be liable and chargeable in the same Manner as their Testator or Intestate would have been if they had been living.

And by *Stat.* 4 & 5 *W. & M.* c. 14. reciting, That forasmuch as it had been a Doubt whether the said Act extended to any Executor or Executors, Administrator or Administrators of any Executor or Administrator of Right, who for want of Pri-

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vity in Law were not before answerable, nor could be sued for the Debts due from or by the first Testator or Intestate, notwithstanding that such Executors or Administrators had wasted the Goods and Estate of the first Testator or Intestate, or converted the same to his or their own Use; for Remedy whereof, *it is enacted*, That all and every the Executor and Executors, Administrator or Administrators of such Executor or Administrator of Right, who shall waste or convert to his own Use Goods, Chattels or Estate of his Testator or Intestate, shall from henceforth be liable and chargeable in the same Manner as his or their Testator or Intestate should or might have been.

S E C T. VI.

Of acquiring Personal Estates, &c. by Administration and Distribution.

Property in Goods may in some Measure be acquired by Letters of Administration, as that if he pays the Intestate's funeral Expences or Debts with his own Money, he may retain so much of the Goods in Kind of the Intestate as is equivalent to the Money paid, and shall have the Property therein, &c. (*See what Interest he has in the Intestate's Goods, &c. post.*) But now he must not have the Surplus of the Goods and Chattels of the Intestate after his Debts, &c. paid, (tho' an Executor may of the Goods of the Testator) for it must be distributed according to the Statutes, &c. hereafter mentioned, by which Alteration in the Law, those who receive their Shares of such Surplus acquire so much of the Intestate's Estate by Distribution.

(A) *Administration, what, and who is an Administrator.*

Administration is the Management (committed by the Ordinary in Writing under Seal) of the Goods and Chattels of one that dieth Intestate, or by not appointing an Executor in his Will, or where the Executor refuses to prove his Will. *Terms de la Ley, Administration. 2 Inst. 397.*

He to whom such Management is committed is called an Administrator, or if committed to a Woman she is called an Administratrix.

Administration, what.

Administrator or Administratrix, who.

(B) *By whom Administration may be granted.*

AN Administration is to be granted by the Bishop of the Diocese, or Archdeacon, or Judge of the peculiar Jurisdiction where the Party whose Goods are to be administered lived at the Time of his Death, but a Judge of a Peculiar ought to shew his Grant, how he has Power to grant it. *1 Cro. 791. 2 Cro. 556.*

Regularly, he that shall have the Probate of a Will shall have the Grant of an Administration when the Party dieth Intestate; and if there are *bona Notabilia*, the Administration must be granted there where the Probate of a Will in such a Case is to be granted (*viz.*) by the Archbishop of the Province. In the Time of the Vacation of a Bishoprick, the Guardian of the Spiritualities may grant the Administration.

By whom to be granted.

Power given to the Ordinary by Stat. 31 Ed. 1.

The Ordinary upon good Cause may also revoke an Administration. By the Stat. 31 Ed. 3. c. 11. Where one dies Intestate, (*i. e. either in Fact where he makes no Will, or in Law where he makes a Will, and the Executors refuse before the Ordinary, or all die Intestate.* 9 Co. 40. a.) the Ordinaries shall depute the next and most lawful Friends of the Intestate to administer his Goods; which Deputies shall have an Action to demand and recover the Debts due to the Intestate in the King's Courts, to enable them to administer, &c. and shall answer also in the King's Courts to others, to whom the said Intestate was bound, in the same Manner as Executors shall answer; and shall be accountable to Ordinaries as Executors are in Case of a Testament.

This Act gave Power to Ordinaries to grant Administrations, which they could not do before; for originally the King, who is *Parens Patriæ*, and has the supreme Care to provide for all his Subjects, that every one should enjoy that which he ought

How the Law was before the Statute.

to

to have, used by his Officers to seize the Goods of the Intestate to preserve and dispose of them for his Burial, and for Payment of his Debts, and for Advancement of his Wife and Children, if he had any, and if not, those of his Blood. And afterwards this Care and Trust was committed to the Ordinaries, but no Power was given to Ordinaries to sell or dispose of the Goods either to his own Use or the Use of any other, tho' the Goods were in Danger of perishing, but only to the Use of the Deceased, as to pay his Debts, &c. 2 *Inst.* 398. 9 *Co.* 38, 39.

Neither could the Ordinaries bring Actions for Recovery of the Debts of the Intestate, tho' an Action lay against them at Common Law, or their Committees, by the Name of Executors, if they intermeddled with the Goods, and would not pay the Debts. After Possession of Goods they might have an Action of Trespas for carrying them away, or before Possession sue for them in the Spiritual Court. 8 *Co.* 135. 9 *Co.* 39, 40. 2 *Inst.* 398.

What Alterations the said Statute has made.

But now by the said Statute of 31 *Ed.* 3. six Alterations are made; three as to the Ordinaries, and three as to the Administrators.

I. *As to the Ordinary.* First, Whereas before the Statute he was not compellable to grant Administration, now by the Act of Parliament he is commanded and thereby compelled to grant Administration. Secondly, He must grant it to the next and most lawful Friends, (*i. e.* the next of Blood who are not attainted of Treason or Felony, &c.) But the *Stat.* 21 *H.* 8. c. 5. (*which see post.*) gives Power to the Ordinary to commit Administration to the Wife of the Intestate, or to the next of Blood, or to both, and so as to the Wife has altered the Act of 31 *E.* 3. Thirdly, The Ordinary himself has not greater Interest in the Goods by this Act, but has a greater Power than he had before, in this only that he may appoint Administrators, who shall have by this Act greater Interest and Ability than they had before the Act. 9 *Co.* 39, 40.

Under the Word *Ordinary* Commissaries, Archdeacons, Officials, and other Ecclesiastical Judges are comprehended for this Purpose within the Meaning of the Act.

II. *As to the Administrators.* First, The Administrators have by this Act a greater Interest in the Goods, &c. than the Ordinary ever had, and as absolute a Property in the Goods and Chattels as Executors have, which they had not before this Act. [*But now see the Statute of Distribution, post.*] Secondly, Administrators shall recover the Debts, and have all Actions as Executors may have, which they could not do by the Common Law. Thirdly, Administrators shall answer to Actions, &c. in the same Manner as Executors, and be accountable to the Ordinaries as Executors are. 9 *Co.* 40. *a. b.*

By *Stat.* 21 *H.* 8. c. 5. In Case any Person dies Intestate, or the Executor refuses to prove the Testament, the Ordinaries shall grant Administration of the Goods of the Person Deceased to the Widow of the same Person Deceased, or to the next of Kin, or both, as the Ordinary shall think fit, taking Surety for the true Administration thereof; and in Case where divers Persons claim the Administration as next of Kin, which be in equal Degree of Kindred to the Person Deceased, the Ordinary hath Election to accept any one or more making Request; or where but one or more of them, and not all, being in equal Degree, make Request, the Ordinary may admit the Widow, and him or them only making Request, or any one of them, at his Pleasure.

Now, as before it is observed, this Act as to the Wife has alter'd the 31 *Ed.* 3. c. 11. and as to the next Kin, where an Executor refuses to prove the Testament, the Statute supposes that such an Intestate's Intent was to prefer the Kin; but if he makes a Residuary Legatee, that Presumption is taken away; in that Case the Residuary Legatee shall have the Administration, who is to have what remains after the Debts and Legacies are paid. An Administration *Durante minore ætate* of an Executor is not within the Statute, or of Necessity to be granted to the Widow of the Testator, nor Administration *Pendente lite.* *Hob.* 250. 1 *Vent.* 219. 2 *Lev.* 56.

(C) To whom Administration may be granted.

NOW the Law is thus as to whom Administration shall be granted: It shall be granted, How the Law is now.

1. To the *Husband* of the Wife's Goods and Chattels, as of a Lease for Years. As to who may administer.

2. To the *Wife* of the Husband's Goods and Chattels. 4 Co. 51.

But an Administration may be granted to the Father before the Widow. T. Raym.

93. 1 Show. 351.

And a Residuary Legatee ought to be preferred before the Widow in an Administration *cum testamento annexo*. 1 Vent. 217, 218, 219.

If there is no Husband nor Wife living, then,

3. To the *Children*, Sons or Daughters.

4. If Children die first, to the *Father*, or if the Father is dead, to the *Mother*. 3 Co. 40. If there be Grandfather, Father and Son, and the Father dies Intestate, the Son shall have the Administration, and not the Grandfather. Abr. Ca. Eq. 249.

2 Vern. 125. And if no Father or Mother, then,

5. To a *Brother* or *Sister* of the *Whole Blood*; and for want of them,

6. To *Brother* or *Sister* of the *Half Blood*, for they are all next of Kin in equal Degree. Style 74, 75, 102. And if none of the Half Blood, then,

7. To the next of Kin, *Uncle*, *Aunt* or *Cousin*; and if none of these Desire the Administration, but refuse it, which they often do, because the Intestate's Debts are greater than the Estate will bear, then,

8. To a *Creditor*. Bac. L. Tracts 160. And for want of all these,

9. To any other *Person* or *Persons*, at the Discretion of the Ordinary; or the Ordinary may *ex officio* grant to a Stranger Letters *Ad colligendum bona defuncti*; or the Ordinary may take them into his own Hands, to pay the Debts of the Deceased, in such Order as an Executor or Administrator ought to pay them; but he or the Stranger who has Letters *Ad colligendum* cannot sell them without making themselves Executors of their own Wrong. Dyer 256. 1 Roll. Abr. 918. 1 Vent. 350. 8 Co. 135. 9 Co. 39. Letters Ad colligendum.

If one has made a Will, and after the Death of the Testator the Executor proves it, and then dies Intestate, the Ordinary must grant Administration *De bonis non, &c.* Administration de bonis non, &c. viz. *non administratis* to some other Person. 2 Roll. Abr. 907.

If an Executor has not proved the Will of the Testator, and dies, his Executor is not Executor of the first Testament, but Administration *cum testamento annexo* must be granted: But where an Executor has proved the Will, and dies, making an Executor, the second Executor may be Executor to the first Testator. 1 Roll. Abr. 907.

Yet if an Administrator dies Intestate, or makes an Executor, his Administrator or Executor shall not be Administrator or Executor to the first Intestate or Testator, but the Ordinary is to grant a *new Administration*, or an *Administration De bonis non, &c.* of the Goods of the first Intestate or Testator; therefore where an Administrator has Judgment, and dies, his Executor cannot sue out Execution upon that Judgment, for none shall have Execution of that Judgment but he who shall be subject to the Payment of the Debts of the first Intestate, to which the Executors of the Administrator are not subject. 5 Co. 9.

If an Executor refuses to prove a Testament, or if the Testator has appointed no Executor, Administration must be granted *cum testamento annexo* to the next of Kin, &c. Administration cum testamento annexo.

If an Infant is made Executor, Administration must be granted *cum testamento annexo* to his Guardian or next Friend *Durante minore etate*; but such Administration ceases when the Infant is seventeen Years of Age, and so it does if an Infant Executrix marries a Husband of full Age before she is seventeen Years of Age. 2 Inst. 398. 5 Co. 29. 6 Co. 67. Durante minore etate.

If an Infant is intitled to an Administration, it must be granted to another *Durante minore etate*, because till he is of full Age he cannot enter into a Bond with Sureties to administer faithfully, as required by the Stat. 22 & 23 Car. 2. c. 10. but before that Statute the Administration ceased at seventeen Years of Age.

An Administrator *Durante minore etate* may bring Actions, but he cannot sell any of the Goods of the Deceased, unless it is upon Necessity, as for the Payment of the Debts, Actions by him. Selling Goods.

Granting
Leases.

Debts, &c. or for fear the Goods should perish. He cannot let a Lease if the Grant of the Administration is special, as *Ad opus, commodum et utilitatem Executoris durante minore etate, & non aliter, &c.* but if the Grant of the Administration is general without such Restraint, such an Administrator may let Leases, &c. *Q. Noy's Max. 106. 1 Roll. Abr. 910. Cro. Eliz. 718, 719.*

Administra-
tion Durante
absentia extra
Regnum, or
pendente lite.

An Administration may be granted *Durante absentia extra Regnum* or *pendente lite*, which is as good as an Administration *Durante minore etate*.

Where Admini-
stration does
not cease.

If Administration is granted to two, and one dies, yet the Administration does not cease, for it is not like a Letter of Attorney to two, where by the Death of one the Authority ceases; but is rather an Office; and Administrators are enabled to bring Actions in their own Names, they come in the Place of Executors, and therefore the Office survives. *2 Vern. 514.*

(D) *The Interest of an Administrator in the Goods, &c. of the Intestate.*

AN Administrator by Virtue of his Administration has Interest in all the Chattels Real and Personal of the Intestate, and in all the Goods and Chattels either in Possession or Action, in like Manner as an Executor in the Goods of the Testator Deceased. And all these Goods and Chattels which belonged to the Intestate at the Time of his Death, and which come to the Hands of the Administrator, shall be Assets, or sufficient Goods and Chattels to make him chargeable to the Creditors as Executors are to Creditors and Legatees, but before they come to his Hands he is not chargeable. *1 Roll. Abr. 919. 2 Inst. 398.*

By Custom of the City of *London*, if a Contract is made by a Citizen of *London* to pay Money to another Citizen, and he who ought to pay dieth Intestate, the Administrator shall be bound to pay it as if it were by Obligation. *5 Co. 82.*

What Admini-
strator may
retain.

But tho' an Executor shall have all the Residue or Surplusage of the Goods and Chattels after Debts and Legacies paid by Virtue of his Executorship, it is otherwise in Case of an Administration, for an Administrator can take no Advantage by his Administration, (unless by paying his own Debt first, (*2 Roll. Abr. 922.*) if it is equal in Degree with others, or by taking the Goods and Chattels as they are apprais'd) because the Surplusage must be distributed amongst the next of Kin, if there are any Kindred, according to the Statute of *22 & 23 Car. 2. c. 10.* hereafter mentioned.

If a Debtor takes Administration of the Goods and Chattels of his Creditor, this shall not discharge the Debtor, but his Debt shall be Assets, because the Intestate did not act to free him from the Debt, whereas by making a Debtor Executor the Testator doth thereby release the Debt. *8 Co. 136. 1 Roll. Abr. 922.* But the Duty remains, and is Assets. *Co. Lit. 264. b.*

When an Administrator (as well as an Executor) has paid funeral Charges, Debts, &c. with his own Money, he may retain so much of the Goods of the Intestate in Kind according to the Value, and shall have Property in them.

(E) *The Power of an Administrator.*

HE can do nothing till an Administration is granted to him, except Acts of Necessity and Charity. *See before concerning Executors de son tort.*

But an Executor has his Power from the Will, and may act in many Cases before Probate, (*of which see before concerning the Power of Executors*).

After the Administration is granted, the Power of an Administrator is almost equal with that of an Executor, yet if there are many Administrators, one of them cannot sell Goods, release Debts, &c. without the other, but they must all join, because they have but one Authority. *Noy's Max. 106. Bac. L. Tracts 162.*

(F) *The*

(F) *The Office and Duty of an Administrator; and therein how, to whom, and of what Distribution is to be made.*

THE Office and Duty of an Administrator is the same as that of an Executor, as to the Burial of the Deceased, Payment of funeral Charges, making an Inventory, Payment of Debts, and passing the Account. And as an Executor must take a Probate of the Will, so the Administrator must apply to the Ordinary for Letters of Administration, upon granting of which he must enter into a Bond to make an Inventory, &c. as hereafter mentioned.

By Stat. 22 & 23 Car. 2. c. 10. All Ordinaries and Ecclesiastical Judges (upon granting Administrations) must take Bond of the Administrator, with two or more Sureties, (*Qu. Of an Administrator cum testamento annexo*) with Condition, that the Administrator shall make a true and perfect Inventory of all the Goods and Chattels of the Deceased, and exhibit it into the Registry of the Ordinary's Court by such a Day, and to administer according to Law, and to make a true and just Account thereof, and to make Distribution of the Surplusage as followeth, (*viz.*)

One Third to the Wife of the Intestate, the Residue amongst his Children and such as legally represent them, if any of them are dead; except such Children (not Heirs at Law) who had any Estate by Settlement of the Intestate in his Life-time equal to the other Shares. If their Shares are not equal to the other Shares, those Children shall now have so much of the Surplusage as shall make the Estate of all to be equal. But the Heir at Law shall have an equal Share in the Distribution with the other Children, without any Consideration of what he hath of Land by Descent, or otherwise, from the Intestate.

If there are no Children, nor legal Representatives of them, one Half of the Intestate's Goods and Chattels shall go to the Wife, the Residue equally to the next of Kindred to the Intestate in equal Degree, and those that represent them. If there is no Wife, all shall be distributed amongst the Children; if no Child, all shall be distributed amongst the next of Kin, to the Intestate in equal Degree and their Representatives. (*But see Stat. 1 Jac. 1. c. 17. post.*)

No Representative shall be admitted amongst Collaterals after Brothers and Sisters Children.

On the said Statute, the Question was on the Clause, *That if there should be no Representations among Collaterals beyond Brothers and Sisters Children*, whether it be intended of Brothers and Sisters to the Intestate, or whether, when Distribution falls out amongst Brothers and Sisters, tho' remote Relations to the Intestate, Representation shall be admitted; and the Court held, that the Representation should be only between Brothers and Sisters to the Intestate. *Abr. Ca. Eq. 249. 2 Vern. 233. 1 Salk. 250.*

If one dies Intestate, leaving a Grandmother, and Uncles and Aunts, the Grandmother is intitled to the Personal Estate, in Exclusion of the Uncles and Aunts. *Abr. Ca. Eq. 249. 1 Salk. 251.*

Security must be given by those to whom such Distribution shall be made, to refund to the Administrator in Case Debts afterwards appear, as mentioned by the Lord Chancellor in the Case of *Edwards and Freeman, post.*

A Man died Intestate, leaving a Brother of the Whole Blood, and Sister of the Half Blood; and it was held, that the Sister of the Half Blood should come in for an equal Share with the Brother of the Whole Blood. *1 Mod. 209. 1 Vent. 316. 2 Lev. 173. 1 Vern. 437. 2 Vern. 124. Show. Parl. Ca. 108. 2 Vent. 317.*

By Stat. 29 Car. 2. c. 3. The Act of the 22 & 23 Car. 2. c. 10. shall not extend to the Estate of a Feme Covert that dies Intestate, but that their Husbands shall have Administration of their Personal Estates, as before the making of the Act; and the Husbands are not compellable to make Distribution of their Personal Estates.

By Stat. 1 Jac. 2. c. 17. If after the Death of the Father any of his Children shall die Intestate without Wife or Children in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother.

A. had three Brothers, one died, leaving three Children, another two, and the third five; then A. died Intestate; and it was resolved that Distribution should be *per Capita*, and not *per Stirpes*; and that all Children should have equal, because none take by Way of Representation, but all as next of Kin. *Abr. Ca. Eq. 249.*

If

Bond to make
Inventory.

Administer,
and account
and distribute
the Surplus.

How Distri-
bution is to be
made.

If a Man makes his Will, and his Son Executor, but makes no Disposition of the Surplus of the Personal Estate; the Son dies without proving of the Will; the Testator is dead Intestate as to the Surplus, and the same shall be distributed amongst the next of Kin of the Testator. 2 Vern. 634.

Of bringing into Hotchpot according to the Statute of Distribution, and of Distribution where Provision has already been made for some of the Children of the Intestate.

F. on the Marriage of the Daughter of *B.* covenanted, in Case of a second Marriage, to pay the first Son by the first Wife 500 *l.* there was a Son and several other Children of the first Marriage; the Father died Intestate; and it was held that the Heir must bring the 500 *l.* into Hotchpot, altho' in Nature of Purchaser under a Marriage-Settlement. 2 Vern. 638, 639.

The great Case between *Edwards* and *Freeman*, *Mic.* 1727. on the Statute of Distributions was thus:

F. on his Marriage entred into Articles, in Consideration of the said Marriage, and of 4000 *l.* Portion, to settle such an Estate to the Use of himself for Life, Remainder to his intended Wife for Life, Remainder to the first and other Sons of the Marriage successively in Tail Male, Remainder to Trustees for 1000 Years (in Trust) to raise Portions for Daughters in Case there were no Sons; that is to say, if but one such Daughter 5000 *l.* and if two or more, then 6000 *l.* equally between them, to be paid at their respective Ages of eighteen Years, or Days of Marriage, which should first happen; and 80 *l.* per Ann. Maintenance in the mean Time to each Daughter, with Remainder to his own right Heirs, and gave a Bond of 10000 *l.* Penalty for Performance of Covenants: The Marriage took Effect, and they had Issue one Daughter only, one of the Plaintiffs, and no Son; then the Wife died, and afterwards *F.* married a second Wife; and on that Marriage made a Settlement of this Estate amongst others; but neither the second Wife, nor her Trustees, had any Notice of the Articles made on the first Marriage. Afterwards *F.* died Intestate, leaving a Son and Daughter by his second Wife, and left a Personal Estate to the Amount of 20000 *l.* and upwards; the Daughter by his first Wife, at that Time, was about twelve Years of Age, and some Time since intermarrying with the Plaintiff, they brought their Bill to have an Account of the Personal Estate of *F.* and their distributory Share thereof; and the only Question was, whether the 5000 *l.* should not be looked upon to be so far an Advancement of the Daughter of the first Marriage, that if she would have any farther Share of her Father's Personal Estate, they must bring this 5000 *l.* into Hotchpot, upon the several Clauses and Intent of the Statute of Distribution, 22 & 23 Car. 2.

Argued for Plaintiff, 1. That they were intitled to a distributive Share of the Father's Personal Estate, without Regard to this 5000 *l.* which was no Advancement either within the Words or Meaning of the Act of Parliament, which intended only an Advancement of Children after they come *in esse*, and when they were about being married or disposed of in the World; but this, if any, was an Advancement long before the Plaintiff was born, and when it was wholly unknown and uncertain whether there ever would be such a Daughter.

2. That it was likewise contingent and uncertain, after she was born, whether she would ever be intitled to this Fortune or not; for if she had died before eighteen or Marriage, it would have sunk into the Inheritance for the Benefit of the Heir at Law, according to the Case of *Pawlett* and *Pawlett*, 2 Vent. 366. and she was but twelve Years of Age at the Time of her Father's Death, and therefore might have died before she was intitled to this 5000 *l.*

3. That her distributive Share of her Father's Personal Estate vested in her immediately on her Father's Death, or not at all; and then it could not be de vested out of her, by the Accident of her attaining eighteen, or being married, whereby this 5000 *l.* became due.

4. That this 5000 *l.* was a Debt upon the Father's Estate, which she was intitled to as a Creditor or Purchaser, in Consideration of her Mother's Marriage and Portion; for which was cited the Case of *Feast* and *Feast*, 3 April 1726. where on a Marriage-Treaty Sir *F. F.* covenanted to leave his Wife 2000 *l.* at his Death, 2000 *l.* to his eldest Son, and 1000 *l.* a-piece to his younger Children; and afterwards, being a Freeman of *London*, died, leaving several younger Children; and it was held in that Case, that the 1000 *l.* a-piece to the younger Children being due only by Covenant was a Debt on the Personal Estate, and not being to be paid till after the Father's Death, was no Provision or Advancement either within the Statute of Distributions, or the * Custom of *London*, to bar them of their Customary or Distributory Shares of their Father's Personal Estate, which were greatly advanced at the Time of his Death.

* See the Stat. 1 Jac. 1. c. 17. as to the Custom of *London*, &c. *infra*.

5. That this was not an Advancement within the Statute, it was urged, 1. That the Statute mentioned only two Cases wherein there is to be any bringing into Hotchpot: 1st, Where the Child had been advanced by the Father with any Estate. 2^{dly}, Where he had been advanced with any Portion; as to the first, the Plaintiff cannot be said to have any Estate by those Articles, for the Word *Estate* in the Statute means Lands in Opposition to Portion; and in the latter Part of it, it is mentioned Lands by Settlement expressly; but in the present Case the Plaintiff cannot be said to have any Provision of Lands, the Settlement of the Lands being only in the Nature of a Mortgage for her Portion: Secondly, That this Portion is not within the Statute, as an Advancement by the Intestate in his Life-time, being neither payable nor demandable till after his Death; and therefore in the Case of *Rowland* and *Shepherd*, where the Father agreed to give in Marriage with his Daughter the Sum of 7000 *l.* to be paid by Instalments of 1000 *l.* a Year; and the Father had paid 6000 *l.* of this Portion, but died before the last 1000 *l.* became due, and on a Bill brought for a Distribution of his Personal Estate, it was decreed by Lord *Macclesfield*, and affirmed by the then present Chancellor (*King*), that this 6000 *l.* paid was not Part of the Advancement to be brought into Hotchpot, but that the Remaining 1000 *l.* was a Debt to be paid out of the Personal Estate.

2. That the Statute must operate either at the Time of the Father's Death, or within a Year after at farthest; but in this Case the Plaintiff was not intitled to her 5000 *l.* either in her Father's Life-time, or within a Year after; and is the Distribution to wait till it be seen, whether she would attain eighteen, or be married? Suppose there had been a Son at the Time of the Father's Death who had after died without Issue, would this Portion have been an Advancement in the mean Time, so as to debar her of her distributory Share? for being contingent at first, such Value cannot be set on it in Equity, as Gamesters do on Chances; and if Part is to be laid up till the Contingency happens, it is no Advancement in the mean Time; nor is there any Instance that one distributory Share should be laid up to make a Heap.

3. This 5000 *l.* was not a voluntary Provision moving from the Father, but the Plaintiff was a Purchaser thereof, in Consideration of her Mother's Portion; and suppose a Child had Money of his own, and agreed with his Father, in Consideration thereof, to have a Portion from his Father after his Death; or if a collateral Relation had purchased such a Portion from the Father for his Child, certainly this would not be an Advancement, and the Intent of the Statute was to make them all equal out of the Father's Personal Estate, not out of what was purchased for them by others, or by the Mother, as in this Case.

4. That this was not a Debt originally payable out of the Personal Estate, but out of Lands, notwithstanding the 10000 *l.* Bond for performing of Covenants; and tho' the Defendants, who claim under the Settlement made on their Mother's Marriage, shall not be affected as to the Lands thereby settled, for want of Notice, yet as to the Lands comprized therein, they shall be liable in the first Place; and if they are not sufficient, the Personal Estate must be applied in Aid to make it up, by reason of the Bond.

5. Besides, no Case can be produced where a Portion settled by Marriage-Articles had been brought into Hotchpot as an Advancement by the Father; and yet it must often have happened that Fathers who have made such Settlements have died Intestate, and is therefore of great Consequence.

For Defendants it was argued, 1. That in the first Place no Settlement being made pursuant to the Articles, and the Bond for Performance thereof, the Land will in no Sort be subject thereto, but in Aid of the Personal Estate if that were deficient; and that too by the Assistance of a Court of Equity on the Agreement, for between the Heir and Executor the Personal Estate shall be applied in the first Place to discharge Incumbrances even on the Real Estate, and would have been so in this Case, where it rested barely in Covenant, and on the Bond.

2. That the 5000 *l.* thus provided for by the Settlement was an Advancement within the Meaning of the Statute, which appears throughout to intend and preserve an Equality between the Children; and if any *Finesse* of Reasoning were made use of in the Construction thereof, it ought rather to be in Support of that Intent.

3. That the Subject Matter of the Statute was chiefly Personal Estate, and yet there is no Reason to exclude a Provision by a Real Estate; and therefore where the Statute says, *Other than such Child who shall have an Estate by Settlement*, why should not that be extended both to Real and Personal Estate? It is true, the Statute is not perfectly

perfectly correct according to the Rules of Grammar, and therefore where Portion is mentioned in the first Part, it is omitted in the second; and what is called Estate in the first Part, is called Land in the second.

4. That if the Lands are in Equity to be considered as a Settlement of Lands, then it is an Advancement according to the Act; if they are not to be considered as a Settlement of Lands, then it is an Advancement by a Portion; and as to the Objection, that this was not a voluntary Provision of the Father, but arose from the Contract of the Parties; it was answered, that the Statute makes no such Distinction, and therefore neither ought this Court to make it; for the Act only intended an Equality between the Children, whether the Provision was voluntary or by Purchase; and a Child provided for either one way or other is provided for; and it is not like the Cases put, where a Child, either with his own or a Relation's Money, purchases an Estate, or a Sum of Money from the Father; for this certainly is no Provision by the Father, but a direct Sale as much as it would have been to any Stranger; and in the Case of *Newland* and *Shepherd*, the Question was not, whether the 6000 *l.* paid should not be brought into Hotchpot, if she had desired to be let into a further Share; but whether the 6000 *l.* being more than her Share for the Whole, she should besides have the other 1000 *l.* and it was agreed that she should; besides there is no Pretence to say, that the Custom of * *London* is to govern an Act of Parliament.

* See ut supra.

5. That this Portion, tho' not payable till after the Father's Death, was nevertheless a Provision for her by him in his Life-time, as the Act speaks; as the principal Part of it, viz. the Security, was executed by him in his Life-time, and as he was not at Liberty to controul it; and suppose he had given such a Portion at his Death, would not this be a good Provision within the Statute? and here the Portion is payable as soon as possibly it can be wanted, viz. at eighteen, or Marriage, and a Maintenance of 80 *l. per Ann.* in the mean Time; and tho' it is true that a Portion out of Lands sinks in the Inheritance if the Party dies before it becomes payable, which if it were of a Personal Estate it would not; that is not material, since the Statute makes no Distinction, whether the Portion is payable out of the Real or Personal Estate.

6. That if a Bill had been brought immediately after the Father's Death for a Distribution, there would be no Inconvenience in setting apart a Sum to answer the Contingency when it should happen, no more than in the Case of Debts, which is every Day done; and there are some whose Estates are not got in till several Years after their Deaths; and a Distribution may very properly be made thereof from Time to Time, as they come in; neither is the Distribution wholly to wait till they are got in; and in the Cases of *Finney* and *Finney*, and *Lonoy* and *Hutchinson*, it was decreed, that the Heir at Law should bring into Hotchpot whatever Share he received out of the Personal Estate, if he would have any more; and in the Case of *Kelway* and *Kelway*, on the Statute 21 *Jac.* 1. it was held, that where a Man died leaving a Wife and no Children, that the Wife being intitled to one Moiety of his Personal Estate, the other Moiety shall be distributed equally between his Mother and Brothers and Sisters; and yet the Case of leaving a Wife is not mentioned in that Statute.

The Court were all clear of Opinion, That this was an Advancement by the Father in his Life-time within the Meaning of the Statute, tho' contingent and future, so that she could not have that and her distributory Share likewise; and the Master of the Rolls said, that the Civil Law made no Difference between a Real and Personal Estate, but only moveable and immoveable; and the Words of the Act, which speak of a Provision made by the Father in his Life-time, are very proper to distinguish between that and a Provision made by his Will; and cited the Writ *De rationabili parte bonorum*, and *Swinb.* 200. to prove that a future Provision will exclude the Heir or any other of the Children; and cited *Pawlett* and *Pawlett*, 2 *Vent.* 366. 1 *Vern.* 321. and the Chief Justice said, Suppose the Father had left but 2000 *l.* Personal Estate, it would be extremely hard that the eldest Daughter should have her 5000 *l.* and a Share of the 2000 *l.* too.

And per Lord Chancellor, The Case of *Feast* and *Feast* is not to be cited in this Case, that being a Cause by Consent, and the Question very little considered; and he said, he thought any Settlement in or out of Lands, either by Annuity, Rent or Portion, would be a Provision within the Statute; and that such Provision might be valued and brought into *Collatio bonorum* if they think it worth their while, that the 5000 *l.* whether called contingent or not, is an Interest, and such a one as would happen

happen within a reasonable Time, viz. six or seven Years after the Father's Death, and there was then no Son; and it was such an Interest as was valuable. That the Distribution must be made as the Estate stands at the Father's Death, and the Parties are to give Bond to refund if Debts afterwards appear; and future Debts due to the Intestate must be distributed as they can be got in; that here the Contingency has happened, and she is now at Liberty to say, whether she will stick to that Provision, or bring into the Computation of *Collatio bonorum*, in order to have an equal Share with the Rest. But as to the 80*l.* per Ann. Maintenance, that is not to be brought in, being only for the Education and Maintenance of the Daughter, which the Parents were best Judges of, and accordingly the Decree was pronounced. *Per Lord Chancellor King, assisted by Raymond C. J. and the Master of the Rolls, and Price and Fortescue J.* Abr. Ca. Eq. 249 to 254.

And by said Stat. 29 C. 2. c. 3. An Estate *pur auter vie* shall go to the Executors or Administrators of the Party that had the Estate, and be Assets in their Hands, if no Devise be thereof made, or no special Occupant thereof. Estates pur auter vie.

But since the making that Statute, Doubts having arisen, where no Devise was made of such Estates, as to whom the Surplus should belong after Debts, &c. paid; therefore by Stat. 14 G. 2. it is enacted, That such Estates *pur auter vie*, if there be no special Occupant thereof, of which no Devise shall have been made according to said Stat. 29 C. 2. c. 3. or so much thereof as shall not have been so devised, shall go, be applied and distributed in the same Manner as the Personal Estate of the Testator or Intestate.

By Stat. 1 Jac. 2. c. 17. Such Part of any Intestate's Estate within the City of London or Province of York as any Administrator has by Virtue only of being Administrator, shall be subject to Distribution as in other Cases, and the Custom observ'd therein shall not be subject to extend to it. Estates in London and Province of York.

By Stat. 1 Jac. 2. c. 17. No Administrator shall be cited to render an Account of the Personal Estate of the Intestate, otherwise than by Inventory, unless it be at the Instance of some Person in Behalf of a Minor, or of one having a Demand out of such Personal Estate as Creditor or next of Kin. Accounting.

S E C T. VII.

Of acquiring Goods, &c. by Legacy.

THE Property in Goods, &c. may be acquired by Legacy.

(A) *Legacy what, and Legatee who.*

A Legacy is a particular Bequest or Gift of Goods and Chattels to one or more by Testament. In some Cases a Bequest of Lands, &c. may be call'd a Legacy. Legacy what.

Terms de la Ley, Verb. Legacy. 2 Inst. 81.

A Legatee or Legatary, is he to whom the Legacy is given. Legatee who.

And a Residuary Legatee, is he to whom after the particular Legacies all the Rest of Testator's Goods is given.

(B) *To whom Legacies are to be paid, or not.*

A Legacy of 100*l.* was devised to an Infant of about ten Years of Age; the Executor paid this Legacy to the Father, and took his Receipt for it; when the Infant came of Age, the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately; but however would not have him Trouble the Executor about it, for that he would give it him: Upon this the Son rested satisfied for about fourteen or fifteen Years, and he and his Father carried on a joint Trade together, and then became Bankrupts; and upon a Commission taken out against the Son, this Legacy of 100*l.* was assigned, amongst other Things, for the Benefit of his Creditors; and the Plaintiff, the Assignee of the Commission, brought this Bill against the Executor, to have an Account and Payment of the Legacy; and for the Defendant

dant it was insisted, that this would be an extreme Hardship on him if he should be obliged to pay it over again, that he had already fairly and honestly paid it to the Father whilst he was in good Circumstances, and if Application had been made sooner, he might have had his Recompence over against the Father; that the Father was by Nature Guardian to his Children, and such Payments to him have formerly been allowed good, tho' now indeed this Court has thought fit to extend their Care farther for such Children, and disallowed such Payments; but the Circumstances of this Case were such, that the Defendant it was hoped would not be answerable again for it. My Lord Chancellor said, that if the Father had not made his Son such Promise of Recompence, and the Son had acquiesced all that Time, the Case might have been more doubtful; but this Promise of the Father drew him to forbear applying to the Executor sooner; and since his Father had not, nor could now make good his Promise, being a Bankrupt likewise, the Reason of the Son's Forbearance was at an End; and he thought the Rule of this Court, in not suffering Parents to receive their Childrens Legacies, was founded on very good Reason; and therefore left this Case might hereafter be cited as a Precedent, when the Circumstances attending it were forgotten, and to discountenance and deter others from paying such Legacies to the Parents, (tho' he did not deny the Hardships of this particular Case) he decreed against the Executor; which was affirmed on a Rehearing. *Abr. Ca. Eq. 300, 301.*

A. B. devised 100*l.* to *P.*'s Wife, to be paid within six Months after Testator's Death: The Executor paid the same to the Wife, and had her Receipt for it; but it was decreed that the Executor should pay it over again to the Husband with Interest. *1 Vern. 261.*

(C) *Who are incapable of taking by Legacy or of being Legatees.*

BY Stat. 3 Jac. 1. c. 5. §. 10. Every married Woman being a Popish Recusant convict (her Husband not being convicted) who does not conform herself by the Space of one whole Year next before the Death of her Husband, shall be disabled to be Executrix or Administratrix of her said Husband, and to have or demand any Part or Portion of her said late Husband's Goods or Chattels.

And by Stat. 13 W. 3. c. 6. §. 6. & 1 G. 1. c. 13. Every Person that executes any Office, &c. and neglects or refuses to take and subscribe the Oath of Abjuration of the Pretender, and Allegiance to the King, &c. mentioned in the said Statute, shall be incapable of any Legacy or Deed of Gift, &c.

And by Stat. 5 G. 1. c. 27. If any of the King's Subjects, being Artificers in Wool, Iron, Steel, Brass or other Metal, Clock-maker, Watch-maker, or other Artificer of Great Britain, shall go out of the King's Dominions to exercise or teach the said Trades to Foreigners; and if any of the King's Subjects in any foreign Country, exercising any of the said Trades, shall not return into this Kingdom within six Months after Warning given by the Ambassador, &c. of Great Britain, and from thenceforth inhabit within this Realm, such Person shall be incapable of taking any Legacy, &c. and shall forfeit his Goods, &c.

(D) *Difference between the Property and Use being bequeathed.*

THERE is a Difference where the Property of a Thing is given, and when only the Use of it is given; for a Man may give the Use of his Plate, &c. to one for Life, Remainder to another; but if the Plate was given for Life, or an Hour, a Remainder to another would be void, and the Legatee may dispose of it; but if he does not dispose of it, he in Remainder shall have it. *Noy's Max. 31, 99, 100.* But now in Equity a Bequest of a Chattel Personal for Life, &c. is construed to mean the same Thing as a Bequest of the Use of it: For Example, *D.* by Will devised all his Goods in *C.*'s House to *G.* for Life, and after her Decease to the Heir of Sir *J. D.* upon which the Question was, Whether he that was Heir of Sir *J. D.* should take these Goods as Devisee, and the said Goods go to his Executors, altho' such Heir died in the Life-time of *G.* or whether he that was Heir of Sir *J. D.* at *G.*'s Death should have them? It was urged that these Goods were only the Furniture of the said House, and quasi an Heir-Loom. But it was decreed that they absolutely vested in the Person of him that was Heir of Sir *J. D.* at the Time of his Death. *1 Vern. 35, 36.*

(E) *Where Legacies are recoverable; and of an Executor's Assent to Legacies.*

Legacies are not recoverable at *Common Law*, but in *Chancery* or the *Spiritual Court*. Where recoverable.

But if an Executor promises, that in Consideration of Forbearance to sue for his Legacy he will pay the Legacy at such a Time, by Virtue of that Promise it becomes a Debt, and may be recovered at *Common Law*.

The *Common Law* gives the Executor Time to consider of the Value of the Goods, and State of the Debts, that he may safely pay a Legacy without Danger to his own Goods. Executor's Consent to a Legacy, where necessary.

The Legatee must have the Assent or Agreement of the Executors, or one of them, for till then he may not enter or take his Legacy, because the Executor is to pay Debts of Record to the King, or by Bill and Bond sealed, or Arrears of Rent, or Servants or Workmens Wages, before Legacies; but not Debts of Shop-Books, nor Bills unsealed, or Contract by Word, for before them Legacies are to be paid; and if one of the Executors assents to pay Legacies before the Debts which should be first paid, he shall pay the Value thereof out of his own Pocket, if there be not otherwise sufficient to pay the said Debts; and this is the Reason why no Property can be transferred to the Legatee without the Consent of the Executor, even if it is a *Specifick* Legacy, as a Piece of Plate, &c. it cannot be taken without his Assent; for otherwise, by such Legacies, the Testator might give all his Goods away to defraud his Creditors. *Perk. §. 570. 1 Roll. Abr. 618. Co. Lit. 111. a. 10 Co. 49. Bac. L. Tracts 163.*

Where a Lease for Years is devised, the Executor's Assent is necessary. And where a Lease for Years is bequeathed to one for Life, or so many Years as one shall live, the Remainder over, the Assent to the first Estate shall be effectual to him in Remainder. *8 Co. 95, 96. 10 Co. 47. Co. Lit. 111. a.*

If the Legacy is given to the Executor himself, it shall come to him as Executor, except he chuses to take it as Legatee, for the Law gives him his Election. *10 Co. 47.*

When there are many Executors, the Assent of one is sufficient to transfer the Property to the Legatee; and one Executor may take his Legacy without the Assent of his Co-Executors, for one may release, &c. and if there is not sufficient to pay Debts, he only that assents shall answer of his own proper Goods. *Perk. §. 572. Bac. L. Tracts 163.*

An Executor may assent before and after Probate; an Infant Executor before seventeen Years of Age cannot bind himself by his Assent; nor a Feme Covert where she is Executrix, but her Husband's Assent in that Case is sufficient. *Cro. El. 719. 5 Co. 29.*

An Administrator *Durante minore etate* of an Executor, cannot assent to a Legacy unless there be Assets to pay Debts, &c. *5 Co. 29. b.*

An Assent may be *implied*, as well as *express*; for if a Horse is bequeathed, and one offers to buy him of the Executor himself, who directs him to go to the Legatee to buy him, or if the Executor himself offers the Legatee Money for him, &c. this is an *implied Assent*, and sufficient; for if the Executor once declares his Assent to the Legacy, the Legatee may take it, tho' the Executor revokes his Assent afterwards, because by the Assent the Property was vested in the Legatee. *4 Co. 28. Plowd. 543, 544.* Assent implied or express.

The Executor's Assent is not needful in a Devise of Lands by one seised in Fee-simple, if he devises the same in Fee, in Tail, for Life, or Years. *Co. Lit. 111. a.* Where the Assent is not necessary.

(F) *At what Time Legacies are to be paid.*

A. by Will gives a Legacy to *B.* at twenty-one, and if he died before twenty-one, then to the Plaintiff; *B.* dies before twenty-one, and the only Question was, whether the Plaintiff was intitled to the Legacy presently, or must wait till *B.* if he had lived, would have been twenty-one; and on Time taken to consider of it, my Lord Chancellor was of Opinion, the Plaintiff was intitled to the Legacy presently; but where a Legacy is given to one, to be paid at twenty-one, so as to be an Interest vested in him presently, tho' not payable till twenty-one; if the Party dies before that

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that Age, his Executors or Administrators shall not have it till the Legatee, if he had lived, would have been twenty-one Years of Age. *Abr. Ca. Eq. 299, 300.*

If a Legacy is given to a Child payable at twenty-one, and the Child dies before, tho' his Administrator shall have the Legacy, yet he must wait for it till such Time as the Child, if he had lived, would have come to twenty-one. *2 Vern. 199.*

But if a Legacy is devised to *J. S.* to be paid at twenty-three Years of Age, and if he dies before, to go over to *A.* and *B.* and *J. S.* dies an Infant, the Legacy shall be paid presently. *2 Vern. 283.*

A Legacy of 500*l.* was given to the Defendant's Testator when he should be twenty-four Years old; the Plaintiff being his Sister, and Executrix to the Testator that gave the Legacy, paid the Legatee 250*l.* of it at twenty-one, to put him out into the World, and gave him a Bond to pay him the other 250*l.* at a Day certain, which was the very Day he would attain his Age of twenty-four Years; he died before that Age. To a Bill to have the 250*l.* repaid, and the Bond delivered up, the Defendant pleaded the Payment, and the Bond which was for Payment at a certain Day, and became a Duty thereby; and upon Debate the Plea was ordered to stand for an Answer, the Lord Chancellor declaring it was fit to be heard on the Merits. *2 Vern. 31.*

(G) *In what Order Legacies are to be paid.*

IF the Executors doubt that they shall not have enough to pay every Legacy, they may pay which they list first; but they may not sell any special Legacy which they will to pay Debts, or a Lease of Goods to pay a Money Legacy; but they may sell any Legacy which they will to pay Debts, if they have not enough besides. *Bac. L. Tracts 163.*

(H) *Of abating Legacies.*

A Specifick Legatee is not to abate in Proportion with other Legatees, where there is a Deficiency to pay the Debts. *2 Vern. 111.*

If *A.* by Will devises to his Wife all his Personal Estate at a Place called *W.* and devises to *B.* a Legacy of 500*l.* and several other Legacies, and Assets prove deficient to pay the 500*l.* and other Legacies, yet the Wife's Legacy being a specifick Legacy, shall take Place. *2 Vern. 688.*

If a Man devises a specifick Legacy, and likewise other Legacies, tho' the other Legacies fall short, yet the Legatee must have his specifick Legacy intire; but if a Man devises several Legacies, and 100*l.* to one and 50*l.* to another, &c. there, altho' he directs the Legacy of 100*l.* to be paid in the first Place, yet if the other Legacies fall short, then the Legatee of 100*l.* must make a proportionable Abatement of his Legacy. *1 Vern. 31. 2 Chan. Rep. 138.*

J. S. having 4000*l.* secured to him by Bond in the Names of *A.* and *B.* in Trust for himself, devised it to his Daughter, (now married to the Plaintiff) and made her Residuary Legatee; and by the same Will devised a Lease he had in Farm to *R. D.* and there not appearing Assets at his Death to pay his Debts, this Farm devised to *R. D.* was sold for Payment of Debts: Afterwards by Decree of this Court the 4000*l.* was adjudged to be Assets to pay Debts, and was brought into Court, and there to remain for that Purpose; the Plaintiff proposed to have what remained of the 4000*l.* paid out of Court to him, all Debts being (as was said) paid, and the Defendant *R. D.* opposed it, till he had first had Satisfaction out of it for the Value of the Farm devised to him, and sold for Payment of Debts. The Court held that the Devise of this Sum of Money was a specifick Legacy, and therefore *R. D.* can have but a proportionable Part of the Value of his specifick Legacy out of it. *Abr. Ca. Eq. 298.*

(I) *Of Refunding Legacies.*

A Creditor shall make Legatees refund, when Assets become deficient, tho' there be no Provision made for Refunding. *1 Vern. 94. 2 Vern. 205. 2 Vent. 360.*

So where *A.* being indebted to *B.* made *C.* his Executor, and *C.* wasted the Estate, and died, having devised several Legacies, and made *D.* Executor, which Legacies

D. paid; and *B.* having exhibited a Bill against *D.* the Executor of *C.* for his Debt due from the first Testator, and against the Legatees in the Will of *C.* to compel them to refund their Legacies, there not being sufficient Assets of the first Testator, and it was decreed accordingly. 1 *Vern.* 162.

If an Executor pays out the Assets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies, he by a Bill in Equity may compel the Legatees to refund. 1 *Chan. Ca.* 136. If he had been compelled by a Decree in Equity to pay the Legacies, he may make the Legatees refund. 2 *Vern.* 205.

But if an Executor voluntarily pays a Legacy, or assents to the Devise thereof, he cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund. 1 *Vern.* 90, 453, 460. 2 *Vern.* 205. 2 *Chan. Ca.* 9, 145. 2 *Chan. Rep.* 248.

One Legatee shall compel another to refund where the Assets become deficient, tho' there be no Provision made for refunding. 1 *Vern.* 94. But if the Executor is solvent, and he voluntarily paid the Legacy, the unsatisfied Legatee may come upon him and oblige him to pay it out of his own Purse. 1 *Chan. Rep.* 133. 2 *Chan. Ca.* 132. And therefore the Executor is always to be made a Party to the Suit. 1 *Chan. Ca.* 136, 248. 2 *Vent.* 360.

(K) *What a Widow may discount out of Legacies to Children for their Maintenance.*

WHEN a Wife is made Executrix with Legacies to the Children, and she marries again at the Instigation of her Husband, she frequently will endeavour to discount Maintenance and Education; but this was not suffered in the Chancery, so as to diminish the principal Sum, for the Mother ought to maintain her Children; yet a Sum of Money paid for the Binding out a Child to be an Apprentice, was allowed to be discounted. 2 *Vent.* 353.

(L) *Where the Legatees shall have Interest and Maintenance.*

Legatees exhibit a Bill against the Executor, and by their Guardian pray, that he may be obliged to allow them Maintenance; to which the Executor demurred, because the Legatees were under Age, and the Legacies not payable till they were twenty-one Years of Age; but the Demurrer was over-ruled. 1 *Chan. Ca.* 60.

If a Father devises Legacies or Portions to his Daughters or younger Children, to be paid or payable at their respective Ages of twenty-one Years, or any other Time certain, without making any Provision for their Maintenance in the mean Time, and die; in this Case they shall have Interest for their Portions from his Death till paid, because the Father was obliged to have provided for them if he had lived; but if such Portions had been devised to them by a Stranger, to be paid or payable at such an Age, their Legacies should not carry Interest in the mean Time, because he being a Stranger, was under no such Obligation to provide for them. *Abr. Ca. Eq.* 301.

A Father by his Will gave 2000 *l.* a-piece to his two Daughters, payable at twenty-one, and charged on Land and Personal Estate; and the Personal Estate being exhausted in Debts, my Lord Chancellor held they should have a reasonable Maintenance out of the Real Estate until their Legacies became payable, and allowed them 80 *l.* per Ann. each. *Ibid.*

If *A.* gave a Legacy to his Grand-daughter an Infant, to be paid at a certain Time, in such Manner as his Wife, who was his Executrix, should think fit and best for his Grand-daughter; and the Executrix lived near twenty Years, and died without paying the Legacy, the Legacy was decreed to be paid with Interest from the Death of *A.* tho' there was no Demand made of it in the Life of the Executrix. 1 *Vern.* 251.

If a Legacy be made payable at a certain Day, it shall carry Interest from the Time of Payment. 1 *Vern.* 262. But a Demand seems necessary, for where a Legacy was given to *J. S.* to be paid at a certain Time, it was held that it should only carry Interest from the Time of the Demand made. *Abr. Ca. Eq.* 286.

(M) *Ademption*

(M) *Ademption of a Legacy.*

A. devised to his Daughter 200*l.* and also his Household Goods, if she should not be married in his Life-time; but before he died he gave with his Daughter in Marriage above 200*l.* and died, not having revoked nor altered his Will; and the Court held, that the Legacy was extinguished by the Portion. 2 *Vern.* 114.

The Defendant's late Husband *inter alia* devised as followeth: *I give and devise to A. my good and only Uncle, the Sum of 500*l.* that is to say, that Bond and Judgment be gave me for 400*l.* and 100*l.* in Money, and makes the Defendant his Executrix, and desires her to be kind and assisting to his Uncle, that he might live as became a Gentleman: The Uncle sometime after sold an Estate, and with the Money paid off 320*l.* and took up the Bond, and had the Judgment vacated, and gave a new Bond for the Remaining 80*l.* and sometime after the Testator died, and the Uncle having Notice of this Will, brought his Bill for this Legacy of 500*l.* The Defendant insisted that this was a specifick Legacy of that particular Bond and Judgment, and they being cancelled and altered before the Testator's Death, was an Ademption of the Legacy as to so much; and besides, they urged that this Payment of the 350*l.* amounted to a Release of so much of the Legacy, and therefore the Plaintiff would have no Right but to the Remaining 100*l.* On the other Side it was insisted, that the Diversity is where the Money is voluntarily paid in by the Person who owes it, and where the Testator sues for and recovers it. In the first Case the Legacy continues still good, because the Money comes only home to the Personal Estate; but in the other Case, the Testator by suing for it, shews that he intended to make it his own, and therefore would not leave it to the Legatee to recover, and the Justice of the Uncle ought not to prevent the Affection of the Nephew; and no Alteration of his Intention appeared. My Lord Keeper was clear of the same Opinion, and decreed the 80*l.* Bond to be delivered up, and the Residue of the Legacy to be paid. *Abr. Ca. Eq.* 302. 2 *Vern.* 681.*

O. by Will devised thus: Item, *I give and bequeath to my Grand-daughter Mary Ford, the Plaintiff, the Sum of 40*l.* being Part of a Debt due and owing to me for Rent from G. M. she allowing what Charges shall be expended in getting in the same.* Item, *I give and bequeath unto my Grandsons A. and B. the Rest and Residue of what is due and owing to me from the said G. M. which is about 40*l.* more, to be equally divided between them, they allowing Charges as aforesaid;* after the Testator received the whole Debt owing for Rent from G. M. For the Plaintiff it was insisted, that there was a Difference between a specifick and a pecuniary Legacy; that tho' the disposing of a specifick Legacy might be an Ademption of it, yet this being a pecuniary Legacy, the paying the Money to the Testator would be no Loss of it. On the other Side was insisted on the Difference between a voluntary and compulsory Payment, that tho' the first was no Ademption, yet the second was, and that the Testator obliged G. M. to pay in the Money. But Lord Chancellor was of Opinion, that there was no Foundation for the Difference taken in the Books between a voluntary and compulsory Payment, for the latter might be with an Intent to secure the Legacy on all Events, and decreed the Plaintiff the 40*l.* Legacy. *Abr. Ca. Eq.* 302.

(N) *Where a Legacy is lost or not by Death of the Legatee.*

IF a Legatee dies before the Testator, the Legacy is lost; but if the Testator dies, and there is a Time limited for Payment of the Legacy, and the Legatee dies before that Day, his Executor shall have the Legacy; for the Legatee had a present Interest, tho' the Time of the Payment was *in futuro*; otherwise if a Legacy is bequeathed to one at such a Time, and he dies before that Time, for then the Legacy is lost. 10 *Co.* 51. 2 *Vent.* 342, 366.

E. H. by her Will made a Bequest in these Words: *I give unto my loving Kinsman R. H. the Sum of 300*l.* one hundred Pounds Part whereof he doth owe me, which I do intend to give to my Cousin S. H. his youngest Daughter; but my Will and Desire is, that he will give the said 300*l.* to his Daughter S. H. at the Time of his Death, or sooner, if there be Occasion, for her better Advancement and Preferment: The Testatrix at the making of her Will was in England, and it so fell out that R. H. died in Ireland eight Days before the Death of the Testatrix; and afterwards S. H. died at the Age of sixteen, and*

and unmarried, and the Plaintiff was her Administrator. And it was decreed at the Rolls, and affirmed by my Lord Chancellor, that the Words *I desire*, or *I will*, amount unto an express Devise, and that the one hundred Pounds Bond to the Testatrix should be assigned to the Plaintiffs, and the 200*l.* paid him, with Interest from the exhibiting of the Bill; altho' it was insisted upon that a Benefit was designed R. H. and that he was not a bare Trustee, for he was to have the Interest of the 300*l.* for his Life, unless his Daughter had Occasion for it before his Death, which she had not. 2 Vern. 466, 467, 468.

But where A. devises to his Sister 350*l.* upon Condition that she at or before her Death should give to her Children 200*l.* thereof, and the Sister died in the Life-time of the Testator; it was held that the whole 350*l.* was lapsed; for it being a Devise of Money, the absolute Property vested in the first Legatee. 2 Vern. 116.

D. the Testatrix by Will, reciting, that E. owed him 400*l.* gave and bequeathed that 400*l.* to him, provided he out of the 400*l.* paid several Sums in the Will mentioned to his Wife and Children, and the Rest and Residue he freely and absolutely gave to E. and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof; but to give such Release or Discharge as E. his Executors or Administrators, should require or think fit; E. died in the Life-time of the Testatrix; and it was held, that the Money directed to be paid the Wife and Children was well devised; but as to the Residue devised to the Debtor himself, that it was a lapsed Legacy, he dying in the Life-time of the Testator; altho' it was admitted, that if the Testator had said, *I forgive such a Debt*; or, *that my Executor shall not demand it*, or *shall release it*, that would have been a good Discharge of the Debt, tho' the Debtor died in the Life-time of the Testatrix. 2 Vern. 521.

If A. devises 1500*l.* a-piece to the four Children of J. S. by Name, to the Sons to be paid at their Ages of twenty-one Years, and to the Daughters at eighteen or Days of Marriage; and in Case one or more of the aforesaid Children shall happen to die before his, her or their respective Legacy or Legacies shall become due, then such Legacy or Legacies shall go to the Survivors of them; and in Case three should die, then the Survivor to take the Whole; if one of the Children dies in the Life-time of the Testator, the Survivors shall take that Share, and it shall not be a lapsed Legacy. 2 Vern. 207, 211.

So where a Legacy of 50*l.* was given to A. at twenty-one, or Marriage, and 50*l.* to B. at twenty-one, or Marriage; and in the Close of the Will the Testator added, *If any Legatee dies before his Legacy is payable, the same shall go to the Brothers and Sisters of such Legatee*; A. dying in the Life-time of the Testator, it was adjudged no lapsed Legacy, but that it should go to the Brothers and Sisters. 1 Vern. 425. 2 Vern. 378, 653, 744. 2 Chan. Rep. 187.

So where a Man devised to A. and B. the two Daughters of his Brother G. to be paid within a Year after the Death of his Wife, viz. 50*l.* to A. and 50*l.* to B. if they shall both be alive at the Time of Payment, but if either of them shall die before, then the said 100*l.* to the Survivor of the said two Daughters; one of the said two Daughters died in the Life-time of the Testator; and the only Question was, whether the surviving Daughter should have the whole 100*l.* or only 50*l.* And Rawlinson and Hutchins, Lords Commissioners, were clearly of Opinion, that she should have the whole 100*l.* They said, that by the first Clause of the Will it is a joint Devise to them of the 100*l.* in which Case, if the Will had gone no further, if one had died; it would have survived to the other; then the *videlicet* that comes after is only a Severance of it, in Case they should both live to the Time of Payment, which they did not; and then the last Clause of the Will, *in Case either died before the Time of Payment*, is a new substantive Devise of the whole 100*l.* to the Survivor, and decreed accordingly. Abr. Ca. Eq. 298.

A. devised an Estate to his Wife for her Life, and after to the Plaintiff his Niece, and her Heirs, upon Condition and to the Intent that she shall pay 400*l.* to such Person as his Wife, by her Will in Writing, or any other Writing, should direct and appoint, and dies; the Wife after married a second Husband, and then makes a Will in Writing, and thereby reciting the Power given her by her former Husband's Will, appoints the 400*l.* to be paid to her Husband, his Executors or Administrators; and that when he shall have fully received the 400*l.* he shall pay 100*l.* out of it to B. 50*l.* to C. and 50*l.* to D. and makes her Husband her Executor, and then goes on and says, that she has published this her last Will and Testament in the Presence of

three Witnesses; and the Husband subscribed that he does approve of that Will; afterwards the Husband died before her, and makes her Executrix of his Will and Residuary Legatee; then B. and C. die both Intestate, and afterwards the Wife dies, and the Defendants take out Administration to her, with the Will annexed, and also Administration to B. and C. And the Question was, whether this Appointment being made by Will, and the Appointee dying before the Appointor, this should be in the Nature of a Legacy, and so the Appointment void, the Testatrix surviving the Nominee; and my Lord Keeper held, that if it was a Thing purely Testamentary, it would be plainly a lapsed Legacy; but that in this Case the 400 l. was not in its own Nature Testamentary, but they take as Nominees, and it is but the Execution of a Trust; and decreed the Money to be paid. *Abr. Ca. Eq. 296, 297.*

If Money is bequeathed to one at his Age of twenty-one Years, or Day of Marriage, to be paid to him with Interest, and he dies before either of these Days, yet the Money shall go to his Executor. *2 Vent. 342.*

But if Money be bequeathed to one at his Age of twenty-one Years, and he dies before that Age, the Money is lost. *2 Salk. 415. Chan. Ca. 155.*

The Rule and Distinction in these Cases is agreeable to the Civil Law, which is, that if a Legacy be devised to one generally, to be paid or payable at the Age of twenty-one, or any other Age, and the Legatee dies before that Age, yet this is such an Interest vested in the Legatee, that his Executor or Administrator may sue for and recover it, for it is *Debitum in presenti*, tho' *Solvendum in futuro*, the Time being annexed to the Payment, and not to the Legacy itself; so if the Legacy is made to carry Interest, tho' the Words, *to be paid*, or *payable*, are omitted, it shall be an Interest vested. But if a Legacy be devised to one at twenty-one, or when he shall attain the Age of twenty-one, and the Legatee dies before that Age, the Legacy is lapsed. *Dy. 59. 1 Leon. 177. Off. of Ex. 347. Swinb. 311, 312.*

But in the Case of *Tates and Phettiplace*, *Hil. Term 1700. 2 Vern. 416.* Lord Keeper *Wright* was of Opinion, that there was no Foundation for this Distinction, and that the Testator's Intention was equal in both Cases; but that was in a Case wherein the Legacy was to arise out of the Real Estate, which shall not go to the Representative of the Legatee, but shall sink in the Inheritance for the Benefit of the Heir, as much as if it were a Portion provided by a Marriage-Settlement. *2 Vern. 92, 617, 508.*

But when it was to be paid out of the Personal Estate, the above Distinction had been allowed of as well before as by all the subsequent Chancellors; and my Lord *Cowper* said, that tho' it was at first introduced upon very slender Reasons, and probably upon no other, but from a constant Willingness in the Civil Law to stretch in Favour of a particular Legatee against the Residuary Legatee, who went away with the whole Surplus of the Personal Estate; yet as Chancery has now a concurrent Jurisdiction with the Spiritual Court in Matters of this Nature, he thought it highly reasonable that there should be a Conformity in their Resolutions, that the Subject might have the same Measure of Justice in which Court soever he sued. *Abr. Ca. Eq. 295.*

A Portion was devised to a Child, with Interest, but not to be paid, or payable, until the Child attains twenty-one Years, or was married; the Child died under twenty-one Years, and unmarried; the Portion was decreed to the Administrator of the Infant. *1 Vern. 462.*

A Legacy of 50 l. devised to J. S. when of the Age of sixteen Years, and Interest in the mean Time to be paid quarterly; J. S. died before sixteen, yet adjudged it was a Legacy vested, because it carries Interest. *2 Vern. 673.*

But if A. devises in these Words, *viz. I give 100 l. a-piece to the two Children of J. S. at the End of ten Years after my Decease*, and the Children die within the ten Years, this is a lapsed Legacy, and is so in all Cases where the Time is annexed to the Legacy itself, and not to the Payment of it. Tho' it was objected, that this differed from the Case, where a Man devises 100 l. to J. S. at his Age of twenty-one, because it is a Contingency whether he will attain to that Age, but the Expiration of the ten Years is inevitable. *2 Salk. 415.*

So where one being possessed of a very considerable Personal Estate, Part in *Jamaica* and Part in *England*, and being himself residing in *Jamaica*, made his Will, and thereof several Executors, some for his Estate in *Jamaica*, and others residing in *England*, for his Estate here, and amongst other Things devised in these Words, *viz. I give and bequeath to J. S. now under the Custody of R. D. the Sum of 2000 l. at the Age of twenty-*

one Tear, to be paid by my Executors in England; and devised all the Rest and Residue of his Estate to the Plaintiff, and died; J. S. having attained his Age of eighteen, made his Will, and thereby devised this Legacy, and all his Estate to the Defendant; and my Lord Chancellor held this a lapsed Legacy, and that it was a vain Endeavour in the Defendant's Council to construe it a present Legacy, and therefore vested by the Word *now*, because it was a plain Description of the Condition of the Legatee, *viz.* *Now under the Custody of, &c.* for otherwise they must stop at *now*, which would be playing with the Words; and tho' the Word *paid* was made use of, yet it was plainly intended a Designation of the Persons by whom the Legacy was to be paid, *viz.* by his Executors in England, which was proper, he having two Sets of them. *Abr. Ca. Eq. 295, 296.*

If a Debt or such like Thing in *Action* be given by way of Legacy, and the Legatee is not made Executor as to that Debt, &c. (which would have been the best way) he must then have a Letter of Attorney to sue in the Executor's Name. Of suing for Legacies.

But if an Assent is necessary, and the Executor will not assent to pay a Legacy, he may be compelled to pay it in a Court of Equity, or in the Court Christian.

S E C T. VIII.

Of Acquiring Goods, &c. by Judgment and Execution.

A Acquisition of Property by Act in Law, may be by *Judgment and Execution* thereupon, which in the Case of the King extends as well to *Things in Action* that have a Certainty in them, as *Debts*, as to *Things in Possession*: But in the Case of a common Person, only to *Things in Possession*; which Execution may be a *Fieri Facias* or an *Elegit*. *Hale's Anal. §. 27.*

By Stat. 29 Car. 2. c. 3. The Day of Signing any Judgments in his Majesty's Courts at *Westminster*, must be set down in the Margin of the Roll whereon the said Judgment is entred: And no Writ of *Fieri Facias* or other Execution shall bind the Property of the Goods against whom such Writ of Execution is sued out, but from the Time that such Writ shall be delivered to the Sheriff, Under-Sheriff or Coroners, to be executed: And for the better Manifestation of the said Time, the Sheriff, Under-Sheriff and Coroners, their Deputies and Agents, shall upon the Receipt of such Writ (without Fee for doing the same) endorse upon the Back thereof the Day of the Month or Year whereon he or they received the same.

S E C T. IX.

Of Acquiring Things Personal by Custom.

THINGS Personal may be acquired by Custom; as Heriots, Mortuaries, Heir-Looms, &c. The Acquisition whereof is by Act in Law.

A Heriot (*Heregate*, from *Herus* Lord, and *Gate* best) is a Render made at the Death of the Tenant to the Lord of the best Beast, as a Horse, &c. or in some Manors the best Goods, as a Piece of Plate, &c. found in the Possession of the Tenant Deceased, or some other. *Kitch. 133.*

There is *Heriot-Service* and *Heriot-Custom*: *Heriot-Service* is payable on the Death of Tenant in Fee-simple, and *Heriot-Custom* upon the Death of Tenant for Life. Heriot Service.

When a Tenant holds by Service to pay a *Heriot* at the Time of his Death, which Service is expressed and especially reserved in the Deed of Feoffment, this is *Heriot-Service*. Heriot-Custom.

And where Heriots have been customarily paid Time out of Mind after the Death of Tenant for Life, this is *Heriot-Custom*. *Co. Lit. 185.*

For *Heriot-Service*, the Lord may distrain or seise: The Distress may be of any Beast on the Land, but Seizure may be of any Beast belonging to the Tenant. But for *Heriot-Custom*, he must seise, and not distrain. Here the Lord may seise the best Beast, &c. tho' it is in some Place out of the Manor, or in the Highway, that being no Distress; for it is his own proper Goods by the Tenant's Death, and therefore he may seise it where he finds it.

Mortuary.

A *Mortuary* is a Gift by a Man at his Death to his Parish Church, in Recompence of Personal Tithes omitted to be paid in his Life-time: Or it is that Beast or other Cattle moveable, which after the Owner's Death, by the Custom of some Place, is due to the Parson, Vicar or Priest of the Parish, in Lieu of Tithes or Offerings forgot, or not well and truly paid by the Deceased. *Terms de la Ley* 449.

They are due by Custom only, and are now settled to be paid in Money. By *Stat. 21 H. 8. c. 6.* Where Mortuaries are due by Custom, he who dies possessed of moveable Goods to the Value of 40 *l.* and upwards, (his Debts being first paid) pays 10 *s.* he who dies possessed of Goods to the Value of 30 *l.* and under 40 *l.* pays 6 *s.* 8 *d.* to the Value of 6 *l.* 13 *s.* 4 *d.* and under 30 *l.* pays 3 *s.* 4 *d.* Goods under 6 *l.* 13 *s.* yield no Mortuary. No Mortuary is to be paid by any Feme Covert, Child, Person not keeping House, Way-faring Man, one not residing in the Place where he happens to die; for his Mortuary shall be paid in the Place where he shall find his most Abode.

But by *Stat. 12 Ann. Sess. 2. c. 6.* Mortuaries in the Diocese of *Bangor, Landaff, St. Davids* and *St. Asaph*, are taken away, and Recompence made to the Bishops by adding *Rectories Sine Cura*.

Heir-Looms.

By Custom the Heir shall have Goods and Chattels called Heir-Looms, and not the Executor.

Heir-Looms are such Goods and Chattels as by Custom have been descended to the Heir along with the Freehold, and are not devisable by Testament; for the Law prefers Custom before a Devise. *Co. Lit.* 18, 28.

Foreign Attachment.

Foreign Attachment, is an Attachment of the Goods of Foreigners, found in some Liberty or City, to satisfy their Creditors within such Liberty or City. *Cartb. Rep.* 66.

And by the Custom of some Places, as *London, &c.* a Man may attach Money or Goods in the Hands of a Stranger, but not where the Matter is before any of the Courts at *Westminster*. *Cro. Eliz.* 691.

Bills of Exchange.

Bills of Exchange are assignable by Custom, *Hale's Anal.* §. 27. but promissory Notes by Statute.

S E C T. X.

Of Acquiring the Property in Personal Estates by Means of Forfeitures and Losses in Civil Cases.

(A) *By Sale in a Market-overt and Bankruptcy.*

BY Sale in a Market-overt the Property in Goods that are stolen is sometimes divested and altered, of which see p. 108.

And the Property in Goods may also be altered by Bankruptcy, of which see p. 101.

(B) *By the King's Prerogative, or by his Grant, or by Prescription.*

First, *Of Treasure-Trove.*

Treasure-Trove, what.

TREASURE-TROVE, (*Treasure found*) is Treasure found hid in the Earth, not lying upon the Earth nor hid in the Sea, which for want of a true Owner belongs to the King or to the Lord of the Liberty by special Grant or Prescription; but if the Owner can be found he shall have it.

The Civil Law gives it to the Finder, but the Law of *England* gives it to the King by his Prerogative, or to some other claiming under him. *Braet. lib. 3. 3 Inst.* 132. *Kitch.* 80.

Nothing is said to be Treasure-Trove but Gold and Silver; and it is every Subject's Part as soon as he has found any Treasure in the Earth to acquaint the Coroners of the County, &c. therewith. The Concealing it is punishable with Fine and Imprisonment. *Britton, c. 17. S. P. C.* 25.

Secondly, *Of Waifs.*

The Acquisition of Property in Goods may be by Means of a Thing forfeited by waving it.

A Waif is a Thing which is stolen, and left behind or waved by the Thief in his Waif, what. Flight, upon being pursued, for fear he should be apprehended.

Upon which Account it is forfeited to the King, or to the Lord of the Manor, To whom forfeited. where he has a Right to it by Custom or Charter.

But if the Felon be indicted, adjudged or found Guilty, or outlawed, at the Suit of Restitution in what Cases made. the Owner of the Thing waved, he shall have Restitution of the same. *Bac. L. Tracts 158.*

The Law makes a Forfeiture of Goods waved, as a Punishment to the Owner of Why the Forfeiture is. the Goods for not bringing the Felon to Justice: But if the Thief had not the Goods in his Possession when he fled, there is no Forfeiture. And if he steals the Goods and hides them, and afterwards flies, they are not forfeited; so where he leaves stolen Goods any where with an Intent to fetch them at another Time, they are not waved; and in these Cases the Owner may take his Goods where he finds them, without fresh Suit, &c. *Cro. El. 694. 5 Co. 109. Moor 785.*

If a Felon in Pursuit waves the Goods, or having them in his Custody, and Who may seize Waifs. thinking that Pursuit was made, for his own Ease and more speedy Flight, flies away and leaves the Goods behind him; then the King's Officer or the Bailiff of the Lord of the Manor, within whose Jurisdiction they are left, who has the Franchise of Waif, may seize the Goods to the King or Lord's Use, and keep them; except the Owner makes fresh Pursuit after the Felon, and sues an Appeal of Robbery within a Year and Day, or gives Evidence against him, whereby he is attainted, &c. in which Case the Owner shall have Restitution of his Goods so stolen and waved. *Stat. 21 H. 8. c. 11. 5 Co. 109. Vide as to Fugitives Goods, p. 176.*

Thirdly, Of Strays.

Property in live Cattle may be got by their straying, which Acquisition is by Act in Law, and by the King's Prerogative, or by his Grant or Prescription.

An Estray (*Extrabura*, from the old French Word *Estrayeur*) is any Beast (which An Estray, is not the King's) that is not wild, or Swans (but no other Fowls) found in any what. Ground or Lordship, the Owner thereof being unknown.

In which Case the Party or Lord into whose Ground or Manor the Estray came Proclamation thereof. may seize it, and put a Wythe about its Neck, and then have it cried and proclaimed according to Law in the two next Market-Towns, on two Market-Days, in which Proclamation it should be shewn whether the Estray be Horse, Sheep, &c. the Marks, and by whom seized, so that the Owner may know where to resort for his Cattle: After which if it is not claimed by the Owner within a Year and a Day, the Property thereof is in the Lord of the Liberty or Manor, if he has all Strays by Custom or Charter, or else it is in the King. *Brit. c. 17. Godb. 151. Bac. L. Tracts 158, 159.* Lord Bacon says, it must be cried in three Markets adjoining. In *N. Bendl. 19. pl. 27.* it is said, in three Markets adjoining on three several Days. *Sed Quære. Finch* says, at the Market in two several Towns next adjoining. And *Brit. ut supra*, says two.

If the Beast strays to another Lordship within the Year after it has been an Estray, Of straying again within the Year. the first Lord cannot retake it, for until the Year and Day be past, and Proclamation made as aforesaid, he has no Property, and therefore the Possession of the second Lord is good against him. *Finch 177.*

If there be no Proclamation made, the Owner may take his Cattle at any Time. Of the Owner's claiming and seizing his Cattle. But after Seizure and Proclamation, if the Owner claims it within a Year and a Day, he may have it again, but he must pay the Lord of the Manor for keeping it, for till then he may justify detaining it. *1 Roll. Abr. 879.*

An Owner may seize an Estray without telling the Marks or proving the Property, (which may be done at the Trial if contested) and tendering Amends generally is good in this Case without shewing the particular Sum, because the Owner of the Estray is no Wrong-doer, and knows not how long it has been in the Lord's Possession, &c. which makes it different from Trespasses, where a certain Sum must be tendered. *2 Salk. 686.*

A Beast Estray may not be used in any Manner within the Year and Day, except Estras, how in Case of Necessity; as to milk a Cow, or the like; but not to ride or work a to be used. Horse, &c. *1 Roll. Abr. 673, 879. Cro. Jac. 148.*

Fourthly, Of Wreck.

Property in Goods, &c. may be acquired by their being Wreck. This Manner of Acquisition is also by Act in Law, and by the King's Prerogative or his Grant, or by Prescription.

Wreck, what. Wreck, is a Ship which the Sea casts upon the Coast within some County, having no living Creature, Man, Dog, Cat, &c. on board, whereby the Owner may be known; or such Goods as after a Shipwreck are so cast upon the Coast. 2 Inst. 167. Stat. Westm. 1. c. 4. 5 Co. 106.

Nothing is Wreck so long as it remains at Sea in the Jurisdiction of the Admiralty. 2 Inst. 167.

What is not Wreck, &c. By Stat. Westm. 1. or 3 Ed. 1. c. 4. Where a Man, Dog or Cat escape alive out of a Ship, whereby the Owner of the Goods may be known, neither the Vessel nor any Thing therein shall be adjudged Wreck, but the same shall be kept a Year and a Day by the Sheriff, Coroner or King's Bailiff, &c. and be restored to the Owner, if he claims within that Time.

This Statute is but declaratory of the Common Law, and these Words Man, Dog or Cat, are only put for Examples; for besides these two Kinds of Beasts, all other Beasts, Fowls and living Things are understood, whereby the Ownership or Property of the Goods may be known. 2 Inst. 167, 168.

The Year and Day shall be accounted from the Seizure made as Wreck; yet if the Goods be *Bona peritura*, the Sheriff may sell them within the Year, so as he disposes of them to the best Advantage, and accounts for them, &c. 2 Inst. 167. 5 Co. 106.

Altho' the said Statute speaks only of Wreck, yet it extends to *Flotsam*, *Jetsam* and *Lagan*. 2 Inst. 167.

Flotsam, Jetsam and Lagan. *Flotsam*, is when a Ship is sunk or cast away, and the Goods are floating upon the Sea. 5 Co. 106.

Jetsam, is where any Thing is cast out of a Ship when in Danger of Wreck, and the Ship notwithstanding perishes, and the Thing is drove on Shore. *Lex Mercat.* 149. 5 Co. 106.

Lagan, is when heavy Goods are thrown over-board when in Danger of Shipwreck, which sink to the Bottom of the Sea, *Lex Mercat.* 149. and having a Buoy to them, the Owners may know where to find them. 5 Co. 106. But these are not to be deemed Wreck till they are cast upon the Land by the Sea.

The King shall have *Flotsam*, *Jetsam* and *Lagan*, when the Ship is lost, and the Owners of the Goods are not known, but not otherwise. *F. N. B.* 122.

But so long as Goods are *Lagan* they belong to the Lord Admiral; but if they are cast away upon the Land they are then Wreck. 5 Co. 106.

Yet any Person may have *Flotsam*, *Jetsam* or *Lagan* by the King's Grant, as well as the Lord Admiral, &c. *Lex Mercat.* 149.

Where a Ship is ready to sink, and all the Men therein for the Preservation of their Lives quit the Ship, and afterwards she perishes, if any of the Men are saved and come to Land, the Goods are not lost. 2 Inst. 167.

A Ship at Sea being pursued by Enemies, the Men for Safety of their Lives forsok the Ship, and the Enemies took it, spoiled the Tackle and Goods, and turned her a Drift, and she was cast on the Land, where the Men arrived; this was adjudged to be no Wreck. 2 Inst. 167.

See Stat. 12 Ann. Seff. 2. c. 18. 4 G. 1. c. 12. & 7 G. 2. c. 15. as to the Salvage of Ships.

To whom Wreck belongs. Wreck belongs to the King by his Prerogative, or to a Subject by his Grant, or by Prescription. 2 Inst. 168.

If a Man has a Grant of Wreck, and a Stranger takes it away before Seizure, he may bring an Action of Trespass, &c. and before they are seized there is no Property gained to make it Felony. 1 Hawk. P. C. 94.

And if Goods wrecked be seized by Persons having no Authority, the Owner may have his Action against them; or if the Wrong-doers are unknown, he may have a Commission to inquire, &c. 2 Inst. 166.

Fifthly, Of Deodands.

Property in Goods, &c. may be acquired by Means of a Deodand.

A Deodand (*Deo Dandum*) is a Thing given as it were to God, where a Man comes to a violent Death by Mischance, caused by any moveable Thing inanimate or animate, without the Fault of himself or any other Person, in any County in England, but not upon the Sea or Salt Water.

The Original of Deodands is said to come from the Notion of Purgatory; for when a Person came to a sudden and untimely Death, without having Time to be shrived by a Priest, and to have the Extreme Unction administered to him, the Thing which had been the Occasion of his Death became Deodand; that is, was given to the Church, to be distributed in Charity, and to pray for the Soul of such deceased Person out of Purgatory. 1 *Lill. Reg.* 443.

The Acquisition of Property by Means of Deodand is by a mixt Act, *i. e.* by Operation of the Law concurring with the Act of the Party, *Hale's Anal.* §. 28. but not with the Default of the Party, for that would be *Felo de se*.

Which Thing and every Thing moving with it is forfeited to the King or Grantee of the Crown, if he dies within a Year and a Day after.

Omnia quæ movent ad mortem sunt Deodanda. *Bract. lib. 3. tract. 2. c. 5.* 5 *Co.* 110. 2 *Inst.* 57.

But it has been observed, that at this Day if a Man be killed by the Wheel of a Cart drawn by Horses, the Jury find that only Deodand which was the immediate Cause of his Death, *viz.* the Wheel. 1 *Nelf. Abr.* 636. But *Qu.* If the Wheel, Cart and Horses are not all forfeited.

If a Man riding over a River is thrown off his Horse by the Violence of the Water, and drowned, his Horse is not a Deodand, for the Death was caused *per cursum aquæ*. 2 *Co.* 483.

Where one within the Age of Discretion (*i. e.* under fourteen Years old) falls from a Cart, Horse, &c. they are not Deodand; but if a Horse strikes and kills such a Person, it is Deodand. 3 *Inst.* 57.

And if a Person is accidentally wounded by a Cart, Horse, &c. and dies within a Year and a Day after, what did it is Deodand.

So that if a Horse strikes a Man, and afterwards the Owner sells the Horse, and then the Party that was stricken dies of the Stroke, the Horse, notwithstanding the Sale, shall be forfeited as Deodand. *Plowd.* 260. 5 *Co.* 110.

If a Man falls out of a Vessel in fresh Water, the Vessel is a Deodand; but not if he falls out of a Vessel in salt Water, tho' the Arm of the Sea is in the Body of a County; because Persons at Sea are continually exposed to such Accidents. *Wood's Inst. B. 2. c. 2. p. 212.*

Things fixed to the Freehold cannot be Deodands, as the Wheel of a Mill, a Bell hanging in a Steeple, &c. unless severed from the Freehold before the Accident happened. 2 *Inst.* 281. 1 *Sid.* 204.

If A. kills a Man with B.'s Sword, the Sword is a Deodand. *Wood. B. 2. c. 2. p. 212.*

The Goods and Chattels of *Felo de se* were Deodands. 1 *Lilly* 443.

The Jury who finds or presents the Death by such Misadventure, ought also to find and appraise the Deodand; for the Goods in these Cases are not forfeited till the Matter is found of Record, and therefore cannot be claimed by Prescription. 5 *Co.* 110. *Co. Lit.* 114. a. §. b. 2 *Inst.* 281.

After the Coroner's Inquisition, the Sheriff is answerable for the Value where the Deodand belongs to the King; and he may levy the same on the Town, &c. wherefore the Inquest ought to find the Value of it. 1 *Hawk.* 67.

If the Forfeiture is to the King, his Almoner disposes of it by Sale, and distributes the Money arising thereby to the Poor. And if the Forfeiture be to the Lord of the Liberty, it ought so to be distributed.

S E C T. XI.

Of Acquiring the Property in Personal Estates by Means of Forfeitures and Losses in Criminal Cases.

IF the Owner of Goods and Chattels be outlawed, indicted for Treason or Felony, or either confess it, or be found Guilty of it, or refuse to be tried by Peers or Jury, or be attainted by Judgment, or fly for Felony; altho' he be not Guilty, or suffer

suffer the *Exigent* to go out against him; altho' he be not outlawed, or if he goes over the Seas without Licence, all the Goods he had at the Judgment he forfeits to the Crown, except some Lord by Charter can claim them: For in these Cases Prescription will not serve, except it be so ancient that it has been allowed before the Justices in Eyre in their Circuits, or in the King's Bench in ancient Time. *Bac. L. Tracts* 159.

Fugitives Goods. Tho' *Waif* is generally spoken of Goods stolen, yet if a Man be pursued with Hue and Cry as a Felon, and he flies and leaves his own Goods, these will be forfeited as Goods stolen; but not till it be found before the Coroner, or otherwise of Record, that he fled for the Felony. *2 Hawk.* 450. *5 Co.* 109.

For more of these Kinds of Forfeitures, *vide ante* p. 119.

CHAP. IV.

Of Deeds in general, and the Things incident thereto.

SECT. I.

What a Deed or Charter is, and the Things incident thereto.

Deed, what.

A Deed (Fr. *Fait*, or Lat. *Factum*) is a Writing or Instrument sealed and delivered to prove the Agreement of the Parties to what is contained therein. *Co. Lit.* 35. b. 171. b.

Charter, what.

And a Charter (Lat. *Charta*, Fr. *Chartres*, i. e. *Instrumenta*) is a written Evidence of Things done between Man and Man. And Charters may be of the King, or of private Persons; *Charters of the King* are those whereby the King passes any Grant to any Person or Body Politick; as a Charter of Exemption of Privilege, &c. Charter of Pardon whereby a Man is forgiven a Felony, or other Offence committed against the King's Crown and Dignity; and of these there are several Sorts, *viz.* *Charta pardonationis Utlagarie*, *Charta pardonationis se defendendo*, &c. and others mentioned in *Register of Writs*. Charter of the Forest, wherein the Laws of the Forest are comprised, &c.

But *Charters of private Persons* are Deeds and Instruments for the Conveyance of Lands, &c.

Muniment, what.

Charters are sometimes called Muniments, *a muniendo, quia muniunt & defendunt Hereditatem.*

There is a Difference between *Cartam* and *Factum*, for *Carta* is intended a Charter which touches Inheritance, and so is not *Factum* unless it has some other Addition, *Co. Lit.* 9. a. b. as Livery and Seisin, &c.

The Essence of a Deed.

There are three Things of the Essence and Substance of a Deed, *viz.* (1) Writing in Paper or Parchment, (2) Sealing, and (3) Delivery. *2 Co.* 5.

Things incident to a Deed.

And to a Deed there are ten Things necessarily incident: (1) Writing. (2) In Parchment (*Vellum*) or Paper. (3) A Person able to contract. (4) By a sufficient Name. (5) A Person able to be contracted with. (6) By a sufficient Name. (7) A Thing to be contracted for. (8) Apt Words required by Law. (9) Sealing. And (10) Delivery. *Co. Lit.* 35. b.

SECT. II.

In what Hand or Language a Deed must be written.

1. Writing.

AS to the Writing of a Deed: (1) All the Matter and Form thereof must be written before the Sealing and Delivery of it; for if a Man seals and delivers an empty Piece of Parchment or Paper, altho' he therewithal gives Commandment that an

Obligation

Obligation or other Matter shall be written in it, which is done accordingly, yet this will not make it a good Deed. *Co. Lit.* 171. *Perk.* §. 118, 119.

The Writing must be finished before it be sealed and delivered, or at least before it be delivered; for nothing may be added to it afterwards, nor may any Alteration be made in it; and therefore if a Deed of Obligation be sealed and delivered, with a Blank left for the Sum, which the Obligee does after Sealing and Delivery fill up, this will make the Deed void. *Moor* 28.

And if a Deed be made as an Obligation single, and after upon the Back of it, before the Sealing and Delivery, is written the Intent of the Bond is to pay 10*l.* for such Costs; this if it was perfect might be a good Condition, if there were Words of Conclusion; but if it be written after the Delivery of the Deed, it cannot be good. *Hetley* 136, 137.

A Deed may be written in any Hand, as in Text, Court or Roman Hand, or in any Language, as in *Latin* or *French*, and is as good as a Deed written in *English* and in a Secretary Hand. 2 *Co.* 3.

And it is not necessary that the *Latin* or *English* whereby it is made be true and congruous, for false and incongruous *Latin* or *English* seldom hurts a Deed, for the Rules of Law are, *Falsa Orthographia non vitiat Chartam*; *falsa Grammatica non vitiat concessionem*. *Co. Lit.* 6, 5, 121, 10, 133. And yet false *Latin* if it be very bad, may make a Deed void. *Telv.* 193.

And altho' the Writing be bad, and besides the Lines, or the Lines be written crooked, yet this will not hurt the Deed.

And if there be any Alteration, Rasure or Interlining made in any Part of the Deed before the Delivery of it, this will not hurt the Deed.

But in such Cases it is Policy to make a Memorandum of it upon the Back of the Deed, and to give the Witnesses Notice of it, (this is now usually done in the Attestation of the Deed thus: *Sealed and Delivered, the Words—being first interlined, &c.* For otherwise if it be in any Place material, as in the Name of the Grantor, Grantee in the limiting of the Estate, or the like, and it cannot be proved to be done before the Sealing and Delivery of it, especially if it be in a Deed Poll, it is greatly suspicious. *Co. Lit.* 37, 225. *Perk.* §. 155, 125, 126, 127, 128.

S E C T. III.

On what a Deed must be written.

A Deed must be written in Paper, Parchment or Vellum, as being the least subject to Alteration; for if Writing be on a Piece of Wood, Linen, the Bark of a Tree, a Stone, or the like, and be sealed and delivered, it is no good Deed. *Co. Lit.* 229. a. *F. N. B.* 222.

2. On Parchment, Vellum or Paper.

It may be written either in a Piece of loose Paper or Parchment, or in a Paper or Parchment sewed in a Book. *Bro. Oblig.* 67. *Co. Lit.* 137, 229. But the Paper or Parchment must in most Cases be stamped.

And altho' a Deed be never so well written as to the Hand and Language, and on Parchment or Paper, and duly read, sealed and delivered, yet it must be formally and orderly written, as to the Matter and Manner of it, according to Law, that is, there must be sufficient Words to set forth the Agreement, and to bind the Parties to perform it; for a Deed may be void, and lose its Force in all or Part, for Repugnancy, Incertainty, Mistake, Deficiency and Error. *Of which formal and orderly Parts see the next Chapter.*

S E C T. IV.

Who is able to contract, or to give, grant, &c.

A Nother Thing incidentally necessary to the making a good Deed is, that the Party contracting is capable of giving, granting, &c.

For some Persons are disabled by Common Law and some by Statute; some are absolute, and some are *Secundum quid* only; as in Case of Infants, Feme Coverts,

3. Who may contract, &c.

Disabilities by Common and Statute
Ideots, Law.

- Ideots, Persons *Non compos mentis*, Aliens, Tenants in Tail, Ecclesiastical Persons, and others, some of which may not make any Deeds or Estates by them at all; others but so and so limited and qualified. *Stat. 32 H. 8. c. 28.*
- Bodies Natural or Politick.**
General Rules.
 Generally any Natural, Politick or Corporate Body may make a Deed.
 All who may take by Deed may give and grant by Deed.
 Generally all that are disabled to take by Deed, are disabled to give and grant by Deed; and some others also.
 Some Persons are disabled to give or grant by Deed, and not enabled to take by Deed: And some are enabled to take that are not enabled to give or grant by Deed.
 Some may by Deed give or grant some, and not other Things, and some may not give or grant any Thing at all.
 Some may not make a Deed good of themselves, but by joining with others.
 And some are disabled to make a Deed good, altho' they be joined with others in it.
 Some may make a Deed that will be good to some Persons and not to others.
 Some may make a Deed that will be good at one and not at another Time.
 And some may make a Deed that will be good in one way, but not in another.
- Who are incapable to make a Deed.**
 Disabilities to make Deeds, &c. are chiefly amongst Persons *De non sane memorie*, Infants, Aliens, Women who have Husbands, Men who have Wives, Women that have had Husbands, and Land settled by their Husbands upon them, Persons born Deaf and Dumb, Persons Attaint of Treason or Felony, or in a *Præmunire*, Clerk convict, Leper, Bastard, Tenant in Tail, Ecclesiastical Persons, as Bishops, Parsons, and the like, Jointenants, Tenants in Common, Coparceners, Disseisors, Disseisees, &c.
 And this in some of them is in Part and Temporal only, but in others of them it is absolute, universal and perpetual.
- And who capable.**
 But for all other Persons Male or Female, and for all other Bodies Natural or Politick, either as Sole Corporations or Aggregate, and for all Persons Ecclesiastical and Temporal, they are capable to be Grantors or Grantees, or to give and take by Deed.
- Tenant in Fee-simple.**
 So that if any such Person be seised of an Estate in Fee-simple in his own Right, he may by Deed in Writing *in pais*, or without Writing, by Parol, make what Gift, Grant or Exchange upon it, as he pleases.
- In Tail.**
 But he who has but an Estate-tail in Land can only make a Lease of it for his own Life by Deed, or such a Lease as is within the *Stat. 32 H. 8.*
- Ecclesiasticks.**
 Ecclesiastical Persons cannot make a Lease of their Ecclesiastical Lands for longer than their own Lives, or such a Lease as is warrantable by the Statute of 13 *Eliz. c. 10.* & 1 *Jac. 1. c. 3.* and others.
- Tenant for Life or Years.**
 And he who has only an Estate for his own or another's Life, or a Lease for Years of Land, may give, grant or charge it at his Pleasure for so long as his Estate lasts; and it will be good to all Purposes and against all Persons for that Time.
 And a Man who has an Estate in Land to him and his Wife and his Heirs, may make what Estate he will of it, and this will be good against all but his Wife, and that for her Life only. 7 *Co. 12.* *Co. Lit. 42.* *Perk. §. 182.*
- Who may make Estates for Lives or Years.**
 As to the Disability of Persons *Secundum quid*, or to such a Purpose only, observe that there are three Sorts of Persons that formerly could not make Estates for Lives, &c. but now may by *Stat. 32 H. 8.*
First, Any Persons Husbands and Wives seised of any Estate of Inheritance in Fee-simple, or Fee-tail, in the Right of their Wives, or jointly with their Wives before or after the Coverture.
Secondly, Any Person seised of an Estate-tail in his own Right.
Thirdly, Any Person seised of an Estate in Fee-simple in the Right of his Church.
 The Husband and Wife may by Deed make such an Estate of the Land of his Wife, or Charge thereupon, as to bind the Wife and the Husband, her and their Heirs, by *Stat. 32 H. 8.*
 The Tenant in Tail may make such an Estate, or Charge by Deed, as to bind himself and his Issues in Tail, but not the Reversion or Remainder; by *same Stat.*
 And an Ecclesiastical Person, as the Bishop, &c. without the Dean and Chapter, and the Rest of that Sort, may make such an Estate or Charge by Deed of such Land to bind his Successors, by *Stat. 1 Eliz. c. 13.* 13 *Eliz. §. 1 Jac.*
 But to make all such Leases good, there are divers Things necessary to be observed. *Co. Lit. 44. a.* Of which see Title Leases.

The King for the Greatness of his Person, and Preservation of his Estate, is disabled by Law to grant by Deed *in pais*, but he is to give by Matter of Record, which is of a higher Nature than a Deed. *Fitz. Fait and Feoffment* 21. Who may grant, &c. The King.

The Queen has a Privilege above other Women, that she may make a Gift or Grant of her own Lands or Goods without the King. Queen.

If a Deed be made by Husband and Wife together, this generally will not bind and conclude the Wife as a Fine will do. But a Deed referring to a Fine or Recovery, as to lead the Uses thereof, and the like, may be good by the Husband and Wife. Grants, &c. by both Husband and Wife to others.

Co. Lit. 3. *Perk.* §. 8, 20, 41, 185, 186, 86, 194. *Telv.* 1. *Jenk. Cent.* 4. *Case* 20. A Husband and Wife together may pass what Fine or Recovery they please of the Wife's Land, or charge it for what Time they please, and such Leases and Charges will be good to bind them both and their Heirs; but they may not do so much by their Deed as by Fine. *Woman's Lawyer* 103.

The Husband may make Leases of the Lands or Tenements whereof he has any Estate of Inheritance in Fee-simple or Fee-tail in Right of his Wife, or jointly with his Wife, made before or after Marriage, so as there be observed in such Leases the Conditions or Limitations required in the Leases made by Tenants in Tail; and so as the Wife join in the Deed, and be made Party thereto; and so as she seal and deliver the same Deed in Person; for if a Man and his Wife shall make a Letter of Attorney to another to deliver the Lease upon the Land, this Lease will not be a good Lease from the Wife, warranted by the Stat. (32 H. 8. c. 28.) and yet it will be good against the Husband. But if the Lease is warranted by the Statute, it will bind both the Husband and Wife, and the Heirs of the Wife. And yet in Case of an Estate-tail, it will not bind the Donor, nor him in Remainder. But in this Case the Husband and Wife together may by the Help of a Fine, Recovery, both or one of them, make what further Estate they please, or charge the Land so as to bind the Donor and him in Remainder also, and their Heirs. *Stat.* 32 H. 8. c. 28. *Co. Lit.* 44, 90. *2 Bulstr.* 44.

And where the Wife may do the Principal, as levy a Fine, &c. she may do the Accessary, to wit, declare the Uses of it. *10 Co.* 30.

And yet in Case of a Woman sole, who is Tenant in Tail of the Gift of her deceased Husband, or any of his Ancestors, or with another Husband she shall take afterwards, if she alone, or they two together, shall make any such Lease within the Conditions of the said Statute warranted by it, this Lease will not be a good Bar of the Title to the Inheritance of those who come after; but it will be good to bind the Parties themselves, and all others. *Stat.* 11 H. 7. c. 20. *3 Co.* 51, 60.

If Husband and Wife for Money bargain and sell her Land, and afterwards they levy a Fine *Come ceo* of it; by this the Estate is made good, and the Wife cannot avoid it. *Moor* 22.

If both Husband and Wife join in a Lease of her Land without Render of Rent, this Lease (by the Common Law) will not be good against her. *26 H. 8. 2. 2 Co.* 77. *Dyer* 92.

If Husband and Wife make a Lease Parol of her Land, rendring Rent, or a Lease in Writing, without reserving any Rent, this Lease will not bind, but will be void as to the Wife. *Dyer* 92. *26 H. 8. 24.*

Husband and Wife and a third Person are Jointenants for the Life of the Wife and the third Person, the Husband (thus seised in Right of his Wife) and his Wife by Indenture let a Moiety for twenty-one Years, the Wife dies; this is a good Lease against the Survivors, and shall be as a Lease made by her, until after the Coverture, that she, or one who claims in Privity under her, do avoid it by Entry. *Cro. Jac.* 517. *Dyer* 187.

A. and B. a Woman are Jointenants for Life, the Woman takes a Husband, and they by Indenture do lease their Moiety for Years; in this Case the Lease may be avoided by the Wife, if she overlives the Husband, but not by the other Jointenant. *Bridgm.* 44, 45.

If Husband and Wife be seised of Land in London to them and the Heirs of the Husband, and they covenant by Indenture for 20 l. to suffer a common Recovery according to the Custom of the Place, (which binds as a Fine) and that it should be to the Use of the Recoverors, until they had made a good Lease by Indenture for forty Years, and after the making of the Lease to the Use of them and the Heirs of the Husband, and this Recovery is had; this Lease is good in this Case, and not avoidable by the Wife. *Dyer* 290.

If

If Husband and Wife join in a Deed of Gift or Grant, it shall be said to be the Deed of the Husband alone, and not of him and his Wife. 2 *Broxtonl.* 66.

M. is seised for Life, the Remainder to *K.* in Fee, *K.* takes *N.* to Husband, and after he and his Wife and one *J. D.* levy a Fine of the Land to *F.* and his Heirs, who grants and renders to *J. S.* for fifty Years from *Michaelmas* last past, rendring Rent, and granted the Reversion to the said *N.* and *K.* and to the Heirs of *K.* this is a good Lease. 6 *Co.* 63.

If Land be given to Husband and Wife and the Heirs of their Bodies, and they demise by Indenture, and after the Husband's Death the Wife enters and dies within the Term, it is now no Lease *ab initio.* *Leon.* 192. But till her Entry the Lease is not avoided. *Cro. Jac.* 332, 417.

The Husband is seised of Land in Right of his Wife, they both join in an Exchange of it by Deed, for other Land with a Stranger, and the Exchange is executed. They pass the Land taken in Exchange by Fine, yet the Wife after the Husband's Death may enter upon her own Land. *Dyer* 359. As where he after Marriage makes her an Assurance of a Jointure, and they levy a Fine of it, as of the Gift of her Husband; this will not Bar her of her Dower. 1 *Leon.* 285.

If a Lease is made by Indenture by Husband and Wife, and no Rent is reserved upon it; this is not void as it is in Case of an Infant, but voidable at most. *Hut.* 102.

If Husband and Wife make a Lease by Indenture for Years, rendring Rent, the Lessee enters, the Husband before the Day of Payment of the Rent dies, the Wife also before the Day of Payment marries a second Husband, who accept the Rent at the Day; in this Case the Wife may not avoid the Term, but the Lease is good. *Dyer* 159.

If Husband and Wife be seised of Land in *London* in Right of the Wife, and they by Indenture covenant to suffer a Recovery of it to the Use of the Recoverors, until they make a Lease for forty Years, and after to the Use of the Husband and Wife, and the Heirs of the Wife, the Lease is made accordingly, the Husband dies; the Lease is not avoided, nor avoidable by the Wife after the Death of the Husband. But *Qu.* What Remedy she has for the Rent. *Dyer* 290.

If a Lease is made by Husband and Wife of the Wife's Land to *A.* to try the Title of it, they being put out, and a Letter of Attorney to a third Person to enter into the Land, and to deliver the Deed, and the Letter of Attorney in the Name of the Husband and Wife, and they are sealed and delivered accordingly, this is good. 2 *Leon.* 200.

Husband and Wife in Right of the Wife and a third Person are Jointenants for the Lives of the Wife and a third Person; the Husband and Wife by Deed let the Moiety for twenty-one Years, the Wife died, the surviving Jointenant entred, &c. the Lease is good until she, or some in Privy claiming under her, do after her Coverture avoid it by Entry, for it is not void, but voidable, and the surviving Jointenant may not avoid it, but it will be good as long as either of the Jointenants live. *Cro. Jac.* 417.

Husband and Wife Lessees of a House in *F.* called the *Three Conies*; the Husband made a Lease of it for Part of the Years by these Words: *The House and Tenements in F. called the Three Conies, with all the Chambers, Cellars, Shops, excepting and reserving to J. S. the Husband the Shops for his proper and only Use and Occupation.* The Husband died within the Term, the Wife survived, and entred into the Shops, and lawful; for the Exception is void, and but Temporary at most, to wit, during the Time they are in the Occupation of the Husband, and after his Death they shall be in the Disposal of the Wife, both House and Shops, for the Remainder of the Term. *Dyer* 264.

If Husband and Wife join in a Mortgage of her Term, this is no absolute Disposition. *Hob.* 3. And if he purchases in Fee, the Term is not extinct.

Husband and Wife possessed of a Term, mortgage their Interests, she dies before the Day of Payment, he pays the Money, he shall have the Lease. *Hob.* 3.

If a Feme Covert by Durefs joins in a Lease with her Husband, this shall bind her. 3 *Leon.* 71.

J. S. and a Feme Sole are Jointenants, the Feme marries, and her Husband and she join in an Indenture of Lease for the Moiety of the Land for eighty Years to *J. D.* if the Wife and her Companion shall so long live; the Wife dies, leaving the Husband, this is a good Lease, and not to be avoided by the surviving Jointenant. 3 *Bull.* 271, 273.

Husband and Wife join in a Mortgage of the Wife's Term; this is good, and if the Wife dies, the Condition shall survive to the Husband, as the Term should have done; and the Husband by the Marriage has full Power over his Wife's Term to alien it. *Hob. 3.*

Husband and Wife can neither expressly, nor by Acceptance of a new Lease, surrender the Wife's Freehold, so as to bind her surviving. *Hob. 203, 204.*

Husband and Wife of her Land may make a Lease to try a Title of her Land. *Noy 130, 132.*

Husband and Wife make a Lease of the Wife's Land, and this is signed and sealed by the Husband and Wife, and a Letter of Attorney by them, to deliver it in their Names upon the Land, and by the Attorney delivered in both their Names; this is a void Lease as to the Wife. *Cro. Car. 617.*

Husband and Wife (in Right of the Wife) and a third Person are Jointenants for the Lives of the Wife and the third Person, and the Husband and Wife by Deed indented grant a Moiety for twenty-one Years, the Wife dies, the surviving Jointenant may not enter and avoid it. *Cro. Jac. 417.*

If Husband and Wife make a Lease not warranted by *Stat. 32 H. 8.* yet it may be a good Lease as to the Husband; but if it be made according to the Statute, it will bind the Husband and Wife both, and the Heirs of the Wife; but it will not Bar the Donor or him in Remainder. *Co. Lit. 44.*

If Husband and Wife make a Lease of her Land, rendring Rent to them and the Heir of the Wife, (as such Lease should be made) in this Case the Husband cannot by Fine or Deed grant or discharge this Rent longer than during the Coverture, unless the Wife join in the Fine, but this Rent shall descend, remain or revert in such Sort and Manner as the Land should have done.

A Lease for Years by Husband and Wife, if it be without Deed, is void as to the Wife. *Cro. Car. 656.*

If the Husband be seised in Fee, and the Wife for Life, and they both bargain and sell the Land in Fee, upon Condition, that if they, or either of them, pay 100*l.* then it shall be void; and all Assurances made to be to the Use of the Husband and his Heirs; the Husband dies, the Wife pays the 100*l.* she shall have an Estate for Life, notwithstanding the Declaration of the Use as before. *Cro. Car. 744.*

If Husband and Wife for Money bargain and sell her Land, and afterwards levy a Fine *Come ceo* of it; this Estate is made good, and the Wife cannot avoid it. *Moor 22.*

If Husband and Wife make a Parol Lease for Years of the Wife's Land, and then levy a Fine, and then they both die, the Conusee may avoid this Lease. *1 Leon. 247.*

The Husband and Wife together may join, and by Fine or common Recovery make a good Assurance of any Land she has and her Husband has in her Right of any Freehold Estate they have in her Right. And so they may also Bar her of any Right or Title of Jointure, or Dower, she has or may have in or to any of the Husband's Lands: But so they may not do by Deed indented, (no, tho' it be afterwards inrolled) Feoffment or other Conveyance by Deed, but where there is a special Custom to warrant and enable it. *Co. Lit. 171. 20 H. 7. 8. Plow. 515.*

And they both together may make a Lease of the Land she has and he holds in her Right, for three Lives or twenty-one Years, according to the Statute of 32 *H. 8. c. 28.* to bind them and their Heirs. *Co. Lit. 44.* Or they may make a Lease of such Land to try a Title; and these two Things they may do by Deed *in pais* without Fine or Recovery. And if he has a Copyhold Estate in her Right, they two may surrender it in the Court according to the Custom of the Place. *4 Co. 23. Dy. 344.*

But if they both join in a Statute or Recognizance, this does not bind the Wife, or her Land. *Kelw. 10.*

The Husband by his Fine alone cannot conclude his Wife after his Death, as to her Lands. *Woman's Lawyer 103.*

If the Husband alone levies a Fine of his Wife's Land for any Estate whatsoever, she may avoid this Fine after his Death. *Woman's Lawyer 163.*

And if they make a Lease, rendring Rent to them and the Heirs of the Wife, (as in such Cases the Leases must be made) the Husband may not by Fine or otherwise grant or discharge this Rent for longer Time than during the Coverture, unless the Wife join in the Fine, but the Rent shall remain, descend or revert in such Manner as the Land would have done. *Ibid.*

Or one of them to others.

1. The Husband alone.

If the Husband alone makes a Feoffment or other Grant of his Wife's Land, this will be good against him, and all others, but his Wife, who may avoid it after his Death. *Perk. §. 223.*

If a Woman Inheritrix has a Husband within Age, who within Age aliens her Land and dies, the Wife by her Entry shall avoid this. *Lit. §. 633, 634. Co. Lit. 336. b. 337. a.*

If the Husband alone makes a Lease for Years of his Wife's Land, rendring Rent, and dies, this Lease will be void as to the Wife. *2 Co. 77. 26 H. 8. 2.*

And yet if after his Death she takes another Husband who accepts the Rent, the Lease is made good. *Dyer 159.*

Where the Husband alone makes a Lease for Years of the Wife's Land, this is good for no longer than he lives, and yet it is not avoided till the Wife makes her Entry. *Plow. 137.*

If a Man be possessed of a Term in Right of his Wife, and grants Part of it to another, the Wife after the Husband's Death will have the Residue of the Term not granted; and it shall be only an Alteration for what is granted. *Cro. Car. 33.*

If Husband and Wife be Jointenants for sixty Years, and the Husband by Indenture lets all the Land for seventy Years, to begin immediately after his Death; the Husband dies, the Wife survives, this is a good Lease. But it is otherwise if he grants the Term itself to begin after his Death. *Cro. Car. 287. Cro. Eliz. 155.*

W. and his Wife being possessed of a Term in Right of the Wife, which she has as Administratrix; *W.* grants the Term to *C.* to the Use of him and his Wife for their Lives, and after to the Use of himself; this Grant is good, and shall not be said to be fraudulent to deceive Creditors, and is out of the Statute of 19 H. 7. and all other Statutes of that Nature. *Cro. Car. 392, 393.*

If Husband and Wife have an Estate in Land to them and to the Heirs of the Husband, and he alone makes a Lease of the Land; this will be good against all Persons but the Wife, and that also for her Time only. *Bro. Leafes 58.*

If Tenant in Fee-simple takes a Wife, and then makes a Lease for Years, and dies, and the Wife is endowed of the third Part of his Land; in this Case she will avoid the Lease for her Time for so much of the Land as is within her Thirds, but after her Death it will be good again. *Co. Lit. 46.*

A Man purchases Land to him and his Wife, and their Heirs, afterwards he without his Wife lets this Land for sixty Years to another, if they two live so long, the Husband dies; in this Case it seems this Lease shall bind the Wife, altho' she be no Party to the Deed, by *Stat. 32 H. 8. c. 28.* and is within that Statute. *Cro. Eliz. 15, 16.*

If a Man who is possessed of a Term of Years in Right of his Wife makes a Lease thereof to begin after his Death, and dies during the Term, the Wife survives; the Lease is good. *Popb. 97.*

A Man who has Land in Right of his Wife makes a Lease for Years of it, it is not void by his Death till she enters. *Cro. Jac. 132.*

If Husband makes a Gift in Tail of his Wife's Land, rendring Rent, and they after grant the Reversion by Fine, by this the Wife is barred of all; but if they grant the Rent only by Fine, there the Wife after his Death may enter. *Moor 91.*

If a Lease be made to Husband and Wife during their Lives, the Remainder to the Executors of the Survivor of them; if the Husband grant away this Term, and dies, the same will not Bar the Wife, for he has but a Possibility, and no Interest.

But if a Man be possessed of a Term for forty Years in the Right of his Wife, and he makes a Lease for twenty Years, reserving Rent, and dies, altho' the Wife has the Residue of the Term, yet the Executors of the Husband shall have the Rent, for she is no Party to the Lease.

So if the Husband makes a Grant of the whole Term, upon Condition that the Grantee shall pay a Sum of Money to the Executors, &c. the Husband dies, and upon Breach of the Condition the Executors enter; by this the whole Term passes, and he is barred of it. *Co. Lit. 46. 10 Co. in Lampet's Case.*

If a Man purchases Land to him and his Wife and their Heirs, and afterwards (without his Wife) he lets the Land for sixty Years, if they two live so long, the Husband dies; this binds the Wife by *Stat. 32 H. 8. c. 28.* altho' she be no Party to the Deed. *Cro. Eliz. 15.*

If a Man possessed of a Term in Right of his Wife makes a Lease for Years of the Land, to begin after his Death, and then dies, his Wife survives; the Lessee shall have

have it during his Term, but for the Remainder of the Term, if the Husband makes no Disposition of it, the Wife shall have it. *Popb. 5.* For where a Woman has a Term, and marries, the Husband may dispose of it in his Life, but not by Will. *Plow. 416.*

Land is given to Husband and Wife and to the Heirs of their two Bodies begotten, the Husband makes a Feoffment in Fee, and dies, having Issue, and afterwards the Wife before she enters dies; the Feoffment is a Discontinuance to the Issue at Common Law, and this Estate in the Husband and Wife is within the Statute of 32 H. 8. c. 28. and by that Statute the Entry of the Issue in Tail is lawful. 1 Co. 71. *Moor 28.*

If the Husband be Tenant in Tail, the Remainder to the Wife in Tail, and the Husband makes a Feoffment in Fee, and dies without Issue, the Wife may enter; but if he suffers a Recovery, and dies without Issue *contra*, she is barred. 8 Co. 72.

If the Husband has Issue and aliens, and the Wife dies, the Issue may not enter during the Life of the Husband; but if the Husband aliens, and after the Wife is divorced *Causa præcontractus*, or for other Cause dissolving the Marriage *a vinculo, &c.* there the Wife may enter by the Statute during the Life of the Husband. 8 Co. 72.

Husband purchased Land to him and his Wife and their Heirs, and afterwards without his Wife let the Land for sixty Years, if they lived so long, rendring Rent, the Husband dies; the Wife by 32 H. 8. c. 28. is bound by the Lease. *Cro. Car. 15, 16.*

A Lease and Letter of Attorney by the Husband alone, and under his Seal, without the Seal of the Wife, is not good; but in such Case to seal a Lease to try a Title by Ejectment, the Husband and Wife both must seal the Lease and Letter of Attorney, and the Attorney must enter in both their Names. And so Leases must be made to sue for Recovery of her Lands. 2 *Bulf. 11.*

Husband and Wife seised jointly to them and their Heirs of an Estate of Inheritance of Lands made during the Coverture, and the Husband makes a Feoffment in Fee, and dies, the Wife may enter within the Statute of 32 H. 8. c. 28. altho' it was the Inheritance of them both. *Co. Lit. 326. a.*

And so it is if the Feoffment be made by the Husband and Wife, (altho' the Words of the Statute be by the Husband only) for in Substance this is the Act of the Husband only. *Co. Lit. 326. a.*

Before the Statute of 27 H. 8. of Uses, a Feoffment was made to the Use of a Man and a Woman who were unmarried, and of the Heirs of their two Bodies; they marry, and then the Statute is made; afterwards the Husband bargains and sells the whole Land to one of the Feoffees, and dies, the Wife shall have but a Moiety of the Land; but if the Wife dies, the Son shall have a *Formedon* of the whole Land. *Dyer 149.*

If a Husband be possessed of Land for Years in Right of his Wife, and grants a Rent-Charge, and dies, the Wife may avoid it. *Co. Lit. 185.*

If Husband alone without his Wife makes a Lease for Years of his Wife's Land, this is only voidable, and not void by his Death. *Cro. Jac. 332, 417.*

If Husband purchases Lands to him and his Wife in Fee, and he alone makes a Lease of the Land for sixty Years, this seems a good Lease by 32 H. 8. c. 28. *Cro. Eliz. 15.*

And yet if the Husband at Common Law was seised of Land in Right of his Wife, and he made a Lease for Years, rendring Rent, and died, this Lease had been void as to the Wife. *Cro. Jac. 77. 26 H. 8. 2. Dyer 92.*

An Annuity is granted to a Wife for Life by one, to whom the Husband releases all Demands, and dies, the Wife is not barred by this. *Moor 668.*

If a Husband makes a Lease for Years of his Wife's Copyhold Lands of Inheritance, (which is a Forfeiture by the Custom) this is no good Lease to bind, and therefore shall not Prejudice his Wife after his Death. *Cro. Eliz. 4.*

A Lease of Land is made to Husband and Wife for their Lives, the Remainder to the Executors of the Survivor of them, the Husband grants away the Term, and dies, this is not good against the Wife, for it is but a Possibility, and not an Interest. *Co. Lit. 46.*

Baron and Feme Jointenants during the Coverture for sixty Years; the Baron by Indenture lets all the Land for seventy Years, to begin immediately after his Death; the Baron dies, the Wife survives, this is a good Lease, and not like to a Lease to begin after the Death of the Baron, where he may over-live the whole Term; nor like a Grant of a Term to begin after his Death, where nothing passes till his Death: But here a good Term is created in Interest tho' not in Possession; and here the Baron

Baron having an Interest to dispose of in his Life-time, he may dispose of the Term, and it shall bind the Wife; and when he has disposed of it by Act executed in his Life-time, he has created a Term in Interest, and it is as good as if he had granted all the Term. *Cro. Eliz.* 287. *1 Co.* 155.

Husband and Wife Jointenants for one hundred Years, the Husband makes a Lease for twenty Years, to begin after his Death, and dies; the Lease is good. *Moore* 395.

The Husband alone may convey the Land he has in Right of his Wife, during both their Lives together, without her Consent or Agreement.

A Lease made by the Husband alone of the Wife's Land is not void by his Death till the Wife's Entry. *Cro. Jac.* 417. *Dyer* 290.

The Husband may not make a Lease of his Wife's Copyhold of Inheritance to Prejudice her or her Heirs after his Death. *Cro. Eliz.* 4.

If one has a Lease for Years, Extent, or the next Avoidance of a Church, in the Right of his Wife, he may grant it away by Act executed in his Life-time, but not devise it by Will, for it will return to the Wife if not disposed by his Act executed.

But the absolute Property of all the Wife's Goods and Chattels moveable and Personal Estate is vested in the Husband, and he may give or grant them away, without her, at his Pleasure. *Moore* 44, 45.

If a Feme Inheritrix has a Husband within Age, and he within Age aliens her Land, and dies, she by her Entry may avoid this. *Lit.* §. 633, 634.

If Husband conveys his Land to the Use of himself and Wife, and to the Heirs of the Survivor of them, and he afterwards makes a Feoffment of this Land, by this he has destroyed the contingent Use. *Cro. Eliz.* 73.

Husband possessed of a Term in Right of his Wife, grants Part of the Term to another; the Wife shall have the Residue of the Term after the Husband's Death, and the Alteration shall be only for what is granted. *Cro. Car.* 33.

If a Lease for Years be made to the Husband to the Use of the Wife, the Husband may sell it for a good Consideration, and there will be no Remedy for the Wife in Law. *1 Bulst.* 118.

If Husband and Wife make a Lease of her Land, rendring Rent to them and to the Heirs of the Wife, for so the Render should be made: The Husband by Fine or otherwise cannot grant or discharge the Rent for longer Time than during the Coverture, unless the Wife joins with him. *Woman's Lawyer* 113.

If Husband purchases Land in Fee to them two and their Heirs, he alone without her may make a Lease of the Land, for this is out of the Statute of 32 H. 8. as to require her joining with him. *Cro. Eliz.* 15.

If a Woman has a Lease for Years, and conveys it in Trust for her own Use, and after marries, the Husband may not dispose of it; and if the Wife dies, the Husband may not dispose of it, but it shall go to the Executor of the Wife. *March* 44. *Case* 69.

If a Copyholder makes a Lease for Years of the Land whereof a Feme by Custom is to have her Widow's Estate, she shall not avoid the Lease, unless there be a special Custom to avoid it; for he comes under the Custom, and by the Lord's Licence as well as the Feme. *Cro. Jac.* 36, 37.

If Husband has an Estate in Right of his Wife for her Life as Dower or otherwise, and he alone, or they both, by Deed surrender to him in Reversion; this is good during the Coverture, but if she survives, or there be a Divorce *Causa pracontractus*, the Wife may enter, and avoid the Surrender, tho' he to whom it was made be dead, and his Heir in by Descent. *Perk.* §. 117.

If a Feme Sole makes a Feoffment in Fee, on Condition to pay 10 l. to the Wife at Easter next, and she before that Time takes a Husband, the Husband may release this Condition, and bar her for ever. *Perk. fo.* 764.

If a Lease be made to Husband and Wife for Years, the Remainder to the Survivor of them for twenty-one Years, the Husband alone cannot dispose of this Remainder to bar his Wife.

So if a Lease be made to them for Lives with such a Remainder, the Husband cannot grant it away. *10 Co.* 51.

Husband purchases Land to him and his Wife and their Heirs, and after he alone lets it for sixty Years, if he lives so long, rendring Rent, Husband dies; the Lease shall be good against the Wife upon the *Stat.* 32 H. 8. c. 28. and not within the Proviso. *Cro. El.* 15, 16.

The Husband alone cannot by Fine, Recovery or otherwise, by any Deed dispose of the Land of his Wife for longer Time than he lives with her, but she or her Heir will avoid it.

But by *Stat. 32 H. 8.* they may make Leases according as the Statute directs. *17 E. 4. 14.* And if it be otherwise made, altho' the Money given for the Land sold be paid to her, yet this will not make it good. *8 Co. 72.*

Where Husband and Wife are joint Purchasers, the Husband alone may make a Feoffment or Discontinuance, the Wife being upon the Land and not agreeing to it.

But of a joint Estate in Fee-simple, or for Life, to the Husband and Wife, there regularly the Husband alone during his Wife's Life may not sever the Jointure, or dispose of it.

And if a Lease for Years be made to them, and he alone charges it, she may avoid this. *Plow. 58, 259. Dyer 9.*

And if the Husband makes a Lease of his Wife's Land for Years, and then he and his Wife alien it by Fine, and the Husband dies, the Alienee shall avoid this Lease. *Bridgm. 45.*

And if the Husband be seised of a Reversion in the Right of his Wife, and he grants it away, and the Tenant attorn, yet this shall not bar the Wife. *19 H. 6. 4.*

The Husband alone may give or grant away any of the Chattels Real of his Wife by Act executed in his Life-time, and this will bind and bar him and his Wife also; and therefore if one has a Term in Right of his Wife, and he in Reversion confirms the Estate of the Husband and Wife, *Habendum* for Term of their two Lives; by this the Lease for Years is drowned and gone. *Plowd. 199. Lit. §. 526. 9 Co. 129. 10 Co. 47.*

So if the Wife has a future Interest, the Husband alone during the Coverture may grant it away, or by Release, &c. prevent her of it.

So for any Goods or Chattels she has as Executrix. *Kelw. 103, 122. 5 Co. 27. 21 H. 7. 24. Bro. Grants 157.*

If Husband and Wife levy a Fine, and he alone declares the Uses, this is good to bind both of them. *2 Co. 157.* But if she disagrees to it, and declares other Uses, *contra. 2 Co. 17.*

And generally all Acts done by the Husband voluntarily and out of Court, which he and his Wife are compellable to do, and is to be done by Deed, or otherwise, shall be deemed both their Acts, and good: As where he is seised in his Wife's Right, or jointly with his Wife, and he assigns Dower to another Woman, or grants a Rent for Equality of Partition, or makes an Attornment, this will bind her tho' done by him alone. *9 Co. 85.*

No Man's Wife, except the Queen, may by any Deed of Gift or Grant, Obligation, Release, or otherwise, dispose of or bind her Husband's Person, Land or Goods, without his Consent; nor will any such Deed made by her alone without her Husband conclude or bind herself. And her saying in the Deed that she is Sole, if she be otherwise, will not amend the Case.

The Wife alone, or other Woman alone.

But a Deed referring to a Fine or Recovery, as to lead the Uses thereof, and the like, may in some Cases be good by the Wife alone. *Co. Lit. 3. Perk. §. 8, 20, 41, 185, 186, 86, 194. Telv. 1. Jenk. Cent. 4. Case 20.*

And tho' there be a solemn Agreement between Man and Wife before the Marriage that she alone shall have the Disposol of Lands or Goods without her Husband, yet this will not do, she shall not have the Disposol of his Lands or Goods without his Agreement. *Co. Lit. 3. Perk. §. 8, 21, 41.*

If Husband and Wife Tenants in Tail of the Gift of the Husband, the Remainder to the Husband in Fee, and the Husband dies, and the Son and Heir of the Wife levies a Fine with Proclamations to the Use of himself and Heirs; the Wife makes a Lease of the Land for twenty-one Years, this is good against the Issue in Tail. *Bridgm. 28, 29.*

If a Woman Tenant in Tail makes a Lease for thirty-one Years, and takes a Husband and has Issue, the Wife dies, and the Husband is Tenant by the Curtesy; one may not avoid the Lease during his Life. *Owen 83.*

But if he surrenders to the Issue, the Issue may avoid the Lease. *Moor 8.*

If Land be given to Husband and Wife, and to the Heirs of their two Bodies, and the Husband dies leaving Issue by his Wife, and the Wife makes a Lease according to the Statute of *32 H. 8.* in this Case it seems the Lease is good to bind the Issue. *Godb. Case 119.*

If Husband and Wife seised of Land in Right of the Wife, levy a Fine to the Use of themselves for their Lives, and after to the Use of the Heirs of the Wife, provided that it shall be lawful for the Husband and Wife at any Time during their Lives to make Leases for twenty-one Years, or three Lives; the Wife being Covert makes a Lease for twenty-one Years, the Lease will be good against the Husband. *Godb. Case 419.*

If a Man seised of Land in Fee enfeoffs divers Persons, upon Condition that they shall give back the Land to him and his Wife in Tail, the Remainder to his right Heirs; they have Issue a Son, the Husband dies, the Son in the Life of the Wife levies a Fine with Proclamations to *A.* the Wife enters, and makes a Lease for three Lives, not warranted by *Stat. 32 H. 8.* the Conusee re-enters, his Entry is lawful; for the Lease being a Discontinuance, is within the *Stat. 11 H. 7. c. 20.* and the Conusee may enter for the Forfeiture. And if a Wife accepts a Fine *Sur Conuſance de droit come ceo, &c.* she being Tenant in Tail, and thereby grant and render the Land for 1000 Years, this is an Alienation within the Statute of *11 H. 7. 3 Co. 51. Dyer 148.*

If a Woman Tenant in Tail of the Gift of her deceased Husband, or any of his Ancestors whilst she is Sole, or after with another Husband makes a Lease, altho' it be within the *Stat. 32 H. 8.* yet it is not good. *3 Co. 51. Stat. 11 H. 7. c. 20.*

A Feme Sole possessed of a Term conveys it over in Trust for her, and being to marry, the Husband is bound not to meddle with it; he may not have it, nor assign it. *March, pl. 141.*

A Feme Sole conveys a Term in Trust, and then marries, the Husband assigns it; the Trust (not the Estate) passes. *March, pl. 141.*

If a Feme Covert grants an Annuity by Deed, it is void.

And if her Husband be seised of Land in her Right, and she grants a Rent-Charge out of it by Deed, it is void.

And so if the Husband knows of it, and agrees to it, if it be done by him also.

And altho' he has been out of the Country, and it is not known whether he be living, but she has managed the Estate a great while, yet if he be alive the Deed is void. *Perk. c. 1. §. 6.*

A Lease made by a Feme Covert is not good unless it be made by Deed; for if it be by Parol, it is void, but if by Deed, it is voidable only. *Cro. Eliz. 497.*

A Woman who has recovered the third Part of her Husband's Land in Dower, may not make a Lease of it till she be in Possession by Execution. *Bro. Sci. Fa. 36.*

A Feme Covert will not be bound by a Deed inrolled, unless she be examined, and so in *London* it will bind her. *Hob. 225.*

A Feme Covert alone and without her Husband cannot make a Feoffment of her own Land, and if she dies, it is void, altho' her Husband agrees to it. *Perk. §. 185, 186.*

If Land be given to Husband and Wife, and to the Heirs of their two Bodies, and the Husband dies leaving Issue by the Wife, and the Wife make a Lease according to the *Stat. 32 H. 8.* this Lease it seems is good to bind the Issue. *Godb. Case 119.*

If a Feme Sole makes a Grant of a Rent out of her Land, and delivers it to a Stranger to take Effect as her Deed, upon certain Conditions performed, her taking a Husband before the Time, or if she had made a Feoffment or Lease, will not hinder, but upon Performance of the Condition the Deed shall take Effect. *Perk. c. 1, 2.* And if she be Covert at the Time of Delivery, and after before the Time of Performance she become Sole, yet is the Deed void. *Idem.*

A Feme Covert alone cannot by any Deed during the Coverture dispose of any of the Lands, Goods or Chattels she has in her own Right, without her Husband; and therefore all Feoffments, Deeds, Gifts and Grants made thereof by her alone, are void. And altho' she says in the Deed that she is Sole, that will not make the Case better. And altho' such Deeds be executed by Livery of Seisin or Attornment, yet they are not good, or of any Force at all. And altho' the Husband be agreeing or privy to it, yet they are not good to bind the Husband or herself. And altho' he be out of the Country vagrant, and it is not known whether he be alive or dead, yet it is not good. *Co. Lit. 112. Dyer 234. Perk. c. 7. 2.*

So of Statutes and Obligations made by her, these are all void, and not binding to him or her. *10 Co. 43. Kekw. 10, 12, 21. 16 H. 7. 5. 1 H. 7. 15. 5 Co. 27.*

And therefore *a fortiori*, she may not dispose of her Husband's own Lands, Goods or Chattels, that he is seised or possessed of in his own Right without her Husband.

But if a Feme Sole Executrix takes a Husband, she, after her Marriage, without and against her Husband's Will, may do any lawful Act for an Executor to do; but if that which is done be a *Devastavit*, it is not good to bind him. *Perk. c. 1, 2.*

If there be a Difference between a Man and a Wife, and by the Mediation of some Friends some of his Land be assigned to her by his Assent, yet she may not dispose of it without him. *Perk. §. 7.*

If the Wife alone gives or grants the Husband's Goods, this will be good till the Husband disagrees to it; but if it be by Deed, the Deed will be void; and yet by the Husband's Agreement it may be made good for ever. *Bro. Dower 504. Plow. 294.*

If one devises that his Executor shall sell his Land, and makes his Wife Executrix; she alone, or with another Husband, may sell it. *Kelw. 10.*

A Feme Covert that is an Executrix may do any Thing according to the Office and Duty of an Executor as another may do, save only give or sell Goods or Chattels; this she may not do; and she may not assent to a Legacy without him. *5 Co. 27. 2 H. 7. 15. Perk. §. 2.*

A Man may not after his Marriage make a Feoffment to his Wife; but after a Contract made, and his having had carnal Knowledge of her before Marriage, such a Feoffment is good. *Perk. §. 194, 195.*

A Man can make no Estate to his Wife by Deed, he may not covenant with her to stand seised to her Use, for they are but one Person in Law; but he may covenant with another so to do: Or he may make a Feoffment or other Conveyance to her Use, or he may surrender a Copyhold to her Use. *Co. Lit. 112. 4 Co. 29.*

And he may devise to his Wife as to another. *Co. Lit. 112.*

A Feme Covert cannot take any Thing of the Gift of her Husband, but she may purchase Lands of others without his Assent; but if he disagrees, the same is devested; and if he agrees to it, yet after his Death she may waive it until after his Death she has agreed to it. *Co. Lit. 3.*

A Custom that a Wife may give Lands to her Husband is void. *Godb. Case 178.*

Where one of many that make a Deed of Feoffment has the Land, and the Rest have nothing in it, yet it is a good Deed to pass the Land. *Bro. Feoffments 4. Perk. §. 222.*

A Jointenant may lease his Moiety for Years, to commence after his own or after his Companion's Death. *Lane 14.*

An Infant may not make a Gift or Grant by Deed, or do any Thing else by Deed that will be good and binding to him or others, but in some special Cases: For if he makes such a Deed that shall take Effect by the Delivery of the Deed only, as where he shall grant a Rent-charge out of his Land, or make a Feoffment with a Letter of Attorney to give Livery of Seisin, or by Deed give or sell any of his Goods, and the Buyer takes the Thing, these Deeds are void *ab initio*.

But if the Deed takes Effect by the Delivery of the Hand of the Infant, as where by Deed he makes a Feoffment, and gives Livery of Seisin by his own Hand; or sells Goods and delivers them with his own Hand; these are voidable by the Infant himself, or him that shall have his Right, as Privies in Blood or Estate, &c. *Moor 105.*

But what he does by Fine or Recovery, or by way of Statute or Recognizance, or Inrolment of a Deed, he may avoid this during his Minority; it is not to be avoided afterwards. *17 Aff. 17. Latch 151. F. N. B. 104. 9 H. 7. 27.*

And if he dies during his Nonage, his Heir cannot avoid it. *26 H. 8. 2. 7 H. 4. 3. Perk. §. 12, 13, 19. Popb. 152. Moor 146. Co. Lit. 171.*

If an Infant makes an Exchange or Partition by Deed, this it seems is only voidable, and he may affirm it at his full Age. *F. N. B. 62. 18 E. 4. 2. 18 H. 4. 11.*

If he makes a Feoffment in Fee, with a Warrant to give Livery of Seisin, and the Attorney does it accordingly; this is void, and the Feoffee when he enters is a Disseisor, and so the Infant may sue him as such, or he may enter upon him: But if the Infant gives Livery with his own Hands, the Estate is only voidable, and the Feoffee may not be charged as a Disseisor or Trespasser. *5 Co. 119. 4 Co. 125. 3 Co. 422. Dyer 10, 36, 109.*

If a Wife Inheretrix has a Husband within Age, and he aliens her Land during his Nonage, and dies, the Wife may enter. *Co. Lit. 336.*

By Husband and Wife to one another.

1. Husband to Wife.

2. Wife to Husband.

Grant, &c. by several tho' one only has Right. Jointenant.

Grant, &c. by an Infant.

A Lease at Will by an Infant without Rent is void. *Cro. Car.* 220.

And it is a Rule, That all Gifts and Grants by Deed made by an Infant, that take not Effect by the Livery of the Hand, are void.

And all Gifts and Grants by Deed made by an Infant, that take Effect by Livery of the Hand, are voidable by himself, his Heirs, and those to whom his Estate shall come. *Co. Lit.* 171. *Perk.* §. 12. 1 *Brownl.* 120. 21 *H.* 6. 31.

But if an Infant be Executor, he may do any lawful Act as Executor; and therefore if he makes a Release for a Debt he hath duly received, this is a good Deed; but if he shall make a Deed of Release for the Debt he hath not received, this Deed will be void; but if he does receive the Money, it is a good Deed of Release against him. *Cro. Eliz.* 532. *Co. Lit.* 172. *Bro. Executor* 114. *Dyer* 104.

But for the Person to take Advantage of a voidable Deed or Estate made by an Infant, see 8 *Co.* 43.

And it is a Rule, that where an Infant makes a voidable Feoffment, there his Privies in Blood, as the Heir general or special, or general and special both, may take Advantage of the Infancy of the Ancestor, and enter: But Privies in Law, as the Lord by Escheat, and the like, may not take Advantage of such Infancy; and where an Infant dies without Heir, his Feoffment is unavoidable. 9 *Co.* 42. 4 *Co.* 125.

If a Tenant in Tail makes a Lease not warranted by the Statute of 32 *H.* 8. and dies without Issue, and the Reversion descend to his general Heir, being an Infant, he may avoid it. But an Heir in Tail then within Age, when he comes of full Age, by Acceptance of the Rent, may make the Lease of the Tenant in Tail good.

And yet the King as to his Right by Wardship might have avoided it for his Time. 7 *Co.* 3.

And if Tenant in Tail makes a Lease for thirty or forty Years, and dies without Issue, his Wife young with Child of a Son, and the Donor enters and avoids the Lease, and then the Son is born, the Lessee enters, and the Son at his full Age accepts the Rent; by this he has made good the Lease that was before only avoidable. 7 *Co.* 3.

If an Infant Tenant in Tail makes a Lease for Years within the Statute of 32 *H.* 8. this is not good altho' the Statute be general.

If an Infant Copyholder makes a Lease of his Copyhold Land, it is no Forfeiture because it is void; but if he accepts the Rent reserved upon it at full Age, it will be a Forfeiture. *Latch* 199.

A Grant of a Copyhold by an Infant is good if the Custom will warrant it; and the Presentation to a Church by an Infant is good for Fear of Lapse; but it seems the Infant must be of the Age of fourteen Years or more to present to a Church. *Perk.* c. 1. 4 *Co.* 23. 8 *Co.* 63. *Noy* 41.

An Infant also may make a Lease for Years to try a Title of Lands. *Noy* 130.

If an Infant seised of Lands in Fee makes a Lease for Years of it, rendring Rent; this is only voidable, and by his Acceptance of the Rent when he is of Age will be affirmed and made good.

But if he make a Lease of it, rendring no Rent, the Lease is void. 9 *H.* 7. 24. *Plowd.* 545. 18 *E.* 4. 2. 3 *Co.* 65.

If an Infant grants a Rent, Advowson or Common by Deed, this Deed will be void, and he shall have the same Remedy against the Grantee for his taking a Distress for the Rent, or any other Use made of the Grant, as if no such Grant had been. *Co. Lit.* 172.

An Infant after he is of Years of Discretion may contract, and may make a single Bill on Contract to pay Money for his necessary Physick, Food, Apparel or Schooling, or Instruction in any Thing that may Profit him, or the Nursing of his Child; and this Deed will bind him as much as if he was of full Age, and what shall be said to be necessary in these Cases shall be tried by the Judges, and not by a Jury. *Co. Lit.* 172. a.

But if it be a Writing with a Penalty, it will not bind him, nor will his Bill to another Man that has paid such Money for him to pay it again bind an Infant. *Co. Lit.* 172. *Poph.* 152. 9 *Co.* 87. *Kelw.* 19. *Latch* 151. *Cro. Car.* 560. 12 *Co.* 122, 123.

The Grants of some Persons will not be good in Perpetuity without the Assent of others, by way of Grants, Confirmations or otherwise; so the Grant of a Dean without the Chapter, of the Mayor without the Commonalty, the Master of a College without his Fellows, and the like, without a general Consent of the whole Body, is

By a Corporation.

is void: But a Body Corporate may by Deed give or grant, do or convey together by joint Consent, as a single Person may do; and so they may convey or charge any of the Lands, or give or dispose any of the Goods or Chattels belonging to their Corporation. *Perk. §. 31, 32, 33.*

And if any of the Members of any such Corporation be seised of any Land in his own Right, and in his natural Capacity he may make a Feoffment, Grant or Lease of, or a Charge upon this Land, as another Man may do, and so he may dispose of his Goods and Chattels. *Perk. §. 224, 225, 51, 209. Fitz. Facts and Feoffments 29. Godb. 300.*

A Corporation may grant their Land by way of Bargain and Sale. *3 Leon. 159.*

But generally, neither the Head alone, nor any one or more of the Members of a Corporation Aggregate of many alone, as a Dean without the Chapter, or Chapter without the Dean, may make a Deed of Feoffment or other Grant of any of the Lands belonging to the Corporation; but all of them together may make a Deed of Feoffment or Lease of any of the Lands belonging to the Corporation. *Perk. §. 224, 225. Fitz. Facts and Feoffments 29.*

If a Disseisor, or the Feoffee of a Disseisor, or any other who has but a tortious and defeasible Title, subject to an Action or Entry, shall hold a Copyhold Court, and makes Copyhold Estates, such voluntary Grants made by him will not bind him who has Right, when he shall recontinue the Manor by Action or Entry: And yet if one who has such a defeasible Estate shall in such a Manor admit one upon a Surrender, or upon a Descent, such Admittances, according to the Custom, are good. *4 Co. 23. Hob. 215. Popb. 141.*

A Tenant at Will Copyholder cannot by Custom make a Lease for Life by Licence of the Lord; and there cannot be any such Custom for a Lease for Life as there is for a Lease for Years. *Godb. 6, 236.*

A Lease of a Copyhold that has been demised according to the Custom, rendring the accustomed Rent, is a Lease within the Stat. 32 H. 8. *Moor 759. 6 Co. 37.*

Copyholders generally pass their Copyhold Lands by Copy of Court-Roll, and not by Deed; but if by any special Custom of the Place a Copyholder may make a Deed, as in some Cases he may make a Lease for Years, there he that holds this Land may by Deed grant it as the Custom is; for all Things are to be done by the Copyholder, according to the Custom of the Place; and he is to do nothing against the Custom, nor without Warrant of it.

If a Copyholder makes such a Lease for Years as is a Forfeiture, yet the Lease is good as to the Parties, and the Lessee may have an *Ejectione firmæ* upon it. *Ow. 18.*

A Lease made by a Copyholder by Licence of the Lord, is a good Lease; and an Ejectment may be brought upon it. *Cro. El. 551.*

Any Person who has a lawful Estate in a Manor, be it in Fee, in Tail, in Dower, by the Curtesy for Life or Years; or as Guardian, or Tenant by Statute, *Elegit*, or at Will, if a Copyhold escheats or comes to their Hands during the Time they have it, may grant the same, rendring the Rent, Customs and Services; and this will bind the Lord who has the Inheritance or Freehold of the Manor; and if a Disseisor, or Feoffee of a Disseisor, or other who has a tortious or defeasible Estate or Interest, subject to the Action or Entry of another, keeps a Court, and makes any voluntary Grant upon Escheat or Forfeiture of a Copyhold, this Grant will not bind him that has Right, when he has recontinued the Manor by Action or Entry; but Admittances of an Heir, or upon a Surrender, are good if made within the Custom. *4 Co. 23.*

A Person born blind, deaf and dumb, is disabled by Law to make a good Deed; and therefore such a Man's Deed is void: But not if he be deaf, dumb or blind, and hath so much Understanding that he can make his Mind known by Signs. *Perk. §. 6, 19, 23, 24.*

And such a Person as before may make a voluntary Grant upon an Escheat, or upon a Forfeiture, or otherwise, according to the Custom of the Manor; and this will be good. *4 Co. 23.*

A Gift or Grant by or to a deformed Person, having human Shape, or to a Leper, or such like Person, of Lands or Goods, may be as good as by or to any other Person whatsoever. *Co. Lit. 2.*

And a Leper removed by the King's Writ from the Society of Men, may notwithstanding give or take by Deed as another Man may do. *Co. Lit. 2.*

Hermaphro-
dite.

By Persons
attainted of
Treason or
Felony.

By outlawed
Persons.

By an ex-
communicate
Person.

By a Man
that is drunk.

By a Man
that is of Sane
Memory.
Ideot.

Lunatick.

And an Hermaphrodite, according to the most prevailing Sex, may give or grant, have and take by Deed, as any Man may do. *Co. Lit. 2.*

A Person who has committed Treason or Felony may give or grant or charge his Lands by Deed, as another Man may do; and so he may after he is attainted for the same Offence by Outlawry, Verdict or Confession; but this shall not hinder the Forfeiture due to the King or to the Lord.

And in this Case, such a Person before or after his Attainder may give or grant his Goods or Chattels by or without Deed to relieve himself in Prison: And this, for so much, will be good and binding to the Lord and King also; and for all the rest, it is good against all Persons whatsoever, except the Lord and King. *Co. Lit. 2, 42, 43. Perk. §. 26, 27, 28, 29, 182.*

If an outlawed Person, or an Heir in Ward, makes a Deed of Feoffment, or other Grant of his Land, this will be good against all Men but the King and the Lord. *Perk. §. 219. Staun. Prærog. 40.*

A Person outlawed in any Civil Action may give, or grant or charge, have and take Lands or Goods by Deed, as any other Man may do; and this will be good against him and all others. But this notwithstanding shall not bar or exclude the King or other Persons from the Benefit of Forfeiture which is given and due to them by the Outlawry. And altho' the King seises and takes into his Hands the Profits of his Land (as he may) upon the Outlawry, yet the Person outlawed may make what Disposol he pleases of the Land itself, and this will bind himself and all others, save the King, for the Profits of the Land during the Life of the outlawed Person only; and for his Goods and Chattels he may dispose of them until the King or his Patentee seises them. *Perk. §. 26, 48. Owen 116. Co. Lit. 2.*

An excommunicate Person may give, or grant or charge his Lands or Goods, or have and take Lands or Goods by the Gift or Grant of another Man, as any other Person whatsoever may do: And such Gifts and Grants will be good against and to the Parties that give or take by the Deeds, and against all others whatsoever. *Perk. §. 182, 185.*

A Man that is drunk may give or grant, do, have and take by Deed, as any other Man may do; or as he himself when he is fresh and sober may do; and his Deed will be as binding to him, and all others, made at this Time, as at any other Time. *Wing. Max. 570.*

To the making of a good Deed it is requisite (amongst other Things) that he who makes it, when he does it, has his Reason and Understanding: And therefore if a Man void of Reason, and that wants common Understanding, and that is either born so, and has been so from his Birth, who is called an *Ideot a Nativitate*, or one that is born with Understanding, and becomes accidentally so, such as we call a Lunatick or mad Person, be he so always, or at certain Seasons and by Fits, that has (as we say) his *Lucida intervalla*, if any such Person, whilst he is in this Case, shall do any Thing by Fine or Recovery, this will be good to bind him and all others. And if he makes any Deed, and thereby gives, or grants or charges his Land, or gives or sells his Goods; this Deed will be good and binding to himself, for it is a Rule in Law, *Nemo admittendus est inhabilitare seipsum*; but it shall not bind his Heirs, Executors, and such others as should have had the Thing given or granted after his Death, had not that Deed been made; but they may avoid it: So that the Law in this is, That all Acts done by one *Non sane memorie* are good against himself, but voidable by his Heirs, Executors, and such as are to have his Estate after his Death. And yet if he be such a one as has his *Lucida intervalla*, and the Deed in Question is made by him whilst he is in that Case; this is a good Deed, and will be binding to him and all others. *4 Co. 123. Co. Lit. 123. F. N. B. 202. 7 H. 4. 5. 22. Perk. §. 24. Hob. 96, 155.*

As if a Man of sound Mind and good Memory makes a Feoffment of his Land with a Letter of Attorney, and before Livery is made he becomes *Paralytick*, and he by Signs shews his Mind to be, to have Livery made, and so it is made; it is said, this is a good Feoffment. *Perk. §. 22.*

But if a Letter of Attorney to make Livery be made of Land by such a Man as is *Non sane memorie*, and after he comes to his Memory, and then Livery of Seisin is made by Virtue of the Letter of Attorney, without any other Assent of the Feoffor, and the Feoffor dies, in this Case the Heir may enter upon the Feoffee and avoid the Feoffment, but he himself in his Life-time might not have done it. *Perk. §. 21, 23.*

An Alien Enemy, that is, one born under another Prince in Enmity with the King, By an Alien can neither give nor take by Deed amongst us, for he is to have no Benefit of our Enemy, Lands. And one born in another Country, under the Obedience of another Prince in Amity with our King, who is amongst us accounted as an Alien-amy, but is no Denizen or natural Subject of the King's, such a one may by Deed give or grant such a Thing as he has a Capacity to have and hold amongst us; and any such Thing may be given or granted to him. But such an Alien-amy is not capable of holding Land in Fee or for Life: If therefore any such Estate be conveyed to him, the King will have it from him. *Co. Lit. 2.*

And altho' he be made Denizen by the King's Letters Patent, yet he is then in no better Case for this; but if he be naturalized by Act of Parliament, then may he give or take Lands by Deed, as another Man may do. And if he be a Merchant, he may take and enjoy a House for this Purpose so long as he useth the Trade. And altho' he be no Denizen, yet may he have and enjoy Goods or Chattels: And therefore of such a Thing any Gift or Grant by or to him will be as good as such Gifts or Grants by or to any other Person. *7 Co. 16. Co. Lit. 2, 31. Dyer 224, 283. Godb. 275. Perk. §. 48. Owen 45. Brownl. 41. Goldsb. 29. Bendl. 10.*

The Gifts and Grants of and to dead Persons in Law, such as are Monks, Friars, By Persons Canons professed, and the like Religious Persons, are utterly void in Law: And dead in Law. therefore if *J. S.* be seised of an Acre of Land in Fee, and he joins with such a Person in the Grant of a Rent out of it; this will be void as to the Person disabled, the dead Person, and good against *J. S.* only, and it shall be said to be his Grant. *Perk. §. 4, 5, 6, 48. Co. Lit. 3.*

A Bastard, who (by our Law) is one that is born of a Woman not married to By a Bastard. any Man, so that his Father is not known; such a one, altho' he can neither be Heir to another, nor have an Heir to himself; yet after he hath once gotten a Name by common Reputation, either from him that is suspected to beget him, from his Mother, or otherwise, he may by that Name give and take Lands or Goods by Deed, as any other Man whatsoever may do; and such Gifts and Grants are good. *Perk. §. 26, 48, 49. Co. Lit. 2. 3 Leon. 69. Noy 35.*

One of many Executors or Administrators may alone, without his Companions, by By Executors Deed or otherwise dispose of the Goods and Chattels of the Deceased, and this shall or Admini- bind all the rest of them. So that if two have a Term, and one grants all that be- strators. longs to him, by this all is granted away. Executors or Administrators may make any Deed of Gift or Grant of what is under their Power in that Capacity; as the deceased Person himself to whom they are Executors or Administrators might have done. *Dyer 23. Kelw. 22.*

If an Administration be granted *Durante minore etate* of *J. S.* to *J. D.* this *J. D.* in this Case, especially if the Administration be *Ad opus, usum & commodum Executoris*, this *J. D.* in this Case may not assign a Term, or an *Interesse termini*: But if he be such an Administrator, and made so without any Restraint or Limitation, in this Case he may assign such an Interest at the least during the Minority of the Executor. *6 Co. 63.*

One Tenant in Common, or a Coparcener, may by his Deed of Feoffment pass By Jointe- and convey his Part of the Land so held to his Companion, and this will be good; nants, Tenants but one Jointenant may not do so: And therefore a Feoffment by one, and to ano- in Common, ther Jointenant, is not good; but by a Release, or some other way, the Thing is or Copar- to be done. And Coparceners may both enfeoff and release one to another. *Co. Lit. 48, 49. Perk. §. 197.*

And a Feoffment in some Cases between them may enure to some other Purpose. *Fitz. Feits and Feoffments 26.*

And if one Jointenant covenants to stand seised of the Moiety of his Companion after his Death to the Use of, &c. no Use will arise by this, for it is but a bare Possibility. *Noy 14. Dyer 150. 20 H. 7. 26.*

And Jointenants, Tenants in Common, and Coparceners in Fee-simple, may make what Estate they please therein of their Part to a Stranger, to bind them and their Companion also. *F. N. B. 62. Perk. §. 220.*

And yet one Jointenant may make a Lease for Years of his Moiety to his Companion, as some say, as well as Tenants in Common and Coparceners may do. *Owen 102, 103. F. N. B. 62.*

And

And one Jointenant may make a Lease for Years, to commence *in presenti* or *in futuro* of his Part: As if two Jointenants be for Life, and one of them makes a Lease to begin after his Death, and dies; this is a good Lease, and will bind his Companion. *Noy 158. 3 Bulst. 131, 132.*

If *A.* and *B.* be Jointenants for Life, and *A.* agrees with *J. S.* that he shall have the Moiety of the Land from the Death of *B.* for sixty Years, if *A.* so long live; and then grants the other Moiety to *J. S.* from the Death of *A.* for sixty Years, if *B.* lives so long; and *B.* survives *A.* in this Case the Lease will be good against *A.* for the one, but not for the other Moiety; for a Jointenant may make a Lease for Years of his own Part, to begin after his Death, or the Death of his Companion, and this Lease will bind his Companion; and if *A.* happens to survive *B.* it will be a good Lease for the other Moiety also. *Cro. Jac. 91. Noy 14.*

If Father and Son be Jointenants for one hundred Years, and the Son takes a Lease of his Father for fifteen Years, to begin, &c. by this the Son is concluded to claim all or Part of the Term by Survivorship. *2 Leon. 159.*

If two Jointenants be seised of an Estate in Fee-simple, and one of them grants a Rent-charge to a Stranger out of his Part; this Grant will be good during his Life, but after his Death the Survivor may avoid it.

So if he charge the Land with Common of Pasture, Turbary, Estovers, or with a Corrody, or with a Way over Land, or the like. *Co. Lit. 184.*

But if one of them only makes a Lease for Years, this will be good. And yet if two Jointenants be, and one of them grants to *J. S.* that if he pays him 20*l.* at Michaelmas he shall have his Moiety, and he dies before Michaelmas, and after the Money is paid; in this Case he shall not have the Land, for the Condition here is to precede the Estate. *Perk. §. 103. Bridgm. 43.*

A. and *B.* a Woman are Jointenants for Life, the Woman takes a Husband, the Husband and Wife by Indenture lease their Moiety for Years; this Lease may not be avoided by the other Jointenants, but it may be avoided by the Wife if she over-lives the Husband; but against the Jointenant it will remain good after the Death of the Wife. *Bridgm. 44, 45.*

If two Jointenants be of a Plough-land, and one of them grants to a Stranger Common of Pasture for Beasts without Number out of and upon the Land so held; this is not good to bind his Companion after his Death, nor perhaps whilst he lives. *Perk. §. 103.*

If two Jointenants be for Lives, and one of them leases his Part, rendring Rent, and dies; in this Case the Term shall continue against the Survivor, but the Rent is gone. *Dyer 187.*

And if two Jointenants be for Life, and one of them makes a Lease for Years, to begin after his Death; this is good to bind his Companion: So for any Lease for Years, to begin at a Day to come; but he may not make any Contract for his Companion's Part. *Cro. Jac. 91, 92.*

If one of two Jointenants makes a Deed of Feoffment of all the Land; this will be good for a Moiety against his Companion and all others. And so of a Lease for Years. And if he makes it for all the Land, it will be good against himself, and against all others but his Companion, for his Part also. *Perk. §. 220.*

If two Jointenants be for Life, and one of them makes a Lease for Years, if he and his Companion live so long, and the other surrenders his Estate, and then takes a new Estate from him in Reversion, and the Lessor dies; by this the Lease is determined, and shall not bind the Survivor. *3 Bulst. 134.*

If one Jointenant for Life makes a Lease for Years in Possession, and dies; this Lease is not at an end, but shall continue. *Popb. 97.*

If two Jointenants be in Fee, and one grants a Rent-charge in Fee, and after releases to the other, now the Grant of the Rent is good, and the other Jointenant shall hold it charged.

If Land be given to two, and the Survivor of them, neither of them alone whilst they be both alive can charge or give this Remainder. *Whitlock's Case, M. 3 Jac. B. R.*

If two Jointenants be for Life, and one of them makes a Lease for sixty Years, if he and his Companion live so long; after he surrenders his Moiety, and takes back an Estate, and dies: In this Case the Lease will determine by the Death of him or of his

his Companion, and will not be good whilst his Companion lives; and it is all one where the Limitation is upon the Lives of the Lessor or of Strangers; and it is determined by the Death of him that made it: For it continues no longer than the Jointure, and so should have been, had there been no Severance of the Jointure by Surrender, &c. *Cro. Jac.* 377.

If a Feme Sole and *J. S.* be Jointenants for Life, and she marries *B.* and *B.* and his Wife lease to *C.* for sixty Years, rendring Rent, if the Wife and *J. S.* live so long, and the Wife dies; now this Lease is good against the Survivor, but the Rent seems to be determined. *Smalman and Agbourn, B. R.*

If *A.* and *B.* be Jointenants in Fee-simple, and *A.* makes a Lease to a Stranger for ninety-nine Years, and then *B.* surrenders, or sues out and makes Partition, and then *A.* dies; yet the Lessee shall retain the Part of *A.* during the Life of *B.* and if he survives, then the Lessee shall retain. But by the Death of *A.* the Lease is become void, for the Lessee has but a Possibility to have it for the Life of *B.* which is now destroyed by the Severance of the Jointure. *Noy* 157, 158.

If two Jointenants be of a Term, and one grants Parcel of it to a Stranger, by this the Jointure of the Whole is severed. *Cro. Car.* 33.

If two Jointenants be of a Reversion, and one of them grants the Whole; this will be void for a Moiety. *Perk.* §. 8.

If two Jointenants be for Life, and one of them makes a Lease for Years of his Part, to begin presently, or at a Day to come; this is good against the Survivor tho' the Lessee dies before Entry, or enters not till after the Lessor's Death. *Co. Lit.* 184, 318. *Plow.* 203. *Goldsb.* 187.

If two Jointenants join in a Lease to two Strangers, and after they make Partition, and then one of them dies, yet the Term remains good for the Whole. *Noy* 157, 158.

M. M. and *E. W.* being Jointenants for Life, *M. M.* grants the Moiety of the Land which she holds in Jointure with *E.* for sixty Years, if she the said *M.* shall so long live; and then grants the other Moiety from and after the Death of *M.* for sixty Years, if the said *E.* shall so long live; in this Case the Lease is not good for any Part; and yet if *M.* shall survive *E.* it may be good for her Part. *Cro. Jac.* 91.

If two Jointenants be for Life, and one of them by Assent of him in Reversion occupies the Land alone, and takes the Profits to his own Use; this will amount to a Lease at Will, which one Jointenant may make to his Companion; but if one of them say, I will not occupy it, this is nothing. *Cro. Car.* 314.

If a Feme Covert and another be Jointenants for Years, and the Husband grants a Rent out of the Land, and dies, and the Wife dies; this Grant is void, and the Survivor shall hold it discharged. *Plow.* 418.

Jointenants may give their Parts one to another by Release, Attornment, Livery or Ceremony, and such Release may be without the Word *Heirs* in the Deed. *Co. Lit.* 194.

All the Jointenants together may grant or charge their Land by Deed how and in what Manner they please; and they may altogether agree and make Partition by Deed: And if it be of a Lease for Years only, they may do it without Deed. *Co. Lit.* 186.

If a Jointenant makes a Lease to begin at a Day to come, and he that makes the Lease dies before the Day comes, yet is the Lease good to bind the Companion. *Co. Lit.* 318. *Plow.* 203.

A Lease made for Years by one of two Jointenants for Life, and he dies, is good against his Companion. *Cro. Jac.* 317. *Dyer* 187.

Two Jointenants under Age make a Feoffment, and one of them dies; here the Survivor may have the Land, and by Entry shall avoid the Feoffment. *Lit.* §. 633, 634. *Co. Lit.* 336.

Husband and Wife are Jointenants for one hundred Years, and the Husband alone by his Deed makes a Lease for twenty Years, to begin after his Death; this is good, for a Jointenant for Years may grant away his Moiety, to commence after his own or after his Companion's Death. *Lane* 14. *Moor* 395.

Husband and Wife and a third Person purchase jointly, the Husband aliens the Whole, he and his Wife die; in this Case the third Person will have all, for this will not prejudice him, the Grant not being good. *Hob.* 3.

7. S. and a Feme Sole are Jointenants, the Wife takes a Husband, the Husband and Wife join in an Indenture of Lease for a Moiety of the Land for eighty Years to J. D. if the Wife and her Companion shall live so long, the Wife dies leaving the Husband; this is a good Lease, and may not be avoided by the surviving Jointenant. 3 Bulst. 271, 273.

Husband and Wife in her Right, and a third Person, are Jointenants for the Lives of the Wife, and the third Person; the Husband and Wife by Indenture let a Moiety for twenty-one Years, the Wife dies; in this Case the Lease shall bind the Survivor as a Lease made by her, which after the Coverture will be good till she or one that claims in Privy under her shall avoid it by Entry. Cro. Jac. 417. Dyer 187. 7 E. 4. 7.

If Husband and Wife and a third Person be Jointenants, and the third Person release to the Husband and Wife, this is good, and gives all the Estate of the third Person to the Husband; or he may release to the Wife alone, and that would give all the Estate to the Wife alone. Co. Lit. 185.

If a Man and Woman be Jointenants for Life, and the Woman marries, and she and her Husband make a Lease for Years of their Moiety, rendring Rent, and then the Woman dies; in this Case the surviving Jointenant shall not avoid this Lease, but the Wife may avoid it if she survive her Husband; and if she had been Sole when she had made it, it had been good for her Life and the Life of the other Jointenant. Bridgm. 42, 43.

A lets Land to two, *Habendum eis ad terminum vite eorum conjunctim, & alterius diutius vivent'*; & *assignatis suis, si primus eorum decedere contingat, durante vita ipsius qui superstes & non aliter*; in this Case they are Jointenants, and may make Partition; but one of them can grant but a Moiety. Dyer 41.

Two Tenants in Common make a Lease for Years, rendring Rent, this will be good; and if either of them dies, the Executor of him that is dead, and the Survivor, may sue for the Rent together or asunder, as they please. Godb. Case 104.

A Tenant in Common may make any Disposol of his own Part at his Pleasure, and another Tenant in Common joined with him cannot by any Deed he can make to a Stranger prejudice him therein, as he may in the taking up the Profits of the Land. Co. Lit. 197. 5 Co. 98.

If two Tenants in Common join together in the Grant of a Rent-charge of 20 s. out of their Land; this is good, and shall be and enure as several Grants. 5 Co. 8.

They may make a Feoffment, and give Livery of Seisin of the Land one to another, or make Leases one to another of the Land which they hold in Common. Co. Lit. 194, 318. Perk. §. 193.

One Coparcener may make a Feoffment and Livery of Seisin of his Part of the Land to his Companion, or he may make a Lease to him, or he may release to him. Co. Lit. 194, 200, 318. Perk. §. 193.

If there be two Coparceners of a House, and one of them enters generally, and makes a Lease for Life by the Name of *All that his House*, &c. the whole House is granted, but the Deed is good only for a Moiety. Cro. Car. 361, 615.

A Wife is Lessee for Life, the Reversion to two Coparceners, and she and one of the Coparceners make a Lease for Years of the Whole, rendring 10 l. a Year Rent to the Woman for her Life, and after 10 l. to the Coparcener; in this Case it seems if the Tenant for Life dies, the Lease is good but for a Moiety of the Parcener that doth let, but the Rent remains for all. Cro. Car. 284, 285.

If two Coparceners be of an Advowson, and the one presents, and then she grants the next Presentation; this may be good, but it must be understood the next she has to grant, for the very next her Companion will have. Dyer 35.

If one Coparcener of a Seigniority grants his Part to a Stranger, it is good. Perk. §. 73.

If two Coparceners have twenty Acres of Land of equal Value between them in Tail, and they have been usually let, and they make Partition, so as each of them has ten Acres; in this Case they make Leases of their several Parts, reserving half the Rent, within the Statute of 32 H. 8. 5 Co. 5. Sed Q. for Co. Lit. 14. is against it.

If a Coparcener be married, and for Equality of Partition the Husband and Wife grant a Rent to the Feme Covert out of the Part of the Wife; this being equal shall bind the Wife for ever, and neither she nor her Heirs shall avoid it. 29 Aff. 23. 17 E. 3. 10.

If two Coparceners make a Lease, reserving Rent, they shall have the Rent in Common, as they have the Reversion.

If Coparceners have an Advowson, they may grant it away; or they may grant the next Avoidance, or they may present by Turns. *Co. Lit.* 164.

The Husband purchases to him and his Wife in Fee, and he alone makes a Lease of the Land for sixty Years; this seems a good Lease by *Stat.* 32 H. 8. *Cro. El.* 15.

And yet this had been void by the Common Law as to the Wife. 2 *Co.* 77. *Dy.* 91.

A Disseisor cannot make a Feoffment or Grant to the Dissee of the Land whereof the Disseisin is; for by this the Dissee will be remitted. Nor may he grant his Right to a Stranger; but by Release, or by some other Way or Means, he may transfer his Interest. But if he shall grant all his Right to a Stranger, such a Grant is void. *Perk.* §. 85, 86, 197, 222. *Co. Lit.* 48, 49.

And yet if he makes a Deed of Feoffment, or other Grant of the Land, whereof the Disseisin is to a Stranger; this will be good against all but the Dissee himself. *Perk.* §. 210.

But a Dissee may make a Deed of Feoffment, and a Letter of Attorney, to enter and give Livery, and this will be good. *Co. Lit.* 48, 49. *F. N. B.* 62. *Perk.* §. 222.

So if a Stranger enters in the Name of him that is disseised, and by his Commandment makes a Feoffment in the Name of the Dissee, and by his Consent; and the Dissee gives Warrant of Attorney for him to enter and make Livery for him, and he does so; this is good, and shall bind him. *Perk.* §. 157.

If a Disseisor makes a Charter of Feoffment to A. with a Letter of Attorney, and before Livery the Dissee confirms the Estate of A. or confirms the Deed to A. this is clearly void tho' Livery be made afterwards. *Co. Lit.* 301.

If the Heir Apparent of the Dissee disseise the Disseisor, and grant a Rent-charge, and then the Dissee dies; in this Case the Grantor will hold it discharged. So if the Father disseise the Grandfather, and grant a Rent-charge, and dies, if the Grandfather dies, the Son will avoid it, for he is remitted. *Co. Lit.* 349.

If he in Reversion disseise his Tenant for Life, and dies seised, the intire Estate goes to the Heir, but the Right remains still in the Lessee. And if the Lessor in this Case grants the Reversion, this Grant is void; for here is no Reversion to grant. *Hob.* 323.

If a Disseisor enfeoffs a Stranger by Deed, and says it is with the Assent of the Dissee, and it is so; yet this is not good, for he cannot depart with his Right without Deed, and by way of Extinguishment: But if the Dissee shall enter, and then he and the Disseisor shall join in a Feoffment by Deed with Words of Confirmation, then it shall be said to be the Feoffment of one, and the Confirmation of the other of them. And if they join in such a Deed before the Entry of the Dissee, and the Disseisor makes Livery, it shall be the Feoffment of the Disseisor, and Confirmation of the Dissee. *Perk.* §. 157.

If a Dissee makes a Lease for Years, and delivers it as an Escrow to a Stranger, commanding him to enter into the Land, and then to deliver it as his Deed, who does so; this is a good Lease, for it is not his Lease till the second Delivery, at which Time he has good Right and Power to let it. *Cro. Car.* 446, 457.

A Dissee may not make a Lease of the Land whereof the Disseisin is until he has made his Entry, and recovered the Possession of the Land again. *Plow.* 133.

And therefore if one be disseised of his Land, and before his Entry or Recovery of the Land he grants or gives the same, or his Right therein, to a Stranger; or grants a Rent-charge out of it to a Stranger: These Grants are void; but by a Fine or Release he may make a Bar or Extinguishment. *Cro. Car.* 315, 368. *Co. Lit.* 214. *Perk.* §. 63, 66.

A Person not in Being at the Time of the Gift or Grant made, makes a Deed of Gift or Grant, this cannot be good: As *Primogenit'*, the first-born of J. S. and J. S. has no Child, or the like, he can neither be a good Grantor nor Grantee: And altho' such a one be afterwards born, it will not amend the Case. But a Remainder so limited may be good, if any such Person shall happen to be when the Remainder falls. *Owen* 40.

A. makes a Lease at Will to three, one of them dies; the Lessor reciting his Death, and that the Indenture is surrendered and cancelled, makes an Estate to the Survivors, *Habendum* to them *& hæredibus*, without any Letter of Attorney to make Livery; this is void. *Dyer* 269. 5 *Co.* 10.

If a Grant of an Office be made for Life, the Remainder to a Successor, it is void as to the Successor. *Moor* 8.

By Lessor or
Lessee.

The Lessor cannot make a Feoffment to his Lessee for Life, Years, or at Will; for one may not give a Possession to one that has it before; and yet such a Feoffment may enure as a Confirmation. *Fitz. Feits and Feoffments* 26. *Perk.* §. 194, 197.

But the Lessor and Lessee joining together may make what Estate they will of the Land. *10 Co.* 49.

If a Lessee for Life or Years makes a Lease for longer Time than he has, as if a Lessee for Years makes a Lease for Life, the Leases are good for so long Time as the Lessor has it; as the Lease of Years in Case of a Lease for Life will be good for the Life if the Term of Years last so long; but if he gives Livery upon it (as he must to make it a good Estate for Life) it will be dangerous to him, for hereby he will commit a Forfeiture. *7 Co.* 12. *Plow.* 524.

So if he charges the Land for longer Time, it will be good for the Time of the Lease. *7 Co.* 12. *Plow.* 524. Tenant in Tail makes a Lease according to the Stat. of 32 H. 8. and then dies without Issue, so that his primitive Estate-tail is at an End, and then the Lease derived out of it must be at an End also. *3 Co.* 34.

Lessee for Years may not grant or charge longer than for his own Time, he cannot charge or create a Freehold out of it. *Cro. Jac.* 142.

By one who
is not the
Owner.

Where one grants that which is none of his own, if he afterwards purchases the Thing granted, and the Grant be by Deed indented, it may be good against him by way of Estoppel. *1 Co.* 77.

By Tenants
in Tail.

If Land be granted to two Men, and the Heirs of their two Bodies; in this Case, altho' they have several Inheritances after their Death, yet neither of them can grant away his Estate after his Life. *Co. Lit.* 282.

Second Grant
of the same
Thing.

If one grants the same Thing twice, the second Grant will be void; as if one grants the next Presentation to a Church after the Death of the present Incumbent, and then after this grants the same to another, the second Grant is void.

So if one makes a Lease of Land for ten Years to one, and then makes a Lease of the same ten Years to another. But a Man seised of a Manor, after he hath demised ten Acres of the Demesne for ten Years, may grant the whole Manor for twenty Years, and it will be good for the Overplus presently, and for the whole Manor for the last ten Years. So where the second Lease is to begin after the End of the first Lease. *Perk.* §. 102. *Dyer* 35, 350.

If one grants me Common of Pasture without Number in his Ground, and after makes the like Grant to another; this second Grant, altho' it be good against the Grantor, yet it is not good as to me. *Dyer* 35, 350.

As if one by Word gives me his Horse, and then grants him by Deed, this is void.

And yet if one makes his Lease for Years, rendring Rent, and after makes a Lease of the same Land to another, to begin during the first Term: This may perhaps be a good Grant of the Reversion so long, and the Rent in this Case may pass without Attornment of the Tenant. *Plowd.* 432.

If a Reversion be granted to one for Life, and after again for Years to the same Person, and the Tenant attorns to both Grants at once, by this both Grants are void. So if one grants his Seigniority to the Bishop of London and his Heirs by one Deed, and grants it by another Deed to him and his Successors, and the Tenant attorn to both together; in this Case they are both void for Incertainty. *Co. Lit.* 310. *11 H.* 7. 10.

If one makes a Lease to A. for twenty Years, if he live so long, rendring Rent, and after he makes a Lease to B. for eighty Years, by Indenture for eighty Years, to begin presently, or grant the Reversion, to begin at a Day past, or the like; in these Cases if the first Lessee attorn, the Rent will pass, and if not, yet it will be a good Lease of the Land for so many Years as shall be to come after the Lease is ended; but if the second Lease be by Word without Deed, then the Reversion as a Reversion cannot pass, and the Grant will be void if there be nothing else to help it. *1 Co.* 155. *Plow.* 431.

The Statute of 1 R. 3. gave Authority to *Cestuy que Use* to make a Grant, Lease or Feoffment; and by this was intended, that they should make such Estate as they might lawfully make, and not a Discontinuance; and therefore if *Cestuy que Use* for Life, where the Remainder was over in Tail, had made a Lease *pur autre vie*, and died, the Lessee had been but Tenant at Sufferance. *Dyer* 57.

By one out of
Possession for
the present.

If one has a Reversion after an Estate for Life in Land, and he grants a Rent issuing out of this Land; in this Case the Grant will be good, and it will charge the Land after the Tenant for Life is dead. *Perk.* §. 65, 86. *Co. Lit.* 214.

If one makes a Lease of Land to *B.* to begin two Years after, and before the two Years ended, whilst the Lessor is in Possession, and before the Entry of *B.* he grants this away to another; this is a good Grant. *Cro. Car.* 117.

If one makes a Lease for Years of his Land to *A.* and afterwards makes a Feoffment of it to *B.* this Feoffment is good to pass the Reversion. *Moor* 11.

If the Father dies, and the Son makes a Lease of the Land descended to him to a Stranger before his Entry, this Lease will be good; but if a Stranger enters and abates into the Land before him, *contra*: And yet if a Lease be made to me for Years, in this Case I may make a Lease for Part of the Term, or an Assignment of all the Term, before I have made any Entry upon the Land. *Co. Lit.* 46. *Plow.* 137, 142. *Perk.* §. 91.

By one before
Entry or Sei-
fin.

If Lessee for Years after his Term expires, takes a new Lease for Years of a Stranger, rendering Rent, and pays it, yet he remains Tenant at Sufferance to the first Lessor; and therefore he may lease it to another before any Entry by him, for it is not out of his Possession. *Noy Rep.* 120.

So if a Rent be granted to me, and I grant it over to a Stranger before I have Seisin of it, this is a good Grant. *Perk.* §. 91.

A Woman that has recovered her Thirds in Dower can make no Lease of it before she has the Possession by Execution. *Plow.* 133.

If one seised of Land in Fee, and he and his Son and Heir Apparent join in a Lease of his Land, to begin after his Death, rendering a Rent to his Son, and then he dies, and leaves this Son his Heir; in this Case the Lease will be good, but the Reservation of the Rent will be void. *Hob.* 151.

By an Heir.

If one makes a Feoffment to the Use of a Stranger for Life, the Remainder to the Wife for her Jointure; altho' the Stranger dies before the Wife, this will not be a good Jointure within the Statute to Bar her of Dower: Nor can such a Jointure be for the Life of another, but it must be for the Wife's own Life. *Hob.* 153, 450. 4 *Co.* in *Vernon's Case*.

One that has but a Right or Title, or Action to Lands or Goods, properly cannot give or grant, and so transfer this to a third Person; but it may be released to him that hath the Possession of the Thing; nor can such a Thing be charged with a Rent, &c. *Perk.* §. 92, 93. *Fitz. Donne* 3. *Bro. Donne* 13.

By one that
has but a
Right or Title
of Entry, &c.

But in such a Case as this a Man may perhaps by Fine, or other Matter of Record, or Deed indented by way of Estoppel, be bound and concluded. *Perk.* §. 65, 66.

As if one grants a Reversion by Fine executory of Land that he has nothing in, and he after purchases this Reversion; this Grant may be good, and the Grantee shall enjoy it. But if two Men join in a Deed to grant a Reversion of Land, and one of them has nothing in it, and the other has all; in this Case it shall be said to be his Grant that had it alone; but by Fine it is otherwise. *Perk.* §. 66.

If one grants or charges Land that is not in his Possession, and he has only a Right to what he grants or charges, this Grant will not be good; as if a Man be disseised of his Land, and before he has entred or recovered the Land, he grants or gives it, or his Right in it, to a Stranger; or grants a Rent-charge out of the Land to a Stranger; these Grants are not good unless they be so made that they may work by way of Estoppel. *Co. Lit.* 214. *Perk.* §. 65, 86.

If one has a Term of Years in his Land, and by his Will devises it to *J. S.* for his Life, and after to me for the Residue of the Years; or if one gives to *J. S.* his Term, if he lives so long as the Term shall last, and if he dies before the Term ends, the Remainder to me; in these Cases, so long as *J. S.* lives, I may not grant this Possibility away to another. So if a Lease be made to me and my Wife, the Remainder to the Survivor of us; this Remainder is not to be granted away. 4 *Co.* 66. 5 *Co.* 24. *Dyer* 244.

A Devisee enters into a Term devised to him without Consent of the Executor, and after grants his Right and Interest to the Executor; this is a good Grant. *Owen* 56.

If there be Lord and Tenant, and the Tenant leases the Tenancy to the Lord for Life; in this Case the Lord altho' his Seigniorship be in suspense, yet the Lord may grant it to a Stranger. *Perk.* §. 88.

If *A.* makes a Feoffment in Fee, on Condition that if he pays 20 *l.* he shall have the Land again, and before the Time of Payment he grants a Rent-charge out of the Land; this is void, for he has but a Possibility of the Land. 1 *Co.* 147. 10 *Co.* 48, 49.

If I have four Houses in Execution upon a Statute, and by Courte of Time it will endure thirteen Years, and after two of the Houses are evicted by *Elegit* for fifteen Years;

E e e

Years; I may in this Case assign this Interest, and it will be good. 4 Co. 66. 5 Co. 24. 10 Co. 51. Dyer 244.

If a Man sells me Goods, and I leave them in his Possession, and a Stranger takes them from him, and I grant or sell them to the Stranger, this is good. Perk. §. 92.

And if a Man takes my Goods, they being out of my Possession, and sells them to me in a Market-overt, this Sale is void. Perk. §. 93.

By Feoffor,
Feoffee,
Mortgagor,
Mortgagee,
Donor or
Donee.

If a Feoffment be made on Condition, and before the Time of the Performance of the Condition the Feoffor and Feoffee join together to make a Lease for Life or Years of the Land, or to charge it with a Rent, or the like, this will be good. 1 Co. 147. 10 Co. 48. 49. For it is a Rule, that all Fee-simple Land may be charged by one way or other.

If A. sells Land to B. by Indenture, and before Inrolment they join in the Grant of a Rent-charge to C. in this Case the Grant of the Rent-charge will be good whether the Deed be inrolled or not. Co. Lit. 45. 10 Co. 48.

If Donor and Donee in Tail grant a Rent-charge out of the Land, and then the Donee dies without Issue; in this Case the Grant will be good to bind the Donor. Ibid.

If a Lease be made to Husband and Wife for their Lives, the Remainder to the Executors of the Survivor of them, and the Husband grants away this Term, and dies, this will not Bar the Wife, for he had but a Possibility, and no Interest. But if a Man be possessed of a Term of forty Years in Right of his Wife, and makes a Lease of twenty Years, reserving a Rent, and dies, the Executors of the Husband will have the Rent, but the Wife will have the Residue of the Term. And if the Husband makes a Grant of the whole Term, upon Condition that the Grantee shall pay a Sum of Money to his Executors, &c. and the Husband dies, and upon Breach of the Condition the Executors enter; this is a Disposition of the whole Term, and the Wife is barred. 5 Co. 9.

If Tenant in Tail, and he that is next in Remainder in Fee join in the Grant of a Rent-charge in Fee, and after the Tenant in Tail dies; in this Case the Grant and Charge is good against him in Remainder. Co. Lit. 45. 10 Co. 48.

If one infeoffs divers to the Use of his Son and Heir upon Condition, and before the Time of the Performance of the Condition the Father and Son join in a Grant or Charge of the Land; this will be a good Grant or Charge. 1 Co. 147.

If A. makes a Feoffment of his Land to B. on Condition, that if A. pays him 20l. he shall have his Land again. In this Case B. may grant over this Estate if he will to a Stranger, but it will be subject to the Condition in whose Hands soever it goes. And if in this Case B. grants a Rent to a Stranger out of the Land, and after the Condition is performed, and the Feoffor enters, here the Feoffor shall avoid the Rent; but if A. in this Case grants a Rent out of the Land, this Grant will be void, for A. has but a Possibility. 1 Co. 147.

By one who
has but an In-
teresse Ter-
mini, or Possi-
bility.

He that has but an *Interesse Termini*, a Lease for Years to commence *in futuro*, either of the Land itself, or any Profit *apprender* out of it; or has only an Interest by Extent upon an Execution, he may grant and transfer this over to another. Co. Lit. 46. 4 Co. 64. Perk. §. 91. 22 E. 4. 37.

One possessed of a Term of Years devises it to one for Life, and after to another for the Residue of the Years, and the first Devisee enters by Assent of the Executors, and after he in Remainder during the Life of the first Devisee grants it away; this is not good, for it is but a Possibility, and not grantable over. 6 Co. 66.

By a Servant
of his Master's
Goods.

If a Shepherd, Bailiff or Parker, gives or grants his Master's Goods, by or without a Deed, without his Master's Consent, this is not good: But yet it is held, that a Taverner may give or sell his Master's Wine, or a Mercer his Mercery Wares; and that this will be good. *Quere*, If he gives, and not sells them away. Bro. Donne 564.

By Ecclesiasti-
cal Persons.

Ecclesiastical Persons, such as are Bishops, Deans, Prebends, Parsons, Vicars, and the like, for the Lands they have in their Spiritual Capacities in Right of their Churches, Houses, &c. which are Ecclesiastical Lands, they are limited and restrained in the Disposal of them, as the Tenant in Tail is limited for his intailed Land; and as the Husband and Wife are limited in the Disposal of the Lands he has in his Wife's Right, or together with her, it is therefore as to all these Kinds of Persons to be observed, that Ecclesiastical Persons for their own Temporal Lands that they have by Purchase or Descent in their natural Capacity, the Tenant in Tail for the Land he has in Fee-simple by Purchase, Descent or otherwise, and for Land that single Men and Women have in their own Right, they may do with these Lands what

what they will, and there is no Restraint upon them. But how far they are restrained as to their other Lands, observe, that by the Stat. of 32 H. 8. c. 28. it is enacted, That Leases made by Tenant in Tail, or by him who is seised in the Right of his Wife or Church, (the Persons making them being of full Age at the Time of making such Lease) shall be good and effectual in Law against the Lessors, their Heirs, Wives and Successors; but this Lease must be made under all the Conditions and Qualifications hereafter mentioned; and by this Act no Fine, Feoffment, or other Act done by the Husband only of the Inheritance or Freehold of the Wife, shall make any Discontinuance, or Prejudice the Wife, or any other who is to enjoy the Land after the Decease of the Wife, the Fine levied by Husband and Wife only excepted.

By 1 Eliz. not printed in the *Statutes at Large*, which you may see in *Moore's Reports*, p. 107. it is provided, That all Estates made by any Archbishop or Bishop of any Manors, &c. Parcel of the Possessions of their Bishoprick, or united or appertaining thereunto, to any but the Queen herself, other than for twenty-one Years or three Lives from the Time of the making of it, shall be void.

By Stat. 13 Eliz. c. 10. it is enacted, That all Leases, Conveyances or Estates made by any Master or Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Master or Guardian of any Hospital, Parson, Vicar, or any other having any Spiritual or Ecclesiastical Living, or any Houses, Lands, Tithes, or other Hereditaments, being Parcel of their College, Cathedral, Chapter, Hospital, Parsonage, Vicarage, or other Spiritual Promotion belonging thereunto, other than for twenty-one Years or three Lives from the Time of the making thereof, shall be void.

And by Stat. 13 Eliz. c. 20. No Lease is to be made of any Benefice or Ecclesiastical Promotion with Cure, or any Part thereof (and not impropriate) shall endure any longer than while the Lessor shall be ordinarily Resident and Serving the Cure of such Benefice, without Absence above eighty Days in any one Year, but that every such Lease immediately upon such Absence shall cease and be void.

Yet he that is allowed to have two Benefices may let one of them (upon which he is not most ordinarily Resident) to his Curate only; but the Lease shall be good no longer than during the Curate's Residence without Absence above forty Days in a Year. See Stat. 14 Eliz. c. 11. 18 Eliz. c. 6. & 11. & 43 Eliz. c. 9.

But by the Common Law a Bishop, Parson, Prebend, &c. upon an Escheat, Forfeiture, or otherwise, may grant a Copyhold Estate according to the Custom of the Manor; and this will be good. 4 Co. 23.

And by the Common Law every Bishop, Dean, Parson, Vicar, or Corporation Spiritual, might have charged their Possessions, or made Leases of their Lands for Lives or Years without Stint of Time or Number, *Concurrentibus his quæ in Lege requiruntur*. But now by the Statutes of 13 H. 8. and 13 Eliz. they are restrained to make Leases or Grants but under certain Limitations and Provisoos.

As, 1. The Grant or Leases must be made in Writing by Deed indented, and not by Deed Poll, or by Word only. Co. Lit. 44.

2. They must begin from the Day of the Date or Making thereof, or a *Confectione inde*. 5 Co. 6.

3. The ancient Lease must be surrendered or yielded up, or expired or ended within a Year after the making of the second Lease; and this Surrender must be absolute and not conditional. 5 Co. 2.

4. There may not be a double Lease in Being at one Time. 5 Co. 6.

5. The Leases may not exceed twenty-one Years or three Lives from the Time of the making of them. Dyer 246.

6. The Lease must be of Lands and Tenements manurable, out of which a Rent may be reserved. 5 Co. 3.

7. It must be of Lands and Tenements which have usually been let to Farm twenty Years before the Lease made. 6 Co. 37. Co. Lit. 44.

8. There must be reserved to them and their Successors so much yearly Rent or more as has been accustomed to be paid for the said Lands. 5 Co. 6.

9. The Lease may not be made without Impeachment of Waste. 6 Co. 37.

10. The Lease must have all due Ceremonies and Circumstances for the Perfection of it as other such like Leases have, as Livery of Seisin, and the like, where they are needful. 7 Co. 7. 8 Co. 54.

11. If it be made according to the Exception of the Statute of 1 Eliz. & 13 Eliz. and not warranted by 32 H. 8. as in the Case of a concurrent Lease, and it be made by

by a Bishop or any Sole Corporation, it must be confirmed by the Dean and Chapter, or others that have Interest. 11 Co. 66. 5 Co. 3, 14. Co. Lit. 44. Stat. 32 H. 8. c. 28. 13 Eliz. c. 10. 1 Jac. c. 3. 1 Eliz. c. 19. 14 Eliz. c. 11. 18 Eliz. c. 10, 20.

And if a Parson or Vicar makes a Lease, it is not good but during the Parson or Vicar's Residence, according to 12 Eliz. c. 20. and here needs no Confirmation at all. Co. Lit. 141.

And if a Parson makes a Lease, and he is after deprived or resigns, the Successor may avoid it. 2 H. 4. 2. 26 H. 8. 2.

These Colleges, Deans, Chapters, Wardens of Hospitals, and the like, having Spiritual or Ecclesiastical Livings, against the Provision of the Act of the 13th of Eliz. c. 10. are restrained to make Leases to the King as well as to common Persons. 5 Co. 14.

Some of the Leases to be made by Colleges and Houses of the University must have some Rent-corn reserved upon them. Stat. 18 Eliz. c. 20.

And Leases of Benefices with Cure are no longer good than the Parson is Resident. Stat. 13 Eliz. c. 20.

And there is no way to make the Leases of these Persons for longer Time good.

The letting at one, or at several Times, for eleven Years, within the twenty Years past, is enough to warrant the new Lease, and a Grant by Copy of Court-Roll for Life, Years, or in Fee, is a sufficient letting to Farm within the Statute; so a Lease at Will by the Common Law. But these Lettings to Farm must be by some one seized of an Estate of Inheritance, and not as Guardian in Chivalry, Tenant by the Curtesy, or in Dower, or the like. 6 Co. 37.

If more be reserved upon the new than was upon the old Lease, it is good enough. But if one Acre more be added to the Land formerly letten, and an Increase of Rent for that, this is not good. But if the Land antiently together be now let asunder, and the Rent divided, but made up in Parts, this is good. So if there be two Coparceners of such Land, and one lets his Part at the half Rent, this will be good. And if the antient Rent be of four Days, and the new Rent is reserved to be paid at one Day, yet the new Lease upon the Statute of 32 H. 8. is good. Co. Lit. 44. 5 Co. 5. 6 Co. 37.

Ecclesiastical Persons may make Estates of their Lands they hold in Right of their Bishopricks, Colleges, Churches, &c. or may make Leases for a lesser Time than three Lives or twenty-Years. Co. Lit. 44.

And Ecclesiastical Persons cannot make Feoffments, Grants, &c. of their Ecclesiastical Lands for longer Time than three Lives or twenty-one Years, for all Feoffments, Gifts, Grants, Leases by Bishops, altho' they be confirmed by their Dean and Chapter, or any of the Colleges or Halls in either of the Universities or elsewhere, or by Dean and Chapters, Masters or Guardians of any Hospitals, Parsons, Vicars, or other having Spiritual or Ecclesiastical Livings, are voidable. Co. Lit. 43.

Leases of Houses in Cities, and belonging to Churches, are not ruled by Statutes of 13 & 18 Eliz. but by the Statute of 14 Eliz. Hob. 269.

Offices.

A Bishop or such like Spiritual Person may grant antient Offices of Trust, of Necessity or Convenience; as the Office of Chancellor, Register, Steward, Bailiff, or the like, with the antient Fees incident thereunto, for the Life or Lives of the Grantees, and these Grants are good, altho' they be made by the Bishops of the new erected Bishopricks, and that there be not in them the Conditions and Properties required in the Leases before mentioned, so as they be confirmed by the Dean and Chapter; and yet they may not make a Grant of any new Office, nor add any Fee to the old Offices; and therefore if a Bishop grants an Annuity *pro consilio impenso & impendendo*, where none was before, his Successor may avoid it. And yet if there be an old Fee, and there is a new Fee added to it, in this Case it seems good for the old Fee, and void for the new Fee. Neither may they grant their Offices otherwise than they have been granted; as where antiently the Office was granted to one, there it must be to one; and where to two, there it must be to two, and that jointly, and not to one after the other. Nor may the Grants be for any longer Time than for the Lives of the Grantees. And in Case where the Grant is void, the Confirmation of the Dean and Chapter will not make it good. Dyer 300. Vide 2 Brownl. 134, 158. 5 Co. 15. 11 Co. 66. 10 Co. 58. Dyer 370. 1 Co. 68.

Bishops.

The Bishop can make no Kind of Conveyance of any of the Lands belonging to his Bishoprick for longer Time than twenty-one Years or three Lives, rendring the antient Rent. Vide Moor's Rep. 107.

A Lease by a Bishop made by Indenture, to commence presently for twenty-one Years, when there is an old Lease *in esse*, is good notwithstanding the Statute of 1 Eliz. Moor 107, 108.

If a Lease be made by such Persons of Land antiently let at such a Rent, and of other Land not before let together at the old Rent, with an Addition of more Rent for the other Land; this is not good. 5 Co. 6.

A Lease made by a Bishop for three Lives, where there is a Lease for Years *in esse*, is void. Moor 253.

And if a Bishop, or other such like Spiritual Person, makes a Lease of his Spiritual Land for twenty-one Years to one, and then makes a Lease of three Lives of it to another, this second Lease is void. Co. Lit. 44. 5 Co. 14. 11 Co. 66.

A Lease for three Lives by a Bishop of Tithe is void against the Successor, altho' there be as much Rent reserved as usually has been reserved and paid upon any former Lease. Moor 778.

If a Bishop oust his Lessee for Years, and then makes a Lease for three Lives, it is void; for where the Statute says, the old Lease must be surrendered, an illusory Surrender upon Condition will not serve the Turn. 5 Co. 2, 3.

If the Parson and Ordinary had made a Lease for Years of the Glebe to the Patron, and after the Patron assigned it over to another Person; this had been good, and the Confirmation of the first Lease made to himself, and the Deed of the Patron, in such a Case should enure to a Deed in Rent, to make the Assignment of the Lease good, and to confirm the Lease to the Assignee. 5 Co. 15.

If a Bishop has two Chapters, as he may have, both of them must confirm Leases made by the Bishop: But if one of the Chapters, after the Date or Making of the Lease be dissolved, there the Confirmation of that which is in Being is good enough to make the Lease good, and there will need no Confirmation of the King as supreme Ordinary. Dyer 282. Co. Lit. 31.

If a Bishop makes a Lease of a Portion of Tithes for three Lives, rendring the antient Rent; this is a void Lease as against the Successor, by the Stat. 32 H. 8. and 1 Eliz. for no Rent will arise out of Tithes; and therefore the Acceptance of it by the Successor will not make it good. Cro. Jac. 173.

If a Bishop makes a Lease for twenty-one Years, and all those Years being spent, saving three or more, yet the Bishop may make a new Lease to another for twenty-one Years, to begin from the making, but not a Lease for Life or Lives, and this concurrent Lease is good as well upon 1 Eliz. in Case of a Bishop, as upon 13 Eliz. of Deans and Chapters, 83c. Co. Lit. 44, 45. And this the 32 H. 8. did not extend to. But in the Case of the Bishop's concurrent Lease it must be confirmed. Also the Exception of the Statute of the 1st and 13th of Eliz. do as herein differ from 32 H. 8. for the Leases for Years to be made upon the 1st and 13th of Eliz. must begin from the Making, and not from the Day of the Making; but the Leases upon the 32 H. 8. are to begin from the Day of the Making. And altho' the Statutes of the 1st and 13th of Eliz. do not say the Lease must be in Writing, yet must it therein, and in the other Properties before-mentioned and required by the 32 H. 8. follow the Pattern thereof, the concurrent Lease only excepted. Co. Lit. 44, 45. Vide Hob. 7, 70, 107, 148, 149.

A Lease made by a Bishop to one for three Lives (*viz.*) to one for Life, the Remainder to another for Life, the Remainder to a third for Life, is not good within the Statute of 1 Eliz. c. 4. for Action of Waste will not lie for the Waste. Cro. Eliz. 67.

A Lease of a Fair reserving a Rent is not good within 1 Eliz. altho' the Rent be due, because of the Contract; yet it is not incident to the Reversion, it is without Remedy by Assise or Distress. 5 Co. 3.

A Lease by a Bishop by Indenture reserving the antient Rent, not saying how much it is, and made of Part of a Manor, and not of all together, which was usually demised together at one Rent; this Lease and Reservation both will be void against the Successor. Cro. Eliz. 67.

Three Years of a former Lease being in Being, the Bishop leased for twenty-one Years, this is a good Lease. 1 Leon. 148.

A Bishop makes a Lease for three Lives in Remainder one after another, which is not within the Statute of the 1st of Eliz. at the old Rent, and the Bishop's Successor accepts the Rent, this shall bind him for his Time. Cro. Eliz. 67.

A Bishop is seised of a Manor whereof an Acre is Parcel, and by Indenture he devises the Acre to *J. D.* and *W. D.* *Habendum* to the said *J. a die datus Indentura* for his Life, the Remainder to *W.* for his Life, rendring 3 s. 2 d. per Ann. at Michaelmas and Lady-day, the Bishop dies, *B.* is created Bishop, his Bailiff of the Manor gathers and pays this amongst the other Rents to the Bishop, who accepts it, this shall bind the Bishop. *Cro. Eliz.* 67.

A Bishop grants a Portion of Tithes to *A. B.* and for their Lives successively, rendring the antient Rent, and dies, the Successor accepts the Rent for divers Years, and then made a Lease for twenty-one Years; in this Case the Lease is void for the Thing not chargeable with the Rent, and therefore the Acceptance by the Successor will not affirm it. And it is not like Leases made by Bishops at Common Law for three Lives, which is only voidable, and their Acceptance of Rent may affirm it. *Cro. Jac.* 173.

A Bishop grants an antient Office of Keeper of one of his Parks, and the antient Fee; and adds, *Necnon pasturam pro duobus equis*; the Grant of the Pasture is void, and it will endanger the whole Grant. *Bridgm.* 29, 30.

By Bishop.

A Bishop granted a Rent to *J. S.* during his Life, out of his Manor of *W.* *pro concilio impendendo*, and then died; and it was held not void against the Bishop whilst he lived, but that it was void by his Death. *Dyer* 370.

A Bishop granted such an Annuity *pro concilio impenso et impendendo*, and this is confirmed by the Dean and Chapter, and then he died; and it was held not good to charge the Successor in an Annuity; and yet it was said, that altho' the Bishoprick was founded of later Times, (*i. e.* in the Time of *H. 8.*) yet that the Grant of an Office of Necessity in Possession with reasonable Fees, was good. *Bridgm.* 31.

A Bishop may grant the Office of Stewardship of a Manor, with a Fee out of the Manor, and such Grant will be good; but the Steward must tender his Service to every Successor. *Dyer* 156.

A Bishop granted the Office of Surveyor of all his Manors to two for their Lives, and twenty Nobles Fee for it; and this was held void. And it was held, that such a Grant by the Common Law, had it been confirmed by the Dean and Chapter, had been good. And where it is an antient Office, the Bishop may grant it still with the antient Fee; yet it may not be granted to two for Lives, for that is against the Statutes, and if confirmed by the Dean and Chapter, yet it is not good. And it was held, that altho' it be an antient Office, yet it is not good without the Confirmation of the Dean and Chapter. And also that if the Bishop be translated, deposed or removed who made the Grant, that the Grant is void against the Successor, altho' he be alive that made it. 9 Co. 51. 1 Co. 58, 59.

A Bishop leases for twenty-one Years, then ousteth the Lessee, and leases to another for three Lives, rendring the antient Rent; this is confirmed by the Dean and Chapter, the Bishop is translated, this Lease is good. 1 Leon. 59, 60.

A Bishop leases for three Lives, (*viz.*) to one for Life, the Remainder to the second, the Remainder to the third for Life, which is not warranted by the Statute of 1 Eliz. the Successor accepted the Rent; this will bind the Successor during his Time. *Cro. Eliz.* 67. 5 Co. 81. *Dyer* 282. 3 Co. 65. Co. Lit. 370.

If a second Lease be made by a Bishop for twenty-one Years, a Year before the End of a former Lease, to begin presently from the Date of it; this is good enough. So to make a Lease for three Years before the Expiration of a former Lease to begin presently. But if the Bishop after a Lease for twenty-one Years makes a Lease for three Lives, this is not good. So for Leases in Reversion. 1 Leon. 147, 148. *Dyer* 246. *Cro. Eliz.* 241.

If such a Person makes a Lease for twenty-one Years, and many Years after makes another Lease to the same Person for twenty-one Years, which is a Surrender of the first Lease; *Qu.* If the second Lease be good. 2 Leon. 107.

A Bishop made a Lease for twenty-one Years, and after made a Lease to another for twenty-one Years, to begin at the End of the first Lease; this is not good. 3 Leon. 130, 131, 132, 133.

If a Bishop grants an ancient Office and Fee incident to it, and makes the Fee greater than antiently it was; it may be good for what was antiently paid, but not for the Increase of the Fee, nor can the Confirmation by the Dean and Chapter make it binding to the Successor. *Bridg.* 29.

Leases for Lives of Copyhold Estates are not within 1 Eliz. 1 Leon. 59.

A Bishop was seised of Tithes in Right of his Bishoprick, and made a Lease thereof for three Lives, rendring the antient Rent, and after died, the Successor made a new Lease

Lease for Years, &c. in this Case it was agreed, that the first Lease of Tithes was void, for it is but of Tithes that lie *in prender*, nor any Place wherein a Distress may be taken, nor any Remedy for the Rent: But had it been a Lease for Years, so that Debt might be brought for the Rent, it had been good. And so it is of all other Things which lie in Render or Prender where no Distress can be taken. *Cro. Jac. 111, 112.*

And it was agreed, that the Lease was not good by 1 *Eliz.* nor is such a Lease good by Tenant in Tail, or by a Bishop, Dean and Chapter, upon 32 *H. 8.* *Cro. Jac. 111, 112.*

A Bishop lets a Portion of Tithes to *A. B. and C.* for their Lives successively, rendering the antient Rent, and after dies, the Successor accepts the Rent for divers Years; this is not a good Lease within 32 *H. 8.* or 1 *Eliz.* for there is no Remedy for the Rent; as where a Rent is reserved upon a Lease of a Hundred for Life, and the Acceptance here does not make it good, for it is void against all but the Bishop himself. *Cro. Jac. 110, 111, 173.*

A Bishop leased to *B.* for Years, rendering Rent, after grants the Reversion to *C.* for ninety-nine Years, rendering the antient Rent, *Habendum* from the Day of the Lease; the Grant was confirmed by the Dean and Chapter, but *B.* did not attorn; and it was held void, for it was by way of Grant, and to pass as a Reversion. *3 Leon. 17.*

Bishops and such like Persons may not alien their Ecclesiastical Lands to the King himself, otherwise than according to the 1 & 13 *Eliz.* 11 *Co.* in *Magdalen College Case.*

A Lease by a Dean and Chapter for three Lives, when the Remainder of a Term is *in esse*, is not void, but voidable during the Life of the Dean. *Moor 875.* Dean and Chapter.

Deans and Chapters, Tenants in Tail, and such like Persons, may not make Leases without Impeachment of Waste, but they may make Leases *pur auter vie*, which will be an Occupancy. 6 *Co. 37.*

If Land has been usually let at Will, or by Copy, such Lands may be let by Deans and Chapters, Tenants in Tail, and such like Persons, upon 13 *Eliz. c. 10.* & 32 *H. 8. c. 28.*

And if a Heriot was reserved upon the Copyhold Leases, and there be no Heriot reserved upon the new Lease, it is good enough. And if the Rent upon the new Leases be reserved upon two Days, where upon the former Letting it was reserved upon four Days, it is good in the Leases of Ecclesiastical Persons, upon 10 *Eliz.* But otherwise it is upon the 32 *H. 8. c. 28.* 6 *Co. 37.*

Bishops with the Assent of Dean and Chapter now can make no Leases but for three Lives or twenty-one Years, but in Case of a necessary Officer for his Life with a Fee, this may be with Consent of Dean and Chapter. 32 *H. 8. c. 28.* 1 *Eliz. c. 19.*

Nor may they grant Annuities or Things out of which no Rent can issue; and if their Grant be ill at first, no subsequent Accident will make it good; as if it be for four Lives, and one of them dies before the Bishop. *Quod initio non valet, &c.* 10 *Co. 58.*

A Dean and Chapter seised of a Manor in Fee, in which were Copyholds grantable for three Lives, the Rent being 8 *s. 6 d.* payable at four Times with Heriot, grants a Copyhold to *A.* for the Life of three others, rendering the 8 *s. 6 d.* at one Payment yearly; this Lease is within the Statute, and good. 6 *Co. 37.*

The Dean can make no Leases without the Chapter. *Godb. 211.*

Deans and Chapters may not make Leases without Impeachment of Waste, by 13 *Eliz. c. 10.* 6 *Co. 37.*

If a Dean of one Cathedral be elected Bishop of another See with Dispensation *Retinere Deconatum in Commendam*, after the Bishop of that See whereof he was Head and Dean, do make a Lease of Parcel of the Possessions of the Bishoprick, the Confirmation of the Lease by the Commendatory Dean is good. *Hughes's Abr. 1220.*

A Lease by the Dean and Chapter of *St. Paul's* of a House in *London*, the House being then in Lease to another for ten Years, is void by the 13 & 14 *Eliz.* *Cro. Eliz. 564.*

A Lease made by a Prebend is good by 32 *H. 8.* but not by a Parson or Vicar. *Prebendary. Cro. Eliz. 350.*

A Prebend was antiently let with the Exception of all Crab-Trees, and such like Trees, and the new Lease is made without this Exception; it is not good. 2 *Co. 458.*

Such Kind of Spiritual Persons, as Bishops, Deans, and the like, may not grant the

the next Avoidance of Churches or Rent out of those Lands, but the same will be void after their Death: Lease by Parson, Patron and Ordinary, being avoided by the next Incumbent, makes it void against all his Successors. *Cro. Eliz.* 420.

A Prebend makes a Lease of Part of his Prebend's Land, with an Exception of great Woods, Oaks, Ashes, &c. this was confirmed by the Bishop, Patron, but not by the Dean and Chapter; after he made a second Lease without an Exception; in this Case the Confirmation without the Dean and Chapter is good, and the second Lease without the Exception is void, by *13 Eliz.* 3 *Bulst.* 290.

Prebend.

A Prebendary made a Lease for Years of his Land, with Exception of the great Wood, as Oak, &c. which is confirmed by the Archbishop, but not by the Dean and Chapter; and then he makes another Lease without this Exception, the Land being usually let with the Exception: In this Case it was held, 1. That the Lease confirmed by the Archbishop, Patron of the Prebend, was good without Confirmation of the Dean and Chapter. 2. And that this second Lease notwithstanding was void by the Statute. 3 *Bulst.* 290, 291.

By an Abbot.

And an Abbot leased to three Men for eighty Years with this Proviso, That if they died within the Term, the Lessor might enter. And after a new Lease was made by him in Reversion to *J. D.* for twenty-one Years, to begin after the End, Surrender, &c. of the first Lease; the three Lessees died within the Term, the said *J. D.* may not have it till *J. D.* enter upon the Condition and avoid the Lease, which he may chuse whether he will do or not. 3 *Leon.* 269.

Parson, Vicar or Prebend.

If a Parson, Vicar or Prebend, makes a Lease for Years, rendring Rent, and dies, and the Successor accepts the Rent, this will not affirm the Lease, for it was void by his Death; otherwise of a Lease for Life. But if a Bishop, Abbot or Prior makes a Lease for Years, and dies, and the Successor accepts the Rent, he shall never avoid the Lease, for here the Lease was only voidable. 5 *Co.* 65.

Parson or Vicar.

A Parson made a Lease of his Rectory, 9 *Eliz.* for sixty Years, and this was confirmed by the succeeding Bishop, succeeding Patron, neither of them being Bishop or Patron at the Time of the Lease; this was good. *Cro. El.* 27. 5 *Co.* 15.

A Lease by a Parson for twenty-one Years after 13 *Eliz.* rendring the ancient Rent, the Patron and Ordinary confirm it, the Parson dies; the Lease is void by his Death, as well as by Non-residence and by Resignation. *Cro. Car.* 123.

A Parson made a Lease for forty Years, the Bishop of London Patron and Ordinary confirmed it under his Hand and Seal, without the Dean and Chapter, the Incumbent died, the Bishop collated another, who made a new Lease, which is well confirmed; afterwards the Bishop is translated; in this Case the first and not the second Lease is good during both the Lives of the Bishop and Incumbent. *Dy.* 359.

A Parson or Vicar, &c. if they make Leases according to the enabling Statute of 32 *H.* 8. they are out of the Statute, and their Leases must be confirmed by the Patron and Ordinary: But if a Bishop seised in Right of his Bishoprick, Dean of his sole Possession, and one that is seised *jure præbendæ*, they may make Leases under the Provisofoes aforesaid. *Co. Lit.* 44.

Parson.

A Parson of a Church may grant his Tithes from Year to Year, or for Years, to his Parishioners that are to pay them, or to a Stranger, and the Grant is good. *Vide Perk.* §. 90. *Owen* 103. *Hetley* 107. *Poph.* 141.

Incumbent.

An Incumbent leases certain Glebe for twenty-one Years, rendring the ancient Rent, the Patron and Ordinary confirm it. Q. If the Lease be void by the Statute of Non-residence. *Moor* 124.

Bishops, Deans and Chapters, Masters and Guardians of any Hospital, and their Brethren, Masters, Governors, and Fellows of Colleges or Houses, or any other Body Politick, Spiritual and Ecclesiastical, (by whatsoever Name they be called) Archdeacons, Prebends, and such as are in the Nature of Prebends, as Precentors, Chaunters Treasurers, Chancellors, and such like; all these, except Parsons and Vicars, may at this Day make Leases of their Spiritual Livings (as is before said) for three Lives or twenty-one Years; and these Leases will be good both against them and their Successors. But such Persons may not make Leases of their Land for any longer Time than for three Lives, or twenty-one Years, and such Leases will be good both against themselves and against their Successors. But if it be for longer Time, altho' it be by Fine or Recovery, and altho' it be confirmed by the Dean and Chapter, yet it will be void as to the Successor; and the Leases that are made by such Persons of their Lands for twenty-one Years, or three Lives, must be made with all the Conditions and Qualifications in Leases made by Tenants in Tail, (*viz.*) by Deed indented

dented, &c. *Co. Lit.* 44. 5 *Co.* 14. 11 *Co.* 66. *Stat.* 32 *H.* 8. c. 28. 13 *El.* c. 20.
1 *Jac.* c. 3. 1 *Eliz.* c. 19. 14 *Eliz.* c. 11.

But such Persons may make longer Leases of their Houses in Corporations or Market-Towns, or in the Suburbs thereof, and of the Grounds appertaining to such Houses, so as they be not their Dwelling-houses, &c. and have not above ten Acres of Ground belonging to them; but of these also it may not be in Reversion, and the old Rent, or more, must be reserved upon them, and the Lessee must be charged with Reparations; nor may these Leases exceed forty Years; and so two Leases one after another, both not above forty Years, may be good. *Poph.* 8, 9.

And these Leases (as it seems) may be granted away altogether, where they shall purchase other Lands in Fee-simple of like Value. *Stat.* 14 *Eliz.* c. 11. But as to other Lands belonging to their Churches and Places, they may by no Means make Leases for longer Time than three Lives or twenty-one Years.

A Lease made of Land antiently let afunder at several Rents, and now let together by one Lease, and more than the whole Rent reserved, is doubted to be a good Lease within the Statute. *Cro. Eliz.* 16.

The Statutes of 13 *Eliz.* and 1 *Eliz.* do not alter the Statute of 32 *H.* 8. but leave it for a Pattern for Leases to be made by others. A Lease made according to the Exception of 1 & 13 *Eliz.* and not warranted by the 32 *H.* 8. if it be by a Bishop, or any sole Corporation, must be confirmed by the Dean and Chapter, and others, that have Interest, as in the Case of a Parson and Vicar. *Co. Lit.* 44.

But Note, That altho' in all these Cases of Leases and Grants not warranted by the Statutes afore said they are said to be void, yet this is to be understood as against the Successors only; for as to the Lessors themselves they are good against them whilst they live, or at least so long as they continue in the Place; so that if such a Lease be made by a Dean and Chapter, or other Congregation Aggregate; this will be good against the Dean, or other Head of the Corporation, so long as he shall continue to be so. So of Leases made by Bishops, not warranted by 1 *Eliz.* or a Dean and Chapter, Master and Fellows of a College, or the like, not warranted by 13 *Eliz.* c. 10. these Leases will be good against themselves altho' they be void against the Successors. So if a private Act of Parliament entails Land upon a Man, and appoints him what Estate he shall make, and that if he makes any other Estates they shall be void; this shall be taken void as to the Tenant in Tail himself that makes them. *Co. Lit.* 45, 329. 3 *Co.* 59. 10 *Co.* 59. 11 *Co.* 35, 78. 5 *Co.* 5.

The Tenant in Tail is also restrained, but in the same Cases as before Leases for twenty-one Years or three Lives, may be made under all the other Qualifications and Conditions before-mentioned in the Leases of Spiritual Persons. *Stat.* 32 *H.* 8. c. 28. *Co. Lit.* 44.

But with this Addition the primitive Estate must continue, for if the Lease be made according to the Statute, and then the Tenant in Tail dies without Issue, the Lease is at an End. 4 *Co.* 34. *Dyer* 34.

And there only where Leases are made with these Conditions they are held to be within the Statute, and such only as do bind the Tenant in Tail himself and his Issue; for otherwise if it be not warranted by this Statute, altho' it will bind the Tenant in Tail himself that made it, yet it will not bind his Issue, but as to him it will be void or voidable at least; for if Tenant in Tail of Land makes a Lease of it for one hundred Years, without any Rent reserved thereupon, this Lease as to the Issue in Tail is void; but if he makes a Lease for one hundred Years, rendring Rent, and has Issue, and dies, in this Case the Lease is only voidable by the Issue at his Pleasure; and therefore if the Issue in Tail after his Death shall accept the Rent, by this the Lease is affirmed and become good; but let the Lease be made how it will, it will not bind him in Remainder over, nor him that is Donor: And therefore if Tenant in Tail makes a Lease warranted by the Statute, and after dies without Issue, so that the Land remains over to another, or reverts to the Donor; in these Cases neither he in Remainder, nor the Donor, shall be bound by this Lease, for as to them it is void. And yet if the Remainder be in the Tenant in Tail himself, and he makes a Lease for Years by Deed according to the Statute or Fine, this Lease is good, and shall bind his own Remainder: But if he makes a Lease for Years by Fine, this will not Bar the Donor, nor him in Remainder, in any Case where it is in a Stranger. *Plow.* 416, 435. *Dyer* 7, 8.

But in this Case the Tenant in Tail may, by the Help of a Fine and Recovery, or one of them, make what further Estate he pleases to bind the Donor and him in Remainder also. 7 Co. 7. 1 Brownl. 139. Plow. 435.

A. and B. his Wife being Tenants in special Tail, the Reversion to A. who dies; C. the Issue in Tail to A. and B. by Deed indented, and in the Life-time of the Mother, makes a Lease for forty Years to D. to begin after the Death of the Mother, rendring Rent, and dies; the Reversion comes to E. who with her Husband in the Life-time of B. the Mother levies a Fine *Sur Conuſance de droit*, &c. to F. and then B. dies, and Proclamations paſs; in this Case the Lease is good. 2 Bulſtr. 45.

And if Tenant in Tail infeoff his Issue, who at his full Age makes a Lease for Years, the Father dies, the Son is remitted, yet he ſhall not avoid his own Lease. Dyer 51.

And if the Son being Issue in Tail after his Mother makes a Lease for Years after the Death of his Mother, and dies, and then the Daughter, the next Issue in Tail, makes another Lease, and both theſe Leases are to begin after the Death of the Mother, the laſt Issue levies a Fine, and then the Mother dies; both the Leases are good, and that which is firſt made ſhall begin firſt. 2 Bulſtr. 46.

If Tenant in Tail makes a Lease to begin at Michaelmas next enſuing for twenty Years, this is good. So is a Lease for ten Years, and after for eleven Years. And ſo in all Cafes where there is not above twenty-one Years in the Whole. 1 Leon. 147, 148. Or not above forty Years in all upon two Leases by Eccleſiaſtical Perſons that may make ſuch Leases. Popb. 8, 9.

If Tenant in Tail makes a Lease for twenty-two or for forty Years, or for four Lives; this Lease is void not only for the Overplus of Time more than twenty-one Years, or for three Lives, but for the Time of three Lives and twenty-one Years alſo. And if ſuch a Tenant in Tail makes a Lease for ninety-nine Years, determinable upon three Lives, it is not a good Lease. But if a Lease be made by Tenant in Tail for a leſſer Time, as for two Lives, or for twenty Years, this is a good Lease. And if it be made for four Lives, and one of the Lives dies before the Tenant in Tail dies, yet this Accident will not make it good, but the Lease is voidable notwithstanding. Dyer 246. 5 Co. 6.

If Land has been formerly let to one Man for three Lives, they may now be let to three Men for three Lives. Cro. Jac. 76, 77.

A Lease of ſuch Land to one for Life, the Remainder to another for Life, the Remainder to a third for Life, is not good; but a Lease to one for the Lives of three others is good, altho' it become an Occupancy. 6 Co. 37.

But a Lease for twenty-one Years by Tenant in Tail after the making of it, is good by 32 H. 8. c. 28. altho' the Day be not accounted Part of the Time. Moor 41.

If Land be given to Husband and Wife, and to the Heirs of their two Bodies, and the Husband dies leaving Issue by his Wife, and the Wife makes a Lease according to the 32 H. 8. c. 28. in this Case it ſeems the Lease is good to bind the Issue. Godb. Caſe 119.

If Tenant in Tail makes a Lease within the Statute to one for Years, and after for Life to another, and a Letter of Attorney to give Livery to another, and before Livery made the firſt Lease is ſurrendered; here the ſecond Lease will be good. Spark's Caſe, Trin. 4 Jac. B. R.

A Lease for Years by one in Remainder in Tail is good againſt the Leſſor; but if any Tenant in Tail in Poſſeſſion ſuffer a Recovery of the Land, by this the Lease will be avoided. Owen 41, 42, 43. 1 Co. Capel's Caſe.

If Tenant in Tail be of a Manor that has been uſually demifed for 10 l. Rent, and after a Tenancy eſcheat, and then he leases the Manor, rendring this Rent, it is ſaid this Lease is good; but that if he purchaſes a Tenancy, it is otherwiſe. 5 Co. 6.

Tenant in Tail of an Advowſon, and his Heir in Tail, join in the Grant of the next Avoidance, the Tenant in Tail dies; this Grant is utterly void as to the Son. Hob. Caſe 47.

If the Tenant in Tail makes a Lease for Life, the Remainder for Life, &c. this is not a good Lease within the Statute; but ſuch a Lease made for the Lives of others that may be an Occupancy, is good. 6 Co. 37.

If Tenant in Tail and one A. levy a Fine to a Stranger of the Land, who grants and renders to A. for Years, rendring Rent, and by the ſame Fine grants the Reversion

sion to Tenant in Tail in Fee; this is a good Lease for Years, altho' it be by one Fine, and the Lease shall be said to precede the Grant of the Reversion. 1 Co. 76, 174.

Where it is required by the Statute that the old Lease shall be surrendered, this Surrender must be absolute, and not conditional; and it must be real, and not illusory and in shew only, *Factum non dicitur quod non perseverat.* 5 Co. 2.

And there may not be a double or concurrent Lease in Being at one Time; as where a Lease for Years is made according to the Statute, he in Reversion may not afterwards repulse the Lessee, and make a Lease for Life or Lives, or another Lease for Years, according to the Statute, nor *e converso.* Co. Lit. 44. b.

But if a Lease for Years be made to one, and after a Lease for Life is made to another, and a Letter of Attorney made to give Livery and Seisin upon the Lease for Life, and before the Livery made the first Lease is surrendered; in this Case the second Lease will be good. Moor 748.

If one in Remainder in Tail makes a Lease for Years, and then levies a Fine with Proclamations; by this the Lease is made good. Plow. 427.

A Lease made by Tenant in Tail, to begin from Michaelmas three Years after, or after the Death of the Tenant in Tail for twenty-one Years, is not good. 5 Co. 6. Dyer 246.

But a Lease made by him to begin at Michaelmas next for twenty-one Years, is a good Lease within the Statute: Such a Lease to commence *a die datus*, is good, so Livery be made after the Date. Moor 759.

Two Coparceners in Tail; the Husband of one being Tenant by the Curtesy join in a Lease, rendring Rent to two and their Heirs; this is not a good Lease by 32 H. 8. of Estates-tail, for it is not reserved to the Donee and his Heirs, but to the Tenant by the Curtesy jointly with the other. Latch 45.

If there be more Rent reserved upon the new than was upon the old Lease, the Lease is good. 5 Co. 5.

If the old Rent was eight Bushels, and the new Rent is a Quarter of the same Corn; this is good enough. 5 Co. 5.

If Tenant in Tail let a Part of the Land accustomably let, and reserve the Rent *pro rata*, or more than after the Rate; this will not be a good Lease. 5 Co. 5.

If two Coparceners have twenty Acres of Land of equal Value between them in Tail, and these have been usually letten, and they make Partition of them, so that each of them has ten Acres; in this Case they may make several Leases each of them of their Parts, reserving Half of the accustomed Rent. 5 Co. 5. Ley 78. Vide Co. Lit. 44. b. contra.

Tenant in Tail is seised of a Manor with three Acres thereof in Demesne, and he makes a Lease of the three Acres also of the Manor, *Habendum* the three Acres and the Manor for twenty-one Years, rendring Rent for the three Acres, and all other the Premises therewith demised 5 l. in this Case the Lease is good for the three Acres. Owen 119.

If Tenant in Tail makes a Lease of his intailed Land without Impeachment of Waste, it is not good altho' it be but for twenty-one Years or three Lives; and therefore also is a Lease for Life, with a Remainder for Life, void because Waste will not lie. 6 Co. 37.

If Tenant in Tail makes a Lease of such a Thing as lies in Grant, as of an Advowson, Fair, Market, a Hundred, Portion of Tithes, Franchise, or the like, out of which a Rent cannot be reserved, altho' it be but for twenty-one Years or three Lives; this will not be good within the Statute: And yet perhaps it may be so far good as to give an Action of Debt for the Rent upon the Personal Contract; and altho' the Thing whereof the Lease is made has been usually let, yet this will not be good; and therefore a Grant of a Rent-charge out of such Land is void. Cro. Jac. 112. 11 Co. 60.

The Lands whereof the Lease is made must be such as have been usually let to Farm for twenty Years before the Lease; so that if it has been let for eleven Years at one or several Times within twenty Years before the new Lease made, it is sufficient. And altho' the Letting has been by Copy of Court-Roll only, yet such a Letting in Fee for Life or Years is a sufficient Letting: And so also is a Letting at Will by the Common Law. But these Lettings to Farm must be made by such as are seised of an Estate of Inheritance; for if it has been by Guardian in Chivalry, Tenant by the Curtesy, Dower, or the like, this will not be a Letting within the Statute. 6 Co. 37. Dyer 271. Cro. Jac. 112.

If

If Tenant in Tail makes a Lease for Years according to 32 H. 8. this will bind the Issue of the Tenant in Tail, but not him in Reversion. *Noy 6. Dyer 19.*

Where a Tenant in Tail makes a Lease for Years, or grants a Rent, Common, &c. or otherwise charges the Land; this is a good Lease, Grant or Charge to bind the Tenant in Tail himself, and his Issue, if made within the Statute. *Bridgm. 28.*

If Tenant in Tail makes a Lease for Years, and then levies a Fine with Proclamations to the Donor, and dies, having Issue; the Donor may not avoid this Lease. *Bridgm. 28.*

Husband and Wife Tenants in Tail of the Gift of the Husband, the Remainder to the Husband in Fee, the Husband dies, the Son and Heir of the Husband and Wife levies a Fine with Proclamations to the Use of him and his Heirs, the Wife makes a Lease of the Land for twenty-one Years; this is good as against the Issue in Tail. *Bridgm. 28, 29.*

If Tenant in Tail makes a Lease for Years at a Rent, and the Issue accepts the Rent, (as he may or may not at his choice) by this the Lease is made good for his Time; but if he infeoff a Stranger before his Entry, the Feoffee cannot avoid it. *Bridgm. 28.*

A Lease for Years of Land usually demised, and of other Land not demised before, reserving the antient Rent for the Land usually let, and 12 *d.* for the other, is not a good Lease. If an Office usually granted for Life be granted for two Lives, or for Life, the Reversion for Life; this is (it seems) not good. *Cro. Eliz. 34, 35. 5 Co. 4.*

The Grant of Increase of Fee by way of Reservation to an antient Officer, is not good. *Cro. Eliz. 34, 35.*

If one seised of Land in Fee in Right of the Wife, and she as Sole without her Husband grants a Rent by Fine issuing out of the Land, this will not bind the Husband during Coverture; but if he dies before they reverse it, she is bound. *Perk. §. 20.*

There must be reserved upon such a Lease made by Tenant in Tail, payable to the Lessor and his Heirs, to whom the Reversion shall appertain, so much or more of yearly Rent during the Lease, as has been usually paid for the same for twenty Years before the Lease made; and therefore if the Rent be reserved but for Part of the Time of the Lease, it is void. *5 Co. 8. Moor 759.*

But a Lease may be good altho' it do not reserve a Heriot, or the like Thing, which is not annual. *6 Co. 37.*

And a Rent formerly reserved at two Days may now be reserved at one Day, and is good. *6 Co. 37.*

If the old Rent were to be paid for a Close, and now a House is built upon it, and the Rent now issues out of both House and Close, it is good. *1 Leon. 147, 148.*

And if Tenant in Tail has twenty Acres of Land that has been usually let, and he makes a Lease thereof, and of one Acre more, which has not been usually let, reserving the usual yearly Rent, and so much more as to exceed the Value of the other Acre; this will not be a good Lease within the Statute. *5 Co. 8.*

If Tenant in Tail be of a Manor that has been usually demised for 10 *l.* Rent, and after a Tenancy escheat, and then he makes a Lease of the Manor, rendring 10 *l.* Rent, it is a good Lease; but where the Lessor purchases a Tenancy, it is otherwise. *5 Co. 5. Ley 7, 8.*

If the Tenant in Tail of two Farms, the one at 20 *l.* the other at 10 *l.* Rent, shall make a Lease of both these together at 30 *l.* it is not a good Lease within the Statute. *5 Co. 8.*

But if the antient Rent was payable at four Days, and the new Rent is payable at two Days, this may be good. *Cro. Jac. 76.*

And if the new Rent be payable at one Day, it is said not to be good. And if the old Rent was payable in Gold, and the new Rent in Silver, this is not good. *5 Co. 6.*

If antiently let to two Tenants, and now to one, and all the Rent and more reserved together, *2 Cro. Eliz. 16.* it seems not good. *5 Co. 5.*

If besides the annual Rent, there has been usually a Reservation or Payment of some Things not annual, as Heriots, Fines, or the like, upon the Death of the Farmers, or a Profit out of another's Soil, as Pasturage for a Colt, &c. and upon the new Lease the yearly Rent is reserved, but the other Reservation and Payments are omitted, the Lease is good enough. *6 Co. 37. Moor 759.*

If a Lease be made by a Tenant in Tail, or Ecclesiastical Person, for twenty-one Years, and then they make another Lease to the same Person for twenty-one Years; it seems this second Lease is good, because the first Lease is surrendered by the taking of the second Lease.

If the Tenant in Tail makes a Lease for Years, rendering Rent, and dies without Issue, his Wife privily with Child of a Son, and he in Reversion enters; in this Case the Lease as to him in Reversion is void: But as to the Son is good, when born, it will be good against him. *Co. Lit.* 46.

Tenant for Life, the Remainder in Tail within Age grants an Annuity with Distress, and *Nomine pæne* 20 s. for every Month; agreed if Tenant for Life, and it is confirmed by the Remainder in Fee within Age, that it is issuing out of the Estate for Life, and a void Grant as to the Remainder: And if Tenant for Life purchases the Remainder or Reversion, it shall not bind the Inheritance; but the Matter of Law was not agreed. *Cro. Eliz.* 73.

Tenant in Tail and his Son join in a Grant of the next Avoidance of a Church, this is void as to the Son. *Hob.* 45.

If a Feme Sole Tenant in Tail makes a Lease not warrantable by the Statute of 32 H. 8. c. 28. and then takes a Husband, and has Issue, and dies, the Husband shall not avoid the Lease, but the Issue shall avoid it if the Father dies or surrenders. *Moor* 8.

If Tenant for Life, and he in Remainder in Tail join and make a Lease to another for two other Lives; this will be good only against them for their own Lives. But *Quære*, If it be not a Forfeiture by the Tenant for Life. *Cro. Car.* 252.

If Tenant in Tail makes a Lease of some Land usually let, and of other Land not let, and makes several Reservations of Rent, and reserve out of the Land usually let the antient Rent thereof; this is a good Lease, at least for so much as hath been usually let. *Cro. Car.* 340, 341.

If a Lease be made for Life to Husband and Wife, the Remainder in Tail to N. T. their Son; a Stranger levies a Fine *Sur Conusance de droit come ceo que il ad de Son done al N. T.* the Son, who grants and renders the Land to him for fifty-four Years, rendering Rent, has Issue, and dies before any Proclamations past, and after the Husband and Wife die; in this Case the Lease is good against the Issue in Tail by Reason of the Rent; otherwise if the Rent had not been reserved. *Plowd.* 430, 431.

A. and B. his Wife, Tenants in special Tail, have Issue a Son, the Father dies, the Son levies a Fine with Proclamations to the Use of himself in Fee, the Wife makes a Lease for twenty-one Years, rendering Rent; this Lease is good against the Son. *Hutton* 84.

If a Woman Tenant in Tail of the Gift of a deceased Husband, or any of his Ancestors whilst she is Sole, or after with another Husband makes any such Lease according to the Statute of the 32 H. 8. c. 28. yet this Lease will not be good, for it is against another Statute, *viz.* 11 H. 7. c. 20. 3 Co. 51.

If a Woman Tenant in Tail makes a Lease for thirty-one Years, and takes a Husband, and has Issue, the Wife dies, the Husband is Tenant by the Curtesy; in this Case the Issue may not avoid the Lease during the Life of the Tenant by the Curtesy. *Owen* 83.

A. being Tenant for Life of Land, the Remainder in Tail to R. his Son, grants a Rent out of it in Fee to Y. S. after this the Father and Son levy a Fine of the Land with Proclamations to the Use of the Father in Fee; this Grant is good, and now unavoidable by the Son by Reason of a Fine levied. *Hutton* 96.

If a Woman Tenant in Tail makes a Lease for Years, and after takes a Husband, and dies, the Husband being Tenant by the Curtesy surrenders to the Issue; the Issue may avoid the Lease. *Moor* 8.

Tenant in Tail makes a Lease to a Feme Covert, the Husband surrenders, and then the Tenant in Tail makes a Lease for three Lives, and dies, the Wife after the Death of the Husband that surrenders enters and dies; the Issue may not avoid the Lease for three Lives.

If Lessee for Years surrenders upon Condition, and the Lessor makes a Lease for three Lives, and the Lessee for Years enters for the Condition, the Years expire. *Quære*, If the Lease be good against the Issue in Tail. *Moor* 783.

If a Woman Tenant in Tail within the 11th of H. 7. accepts of a Fine *Sur By a Woman Conusance, &c.* and renders the Land to the Conusor for 100 or 1000 Years, this is Tenant in Tail.

H h h

within the Statute. So if she has Title of Dower, and before she be endowed she shall enter and levy a Fine. 3 Leon. 78. Dyer 148. 5 Co. Brown's Case. Godb. Case 8. 2 Leon. 168. Hob. 258.

If Lands are given to the Wife in general Tail, the Remainder to a Stranger in Fee, the Donor dies, she takes another Husband, and has Issue a Daughter, the Husband and Wife levy a Fine to a Stranger; the Daughter and next Heir has no Remedy, for that Estate is within the Words of 11 H. 7. not within the Meaning: For no Estate is within the Meaning of the Statute but what is for the Jointure of the Wife; and the Meaning of that Statute is, that the Wife so preferred by her Husband shall not Prejudice the Issues or Heirs of the Husband, and no such Prejudice is in this Case. 3 Leon. 78, 260. Vide Bent. 143.

One in Consideration of Service done to him by his Man, gives Land to him and his Wife, and the Heirs of their two Bodies, and dies; this is not within the Statute, vide Telv. 101. But if it be to Sibil his Wife, *Con sanguineæ sue*, 2. Vide Moor, Case 493.

One seised of Land in Fee makes a Feoffment of it to J. S. to the Use of his Wife for her Life, and after to the Use of the Heirs of the Body of the Feoffor; the Wife dies, the Feoffor makes a Lease for Years, and dies, the Issue may not avoid this Lease, and a Man can have no Heirs whilst he lives. So if a Lease be made for Life, the Remainder to the right Heirs of J. S. and J. S. dies in the Life of the Lessee, there the Remainder is good; otherwise not, but it shall revert. But it may be in a Will. Hetley 66.

The Ancestor of the Husband covenants to stand seised of Land to the Use of the Husband and Wife, in Consideration of Marriage and of Money; if the Wife aliens the Land after the Death of the Husband, the Heir may enter, by the 11th Hen. 7. Moor 93.

But if the Ancestor of the Wife make such a Gift or Covenant, this it seems is not within the Statute.

If the Ancestor of the Husband makes a Feoffment, on Condition to give back to the Husband and Wife in Tail; if in this Case the Wife aliens it after the Death of the Husband, this is within the Statute.

If the Husband be seised of Land in Right of his Wife, and they levy a Fine, and the Conusee grants a Rent to them in Tail, the Husband having Issue died, the Wife aliens the Rent; this is out of the Statute, for the Rent comes in Lieu of the Land. Cro. Eliz. 2.

Husband devised Land to his Wife in Tail, the Remainder over to another, and died, the Wife with her second Husband aliened this Land by Fine, and died; altho' this is within the Words, yet it is not within the Meaning of the Statute of the 11th of Hen. 7. Cro. Car. 21.

One seised of Land in Fee levies a Fine to the Use of himself for Life, and after to the Use of his Wife, and of the Heirs Male of her Body by him begotten, for her Jointure, and had Issue Male; and after he and his Wife levied a Fine, and suffered a common Recovery, the Husband and Wife died; in this Case the Issue Male may enter; for altho' it be out of the Letter, yet it is within the Intent of the 11 H. 7. c. 20.

But if one seised of Land in Right of his Wife, and they two levy a Fine, and the Conusee grants and renders the Land to the Husband and Wife in special Tail, the Remainder to the right Heirs of the Wife; they have Issue, the Husband dies, the Wife takes another Husband, and they levy a Fine in Fee; in this Case the Issue is barred, for this, altho' it be within the Words, yet is not within the Intent of the Statute. Co. Lit. 365.

G. covenants with B. as well in Consideration of a Marriage between L. his Son, and A. the Daughter of B. as of 200 l. paid him by B. to convey the Land to the Use of L. and A. and the Heirs of the Body of A. and to his right Heirs; they after marry, A. dies before the Assurance made, L. the Son makes the Assurance accordingly, and they have Issue R. (1) This Assurance, altho' made for Money as well as upon a Marriage, shall be said to be a Jointure within the 11th of H. 7. Dy. 146. Cro. Jac. 474. (2) This is an Estate-tail in the Wife, and but an Estate for Life in the Husband. (3) The Alienation of the first Husband and A. his Wife, he himself limiting it, being only Tenant for Life, is not a Forfeiture within this Statute. Cro. Jac. 474.

If a Woman Tenant in Tail of the Gift of her deceased Husband, or any of his Ancestors whilst she is Sole, or after with another Husband makes a Lease, altho' it be

be such a one as is within the 3 H. 8. for Tenant in Tail, yet it is not good, being against 11 H. 7. c. 20. 3 Co. 51.

A Gift of Land, Part for Marriage and Part for Money, is within the Statute of 11 H. 7. c. 20. Moor 91.

And therefore if the Land be purchased Part with the Money of the Husband and Part with the Money of the Father, &c. it may be within this Statute. Moor 250.

The Father infeoffs his Son and a Feme Sole, this is not within this Statute. Moor 715, 716.

A Gift partly for Service of the Husband and partly for the Consanguinity of the Wife, is within the Statute of 11 H. 7. Moor 683.

One devised his Land to his Wife in Tail, the Remainder to a Stranger, and dies; in this Case the Wife with her second Husband may alien it: For where the Remainder is to a Stranger, so as it is no Prejudice to the Heir of the Husband; this is not within the Statute, and her Alienation will be no Forfeiture. Cro. Car. 2.

And if the Husband be seised of Land in Right of his Wife, and they levy a Fine, and the Conusee grants a Rent to them in Tail, the Husband leaving Issue dies, and the Wife aliens the Rent; this is out of the Statute of 11 H. 7. for the Rent comes in Lieu of the Land. Cro. Car. 2.

And lastly, as to Leafes made by Tenant in Tail, the Sum of all is this: That such Leafes made by such Tenants of full Age, of the Land they have in their own Right without Fine or Recovery, are good, so as these Conditions be observed: Rules relating to Leafes, &c. by Tenants in Tail.

First, Such Leafes must be by Deed indented, and not by Deed Poll.

Secondly, They must begin from the Making, or from the Day of the Making thereof, and not at a Day to come, as three Years hence, or at the Death of the Lessor, or the like. Co. Lit. 44. Dyer 246.

Thirdly, If there be an old Lease in Being of the Land, the same must be surrendered, ended, or within a Year of Ending, and this Surrender must be real and absolute. 5 Co. 2.

Fourthly, There may not be a double or concurrent Lease in Being at one Time; and therefore if one Lease be in Being, he may not put him out and make another. 5 Co. 2.

Fifthly, These Leafes must not exceed three Lives or twenty-one Years; and therefore if made for forty Years, or four Lives, they will be void, not only for the Overplus, but for all the Time: But for a lesser Time, as for two Lives, or twenty Years, it is good. 5 Co. 6. Dyer 246.

And if made for four Lives, and one of them dies before the Death of Tenant in Tail, yet it is not good.

Sixthly, These Leafes must be of such a Thing as upon which a Rent may be reserved and recoverable, and not out of an Advowson, Fair, Portion of Tithes, Franchise, or the like; and this is so altho' it has been antiently let for the Rent; and therefore a Grant of a Rent-charge out of such Land is void. 5 Co. 2.

Seventhly, The Lease must be of such of his Lands as have been antiently let for twenty Years before. 6 Co. 37. Dyer 271.

Or most commonly let for the greater Part of twenty Years, so as it has been let for eleven Years at one or at several Times within twenty Years before the new Lease made, it is well enough; and altho' the Letting has been by Copy of Court-Roll, or at Will. But such Letting must be by the Tenants themselves, and not by a Guardian, Tenant by the Curtesy, Donor, or the like. *Ibid*.

Such Lease must not be against any Act of Parliament. 3 Co. 51.

Eighthly, There must be reserved on such Lease to the Tenant in Tail and his Heirs, so much or more Rent as has been usually paid for twenty Years before; and this must be reserved for all the Time of the new Lease. And a Lease of the Land before with other Land, reserving the old Rent, with somewhat more for the other Land, is not sufficient. Nor may they join Lands together that had two Rents, reserving the two Rents together: But for accidental Profits, as Heriots, and the like, they may be omitted, yet the Lease may be good. And yet if the old Rent was payable at four Days, and the new is payable at one Day, this is not good. But if the old Rent was to be paid in Gold, and the new Rent is to be paid in Silver, this may be good. 5 Co. 5.

Ninthly, The new Lease may not be made without Impeachment of Waste. 6 Co. 37.

Tenthly,

Tenthly, There must be all due Ceremonies of Livery of Seisin, or Requisites to perfect the same. 7 Co. 7. 8 Co. 54.

One that has an Estate in Land to him and his Wife, and his Heirs, may make what Lease he pleases of the Land, and it will be good against all but his Wife, and that only for her Time. *Bro. Lease* 58.

By Husband
of the Wife's
Land.

A. possessed of a Term of Years in Right of his Wife, makes a Lease for Years of it, to begin after his Death; and it was held good, altho' he could not by Will have disposed it. *Popb.* 5.

So he may contract for and make a Lease for Part of his Time, as twenty-one Years, where he hath forty Years, or the like; and for the Remainder of the Term not disposed of, the Wife will have it. *Ibid.*

If Lands be granted to Husband and Wife for their Lives, the Remainder to the Survivor of them for Years, and the Husband grants over this Term of Years, and dies; this is not good, but the Wife and not the Grantee shall have it: For till a Survivor was, neither of them had Power to grant. So it would have been if the Wife had died, and the Husband had survived, yet he should have had the Term against his own Grant. *Popb.* 5.

W. and his Wife being possessed in Right of his Wife of a Term which she has as Administratrix; W. grants the Term to C. to the Use of him and his Wife for their Lives, and after to the Use of himself: This Grant is good, and it shall not be accounted fraudulent as to Creditors; and it is out of the Statute of 19 H. 7. and all other Statutes of that Nature. *Cro. Car.* 392, 393.

By Husband
alone.

Husband and Wife Jointenants for Life, the Husband alone accepts of a new Lease; this is a Surrender, but avoidable by the Wife if she survives. *Moor* 636.

A Letter of Attorney by Husband and Wife to deliver a Lease made by them, is void as to the Wife. *Telv.* 1.

A Husband by his Marriage has full Power of his Wife's Term, if the Wife dies it survives to the Husband, or if the Husband dies it survives to the Wife, unless he dispose of it. *Hob.* 3.

By Husband
and Wife.

If they join in a Mortgage, this is no Disposition, and if the Husband purchase the Fee, the Term is not extinct; they can neither by Acceptance of a new Lease, nor expressly surrender the Wife's Freehold, so as to bind her surviving. *Hob.* 203.

Husband a-
lone.

The Husband alone may during his Life, by Act executed, dispose of any of the Goods and Chattels of his Wife's, but he cannot dispose it by his Will at his Death. *March* 135.

So he may give or grant Goods and Chattels which he has as Executor, by any Act executed in his Life-time, but not devise them by his Will at his Death. *Plow.* 516. 6 Co. 66.

By Husband
and Wife.

Husband and Wife seised of Land in London to them and the Heirs of the Husband, and they covenanted by Indenture for 20 l. to suffer a common Recovery after the Custom there, (which binds as a Fine) and that it should be to the Use of the Recoverors, until they had made a good Lease by Indenture for forty Years, and after the Making of the Lease, to the Use of them and the Heirs of the Husband, which Recovery was had; this Lease is good, and not avoidable by the Wife. *Dyer* 290.

Husband and Wife seised of Lands in the Right of his Wife, levied a Fine to the Use of themselves for their Lives, and after to the Use of the Heirs of the Wife, provided that it shall be lawful for Husband and Wife at any Time during their Lives to make Leases for twenty-one Years, or three Lives; the Wife being Covert, made a Lease for twenty-one Years; it is a good Lease against the Husband. *Godb.* 327.

Husband.

A Husband seised of Lands in Fee makes a Feoffment from that Day to divers, to the Use of his Wife for her Life, and after to the Use of the Heirs of the Body of the Feoffor; the Wife dies, and the Feoffor makes a Lease for Years, and dies: In this Case the Issue cannot avoid the Lease, for a Man cannot have Heirs of *J. S.* and *J. S.* dies in the Life of the Lessee, then the Remainder is good, otherwise not, but it shall revert; but otherwise perhaps it may be in such a Case upon a Demise. *Hetley* 66.

A Husband makes a Feoffment to the Use of his Wife for Life, and after her Death to the Use of the right Heirs of the Body of the Husband and Wife; the Wife dies having Issue, the Husband survives, this Issue cannot take, for the Husband during his Life cannot have a right Heir capable. *Dyer* 99.

If a Gift be to Husband and Wife, and the Heirs of the Body of the Survivor of By Husband them, and they make a Lease for twenty-one Years, observing all Circumstances by and Wife. 32 H. 8. yet this Lease will not bind the Issue, for the Incertainty of the Person of the Survivor the Estate-tail was not vested. 10 Co. 51.

Tenant in Tail of Lands *in Capite* makes a Lease not warranted by 32 H. 8. and By Tenant in dies without Issue, the Reversion descended to his Heir, who is in Ward, &c. yet Tail. altho' the King avoid this Lease for his Time, as he might, the Heir in Tail may after, by Acceptance of the Rent, make the Lease good. Dyer 119.

So a Tenant in Tail, the Reversion in the King makes a Lease for Years, and dies, his Issue of full Age, the King avoided it for his dues, the Son accepts the Rent after Livery sued out, this is an Affirmance of the Lease. And if Tenant in Tail shall discontinue the Tail, and take back an Estate in Fee, and after makes a Lease for Years, rendring Rent, and dies, the Issue before Entry levies a Fine, the Grantee may not avoid the Lease. 7 Co. 8.

If Tenant in Tail has Issue, who being of Age grants a Rent out of the Land to a Stranger, and after the Tenant in Tail dies, the Issue in Tail shall hold the Land discharged. Co. Lit. 348.

A Guardian during the Minority of the Issue in Tail but of one Year old, makes a Lease for twenty Years of the Land; this is not good within the Statute of 32 H. 8. to bind the Issue. So of the Lease of Tenant in Dower by the Curtesy, or of Husband in Right of his Wife, for they have no Inheritance. Dyer 271. Co. Lit. 44.

7. M. and his Wife Tenants in Tail, the Remainder to the Heirs of the Husband, by Conveyance of the Husband during Coverture, he has a Son, and dies; the Son in the Mother's Life-time levies a Fine to the Use of himself and his Heirs; the Wife lets the Land for twenty-one Years, not reserving the antient Rent, and dies, the Son has Issue a Daughter, and he devises the Land; this is a good Lease to Bar the Devisee of the Son, and all Persons; and it is no Alienation within the Statute of 11 H. 7. Cro. Jac. 689. Bridgm. 27.

If Tenant in Tail reserves a lesser Rent than the antient Rent, and after his Death a greater Rent than the antient Rent was; this will not be a good Lease. 5 Co. 6.

A Lease for the Lives of others is within the Statute of 32 H. 8. for Leases made by Tenant in Tail, as well as within 13 Eliz. 6 Co. 37.

If a Gift be made to a Man and his Wife, and the Heirs of their two Bodies, the Remainder to the right Heirs of the Husband, and they have Issue A. the Husband dies, A. in the Life-time of the Mother levies a Fine, with Proclamations to B. in Fee; the Wife living, the Son made a Lease for three Lives: This Lease is not good altho' she is Tenant in Tail, yet the Fine levied is a Bar to the Issue in Tail. 9 Co. 140.

A Lease made by Tenant in Tail from Michaelmas next for twenty Years, or for ten Years, and after for eleven Years, is good. Dyer 246.

Leases for Years by Tenant in Tail, warranted by the 32 H. 8. or by Husband and Wife of the Lands of the Wife, must not be of Copyhold Land; for it must be of such Land as is grantable by Deed only. Cro. Eliz. 30, 31.

If Tenant in Tail and his Son join in the Grant of the next Avoidance; this will be void as to the Son. Hob. 45.

Two Coparceners in Tail, the Husband of the one being Tenant by the Curtesy joined in a Lease, rendring Rent to one of them and their Heirs; this is not a good Lease by 32 H. 8. of Estate-tail, for the Rent will not go to the Issue. Latch 45.

Tenant in Tail makes a Lease for twenty Years, to begin at Michaelmas. Qu. If good within 32 H. 8. Dyer 2, 46.

If a Tenant in Tail makes a Lease within the Statute of 32 H. 8. and after dies without Issue, this Lease being derived out of the Estate-tail is determined also, *Cessante statu primitivo cessat derivativus*. 8 Co. 34.

And if he makes a Lease for 100 Years, without any Rent reserved; this as to the Issue in Tail is void; but if it be rendring Rent, and he has Issue and dies, in this Case it is only voidable by the Issue at his Pleasure; and therefore if the Issue accepts the Rent after the Tenant in Tail's Death, by this Means the Lease is affirmed, and becomes good. But be it made how it will within the Statute, &c. it shall not bind him that comes in of a Remainder over, nor the Donor; and therefore if he makes a Lease within the Statute, and dies without Issue, so that the Land remains to another, or reverts to the Donor; in these Cases neither he in Remainder,

nor the Donor, shall be bound by it, but as to them it will be void. And yet by a common Recovery the Tenant in Tail may take Leases of, or lay Charges upon the Land, to bind the Donor and him in Remainder also; but otherwise it is of a Fine, for if Tenant in Tail makes a Lease for Years by Fine, this will not Bar the Donor nor him in Remainder in any Case where he is a Stranger. And yet if the Remainder be in the Tenant in Tail himself, and he makes a Lease for Years by Deed, according to the Statute, or by Fine; this Lease will be good, and bind his own Remainder. *Plow. 436. 7 Co. 7, 8, 54. Dyer 7, 8.*

If one has an Inheritance of Rent-Corn, as Tenant in Tail, it is said, it is an Hereditament, and may descend or escheat, a Wife may be endowed of it; and therefore that a Rent may be reserved out of such a Lease: And so it was there said, it may be done upon a Lease of a Rent. *Vide Owen 32. Qu.*

By one who
has no Interest
or Property.

If one grants or charges that which is not his to grant or charge, and that wherein he has no Interest or Propriety, it being in the Grantee, or in a Stranger; this Grant will be void.

And therefore if a Man grants a Rent-charge out of the Manor of Dale, or grant a Reversion of Land, and in Truth the Grantor hath nothing in the Manor of Dale, or in the Land; in this Case the Grant is void.

And altho' the Grantor do after purchase this Manor or Land, yet this will not make the Grant good.

And yet where it is by Fine or Indenture, there in some Cases it may be good by way of Estoppel.

And where the Grantor in such a Case as this shall recite the Land to be his own, yet this will not amend the Case; as if a Man recites that he has a Rent of 10 l. a Year out of such Land, and grants 5 l. Parcel of it; in this Case if there be no such Rent, the Grant will be void. *Perk. §. 65. Dyer 12, 33.*

If the Heir Apparent of the Disseisee disseises the Disseisor, and grants a Rent-Charge, and then the Disseisee dies, the Grantor shall hold it discharged, for a new Right of Entry descends to him. So if the Father disseises the Grandfather, and grants a Rent-Charge, and dies, the Entry of the Grandfather is taken away; and if the Grandfather dies, the Son is remitted, and shall avoid the Charge. *Hugh's Abr. 1029, 1030.*

If a Man grants Common or Rent, and at that Time a Stranger takes the Rent, or uses the Common, yet the Grant is good. And if a Lease for Years be made to me of Land, I may grant it away before my Entry into the Land. *Perk. §. 92, 98. Co. Lit. 46.*

One that has nothing in Land makes a Lease for Years by Indenture, he is estopped to say he had nothing in it. But a Jury is not concluded in it, but they may say the Truth. But regularly a Man cannot grant or charge that which he hath not; and altho' he after acquire it, yet the Grant is not good unless there be an Estoppel. *Perk. c. 1.*

If one makes a Lease for Life, and the Lessee for Life makes a Lease for Years, and after purchases the Reversion, and dies within the Term; yet the Lease for Years is determined, and the Heir in Reversion may oust him, and avoid it: But if one will make a Lease for Years where he has nothing, and after purchases the Land, and the Lessor dies, if it be by Deed indented, the Heir is estopped and cannot avoid it. *Hetley 91.*

If one makes a Lease for Life, and after makes a Feoffment in Fee, and a Letter of Attorney to make Livery, and the Attorney ousts the Lessee for Life, and makes Livery accordingly; this is a good Feoffment, but the Lessee for Life may re-enter, yet the Reversion shall remain in the Feoffee. *Moor, Case 226.*

If a Feoffment be made to J. S. and the Wife he shall after marry, and their Heirs, it gives nothing to the Wife. But a Covenant to stand seised to such an Use is good, and a Fine levied to the Use of the Conusor, and the Wife that he shall after marry, is good. *Moor, Case 240.*

If one makes a Feoffment of another's Land, (which is Disseisin) it is good against all Persons but the Disseisee. *Perk. §. 222.*

If four join in a Feoffment of Land, and three of them have nothing in the Land, it shall be taken to be the Feoffment of the fourth that hath all the Estate, and be a good Feoffment. *Bro. Feoffment 4. Perk. §. 222.*

And this is generally true in such like Cases as these, that one that has neither Right to, nor a Possession of Land, may not give, grant or charge it; nor can a Man lay charge upon that Land to which a Man has only a Right, as before-mentioned.

And yet one may grant a Rent or Common that has Right to, altho' he for the present have not Possession of it. *Perk. §. 98.*

A. makes a Lease for Life of Land, and after covenants to levy a Fine of it to the Use of J. S. for forty Years, to begin after the Death of the Lessee for Life; after the Lessor disseiseth the Lessee for Life, J. S. that has the future Interest during the Disseisin, assigned it over; and this is good, for he has more than a Right. If a Man has a Lease for Years, to begin after a Lease for Life, altho' the Lessee for Life be disseised, yet the Interest of the Term continues good, and is grantable over.

2 Brownl. 224.

A. possessed of a Term of Years, devised the Profits of it to one for Life, and after to another for the Residue of the Years, and died, the first Devisee entred by the Assent of the Executors, and after he in Remainder, during the Life of the first Devisee, assigned it to a Stranger, the first Disseisee died; it was held a void Assignment. *6 Co. 66.*

If a Lease be made for Life, the Remainder for Years to him which comes first to Paul's, and then grants the Term of Years to another; this A. is the first that comes to Paul's; yet this is not good, neither shall the Grantee have it. *Poph. 5.*

A Lease is made of Land to two, *Habendum* to them *Ad terminum vitæ eorum conjunctim & alterius diutius viventis ac assignatis suis, qui primus eorum decedere contingat, durante vita ejus qui superstes & non aliter*; in this Case he that first dies can assign away but one Moiety, for he has no more to grant. *Dyer 46. Co. Lit. 187.*

If one Jointenant makes a Lease for Years, to commence after his Decease; this Lease is good altho' his Companion survives. *Moor, Case 514.*

If two Coparceners be of an Advowson, and one of them presents, and then grants the next Presentation; this is good, but it shall be intended the next which he has to grant, for his Companion will have the next Presentation.

And if one be seised in Fee of an Advowson, and he has a Wife, and he grants the third Presentation; this is good, but it shall be taken for the third he may grant, which is the fourth; for the Wife is to have the third for her Dower. *Dyer 35: 15 H. 7.*

Two Coparceners, the Husband of one Tenant by the Curtesy joins in a Lease, rendering Rent to one of them, and to the Tenant by the Curtesy; this is no good Lease within *32 H. 8. Latch 45.*

A Termor being outlawed of Felony, granted his Term and Interest to J. S. who is put out by J. D. and after the Outlawry is reversed; adjudged that J. S. shall by Action of Trespass recover for the Profits taken between the Outlawry and the Reversal of it. *Cro. Car. 270.*

If Lessee for Years of a Term from the King be ousted by a Stranger, yet he may assign his Term; for in Case of the King he cannot be out of Possession, as where the Reversion is in a common Person. *Cro. Car. 275.*

If a Man makes a Lease for Life, the Remainder to the right Heirs of J. S. J. S. has Issue a Son which sells this Remainder, and after J. S. dies, this Son being his Heir, yet avoids his own Sale. *Poph. 6.*

Lessee for Years makes a Lease at Will, the Lessee at Will makes a Lease for Years, and then he in Remainder grants over his Land; this is good altho' the Deed of the Grant of the Interest be not upon the Land, for he is not out of Possession, but at Will. *Latch 75.*

If one that has a Reversion upon Estate for Life, and he grants a Rent issuing out of this Land; in this Case, and by this the Grant will be good, and the Charge shall fasten upon the Land after the Estate of the Tenant for Life is ended. *Perk. §. 65, 72, 86, 98. Co. Lit. 46.*

If a Bargain and Sale is made of Lands for Years in Possession, and the Bargainee never enters; and after reciting this Lease he makes a Grant of the Reversion; this is a good Conveyance. *Cro. Jac. 604.*

If one has a Term of Years in his Land, and by his Will devises it to J. S. for his Life, and after to me for the Residue of the Years, or devise it to J. S. if he lives so long as the Term shall last, and if he dies before the Term ends, the Remainder to me: In these Cases so long as J. S. lives, I may not grant this Possibility: So

So if a Lease be made to me and my Wife, the Remainder to the Survivor of us. 4 Co. 66. 5 Co. 24. 10 Co. 51. Dyer 244.

If one makes a Lease to *A.* for twenty Years, and *A.* makes a Lease of the Land to *B.* for two Years, rendering Rent, and after *A.* makes a Lease for the Rest of his Time to *L.* by Deed; this Lease, if the Lessee for two Years do attorn, is a good Grant of the Rent and the Reversion. And so it is also without Attornment, if there be any Consideration given for it, and then it will be also a good Lease for all the Rest of the Term after the two Years. Plow. 432. Dyer 112.

If the Lessor enters upon his Lessee for Life, and makes a Feoffment, and the Lessee re-enters, the Reversion shall pass; and if the Lessor be a Tenant in Tail. *Qu.* If this be a Discontinuance. Moor 91.

Tenant in Tail, Remainder over, he in Remainder granted the Land, *Et totum statum*, to a Stranger during the Life of the Tenant in Tail, the Remainder over; in this Case the Grant of the Land is void, but good for all his Estate, and then the Remainder over is void. Moor 466.

By Persons
having a spe-
cial Power or
Proviso.

In some Cases such Persons as are not seised in Fee-simple, &c. nor able to derive such Estates for Life or Years out of their own Estates, may lawfully notwithstanding make such Leases for Life, &c. And this may be by a special Act of Parliament enabling them so to do. And so the Tenant in Tail is enabled to make a Lease for three Lives or twenty-one Years. And sometimes it is by a special Power or Authority given or reserved by and to the Party himself that had the Fee-simple in him, or given to some other to do it in his Name. And Leases thus made may be good.

And therefore where an Act of Parliament enables a Tenant in Tail, or a Tenant for Life to make Leases for three Lives, or twenty-one Years, Leases so made in Pursuance of that Authority are good.

And if a Man be seised of Land in Fee, and conveys it to the Use of himself for Life, or in Tail, with divers Remainders over, with a Proviso that it shall be lawful for him, or any such Tenant in Tail, to make Leases for twenty-one Years; in this Case he or they may make such Leases, and they will be good.

But in both these Cases Care must be had that the Authority be strictly pursued (that is) that the Leases be made according to the Power and Direction given by the Statute or Proviso; for if it differ and vary ever so little from the Sense and Meaning of the same, the Lease will not be good. And therefore in the Case before, of a Power to make a Lease for twenty-one Years, and the Party makes more Leases for twenty-one Years at one Time than one, they are all void but the first, because it is against the Intent of the Parties, tho' it be not against the Words. And so if the Power be to make Leases for three Lives, he may not by this make a Lease for ninety-nine Years, if three Lives live so long. But if the Power be thus: *Provided, &c. that he make any Lease in Possession or Reversion, so as it doth not exceed the Number of three Lives, or twenty-one Years*; in this Case a Lease may be made for ninety-nine Years, if three Lives so long live. But where Uses are raised by way of Covenant, and in the Deed there is a Proviso, *that the Covenantor for divers good Considerations may make Leases for Years*; in this Case the Power is void, and no Lease can be made upon it, neither will any Averment help in this Case. And if a Man have a Letter of Attorney, or other Authority from another to make Leases for him, and do make them accordingly, such Leases are good. But herein Care must be had of three Things: 1. That the Authority be good. 2. That the Deputy or Attorney pursue it strictly. 3. That he does all that he does in the Name of him that gives him the Power, and not in his own Name. 5 Co. 5. Dyer 357. 6 Co. 2. 8 Co. 70. 1 Co. 175. 9 Co. 76.

But if a Power to make Leases be raised upon a Covenant to stand seised without any Transmutation of Possession, this is void in Law, and not to be helped in Equity. Cary 30. Cro. Jac. 180, 181. 1 Leon. 35. Cro. Car. 5.

If Power be given by Parliament to make Leases, yielding the true and ancient Rent of the Land so letten; in this Case if a Lease has been made of many Lands together, whereof some were not demised before; this Lease will be void. Moor 197.

A. being seised of Land in Fee makes a Lease for Life, and after levies a Fine of all his Land, with an Indenture to lead the Uses thereof, *i. e.* to the Use of *J. S.* for fifteen Years, and after to the Use of himself for Life, with a Power therein by Proviso to himself to make Leases for twenty-one Years or three Lives in Possession; by this he may make Leases for twenty-one Years during the fifteen Years, and presently in Possession, but not in Reversion. 2 Bulst. 42. *Erington v. Erington.*

If a Man has Power to make Leases for twenty-one Years, rendring the antient Rent, he may not by this Power make Leases in Reversion. *Cro. Car. 5. Cro. Jac. 319. 1 Leon. 35.*

L. Tenant in Fee of a Manor levies a Fine to the Use of himself for Life, and after to the Use of J. his eldest Son in Tail, &c. with Power for him at any Time to make Leases for twenty-one Years or three Lives, rendring the antient Rent, &c. and he leases two Parts for twenty-one Years to B. and before this Lease expires he makes another Lease to B. for twenty-one Years, to begin after the Determination of the first Lease; and as to the third Part, he made a Lease of it for twenty-one Years after the Death of one C. (who in Truth had not any Estate in the Land) and died; the first Lease expired, and J. the Son entred and leased to the Plaintiff; the Defendant claimed under B. the Lessee; and it was adjudged for the Plaintiff; for by such a Power he may not make a Lease to begin at a Day to come, but it must be a Lease in Possession, and not in Interest, to commence *in futuro*, nor in Reversion after another Estate ended. *Telv. 222.*

An Estate is created by Parliament in a Manor which consists of free Rents, Copyholds and other casual Profits, and thereby it is enacted, *That all Acts which they that are seised by Force of the said Tail shall do to the Prejudice of their Issue, &c. if not Jointures, &c. shall be void*; the Donee makes a Lease of the whole Manor, and an Acre of Waste, rendring Rent at two Days, where the antient Rent was reserved at four Days: In this Case the Lease is void, (1) In Respect of the Acre of Waste not leased before, for this is not the antient Rent. (2) For that it is reserved at two, which antiently was at four Days. And the Reservation of Silver, where the old Rent was in Gold, had not been good.

So, had Part of the Farm been leased for Part of the Rent.

So, where two Farms be in one Demise for the Rent of both.

But the rendring of eight Bushels for a Quarter of Corn, is good, for this is the same Thing.

And altho' the Rent be to be apportioned, yet this will not make the Lease good.

And yet a Parcener may lease her Moiety, reserving Rent for so much, and it is good. *5 Co. 3.*

If it be enacted by Parliament, *That a Woman shall have such Land for her Widowhood, provided that it shall be lawful for him that hath the Fee to make Leases for twenty-one Years, rendring the antient Rent*; he may not by this make a Lease for twenty-one Years to begin at a Day to come, nor one Lease in Reversion after another. *1 Leon. 35.*

The Reversioner upon an Estate for Life levies a Fine to his own Use till the Marriage of his Son, and then to the Use of himself for Life, with Power to make Leases, so they exceed not twenty-one Years or three Lives, reserving the antient Rent, the Remainder to his Son in Fee; the Son marries, the Father leases for ninety-nine Years, if two live so long, reserving Rent to him and his Heirs; this is a good Lease. *8 Co. 69.* For his Power in the Beginning is absolutely limited, that it exceed not three Lives.

There is a Difference between a general and absolute Power and Authority as Owner of the Land, for he that has this Power may make Leases for Life or Years by Attorney; and a particular Power and Authority by him that has but a particular Estate, for he may not do so; as where A. is Tenant for Life, the Remainder in Tail, and A. has Power to make Leases, &c. *2 H. 4. 4. 1 H. 6. 6. 9 H. 7. 14.*

If one makes a Feoffment in Fee to the Use of himself for Life, the Remainder to B. in Fee, with Power to make Leases, &c. reserving the antient Rent, he dies, it seems he in Remainder shall have the Rent. *Lane 110.*

And in these Cases where a Statute makes such Leases void, it shall be taken as against the Lessor, and not as against the Issue. *5 Co. 3.*

If one limits an Estate by Indenture to the Use of himself for Life, with Power to make Leases for Life or Years, or to such Person or Persons as he shall name by his last Will of any Estate or Estates, the Remainder to A. in Tail, with divers Remainders over; these Remainders do not vest till the Contingencies happen. *10 Co. 85.*

One being Lessee for ninety-nine Years of Land devises his Term to his Wife for Life, with Power to make such Estates in as ample Manner as he himself might have done during her Life, the Remainder in Tail to his Daughter, and died; the Wife proved the Will, accepted of the Bargain, and after made a Lease for ninety-nine

K k k

Years

Years of the Land, and died. *Qu.* If by this the Wife may make any Estate to endure after her own Life. *Style* 315, 275.

If a Statute enables a Man to make Leases for twenty-one Years, or less, of Land usually demised for twenty-one Years, or less, rendring the antient Rent; he leases for twenty-one Years, and after during this Term leases to another for twenty-one Years, to begin at the End of the first Lease. *Qu.* If good. 3 *Leon*, Case 110, 184.

One seised of Land makes a Lease for Life, and after levies a Fine of all his Land to the Use of *D.* for fifteen Years, and after to the Use of himself for Life, with a Power to him to make Leases for three Lives or twenty-one Years in Possession, by this the Term of fifteen Years is presently subject to the Power to make Leases for Years, and the first Lessee must have the Rent reserved during the Term of fifteen Years limited to him. *Hughes's Abr.* 1231.

A. Tenant for Life of the Manor of *D.* in Lease for Years levies a Fine to the Use of herself for Life, and after to the Use of her eldest Son in Tail, reserving Power to her at any Time to make Leases for twenty-one Years, the former Lease in Being, she makes a Lease for twenty-one Years to *J. S.* to begin at the Determination of the former Lease; in this Case the second Lease is void, for it must be Leases in Possession, and not in Reversion. *Cro. Jac.* 318.

If a Power be given to make Leases for twenty-one Years, and there be a Lease in Being, and he makes another Lease that has this Power; this is good altho' it be to begin at a Day to come. 1 *Leon*. Case 44.

And altho' it be to begin after the Expiration of the former Lease. *Ibid.* *Poph.* 9. 2 *Leon*, Case 183.

One levies a Fine to the Use of himself for Life, the Remainder in Tail, &c. with Power reserved to the Conusor to make Leases for eighty Years in Possession or Reversion, if *A. B.* and *C.* do so long live, rendring the antient Rent; afterwards he grants the Reversion for eighty Years, reserving the antient Rent: In this Case he does less than he has Power to do, for this Grant of the Reversion expires with the particular Estates for Life: But if he makes a Lease to begin after the Death of the Tenants for Life, *contra.* *Godb.* Case 281.

S E C T. V.

Of the Name and Description of the Person contracting, as the Grantor, Donor, &c.

4. By a sufficient Name.

THE fourth Thing (as Lord Coke observes) necessarily incident to a Deed, is a sufficient Name of the Person contracting, which will be the Subject of this Section.

As to the Naming and Description of the Parties and Persons in Deeds, these Things are necessary to be known:

First, The Names of the Parties to Deeds serve only to distinguish Persons, and to make the Person intended certain; and therefore it is safe to describe the Person intended by his true and proper Names of Baptism and Surname; and if it be a Corporation, by the true Name whereby it was made; yet Mistakes in this, unless they be very gross, will not hurt, *Nilil facit error nominis cum de corpore constat.* 1 *Bulst.* 21, 22. 2 *Bulst.* 302, 303. *Co. Lit.* 3. *Perk.* §. 36.

But if the Name of Baptism or Surname be mistaken, as *John* for *Thomas*, or *Adderley* for *Adderby*, this is dangerous. *Moor* 407, 897.

Secondly, There are many Descriptions of Grantors and Grantees; as (1) proper Names of Baptism and Surnames, and the Names of Corporations, or Bodies Politick or Corporate. (2) Names of Dignities, Office, and the like. And these (of both Sorts) will admit a Description made good by Reputation. And so Land will pass to one, by the Name of a Son, who is a Bastard; so to one by the Name of a Wife, who is not a Wife, if they be reputed or known by that Name. *Hob.* 32.

If *W.* by the Name *J.* (without any Surname) or by the Name of *S.* without any Christian Name, gives or takes by Deed, the Deed is void. 2 *Bulst.* 70. *Perk.* §. 39.

Thirdly, There must be such a Person *in esse* at the Time of the Deed made as is named, and he must be able to give and capable to receive that which is given or granted by the Deed. *Plowd.* 345. *Co. Lit.* 2, 3. *Perk.* §. 43, 52.

And therefore if an Annuity be granted to the right Heirs of *J. S.* he being then living, this is void; for there is none such, nor can be whilst he lives. *Perk. §. 52.*

So *primogenit. proli* of *A.* and *B.* and they have no Issue yet born. *Cro. Car. 22.*

Fourthly, If a Man gets another Name by common Esteem than his right Name, and he is known by his other Name, his Deed made by this other Name may be good. *6 Co. 36. Co. Lit. 3. Perk. §. 41.*

Fifthly, The Mistake is less dangerous where any other Part of the Deed, or some other Addition, shall make the Person intended certain. *6 Co. 36. Co. Lit. 3. Perk. §. 40.*

Sixthly, The Law favours not Advantages of Misnaming, otherwise than as the strict Rules of Law require. *6 Co. 64.*

If *A. S.* be bound by a Deed by the Name of *W. S.* this Deed will be good; and if he be sued upon it by the Name of *W. S. alias dict. A. S.* he shall avoid it; for if he plead *Non est factum*, the Jury shall find it specially, the Plaintiff will not recover. But if the Action be brought against him by the Name of *W. S.* as he is called in the Obligation, the Plaintiff will recover; and if he plead *Non est factum*, it will be found against him. *Dyer 280. Perk. §. 185, 186.*

And therefore if *John at Style* makes a Deed by the Name of *William at Style*, yet this Deed may be good. *Co. Lit. 3. Perk. §. 39, 41.*

A Man being a Patentee of the King's, may be bound by Covenant altho' he do not covenant by Name and in express Terms. *Cro. Jac. 240.*

In *Moor's Rep. Case 1260.* it is said by all the Justices, that they had divers Times resolved, that none can make a Deed by a contrary Name of Baptism, nor may be known by two Names of Baptism. *Vide Co. Lit. 3. Dyer 119. 27 E. 3. 85. 9 E. 4. 43.*

If a Man be baptized by one Name, and after confirmed by another Name, some have said he may make a Deed by either of these Names. *Co. Lit. 3. 6 Co. 36.*

So of a Deed of Grant to one by either of these Names. *Co. Lit. 3.*

But a Man grants a Rent-charge or other Thing by a contrary Name of Baptism of the Grantor or Grantee, the Grant is void. *Moor, Case 215. Perk. §. 42.*

A Grant of an Annuity by an Abbot, by the Name of the Foundation, without Abbot: the Name of Baptism, there being then no other Abbot of that Name in *England*, was good. *Perk. §. 36.*

If a Duke, Marquis, Earl or Bishop, grant by his Name of Honour and Dignity, Duke, Marquis, Earl, or by a false Name of Baptism; as where the Duke of *Suffolk*, by this Name without Christian or Surname, or more Words, or by the Name of *William Duke of Suffolk*, makes a Deed; this is good, for there is but one of that Name in the Kingdom: So of a Bishop. *Fitz. Grant 67. Perk. §. 42.* As to the Bishop of *Worcester*. *Perk. §. 36, 45.*

If the Name of the Father be *W.* and the Name of the Son *W.* also, and either of them makes a Deed by the Name of *W.* without any Addition or Distinction, this is good enough. So of a Deed to them.

And if a Deed be made by the Father without any Distinction of Elder, &c. it shall be good, and taken to be the Deed of the Father. *Perk. §. 37.*

And so it seems it will be for the Deed of the Son, it being made good by Proof to be his Deed. *Perk. §. 37.*

Where *John at Stile* recites by his Deed that his Name is so, and then after grants by the Name of *Thomas at Stile*, this is good. *Perk. §. 40.*

So where *Alice at Stile* recites by her Deed, that she is a Feme Covert, and in Truth she is Sole. *Perk. §. 40.*

So a Deed of Grant to *W.* Wife of *W. S.* where she is Sole, is good.

A Grant by *Richard*, Abbot of *S.* where his Name was *Thomas*, was good; so there were then no other of that Name in *England*. *Perk. §. 42.*

If one give me a House by Word, and make a Writing of the Gift, either by a contrary Name of Baptism of him or me; this Gift by Word is good, but by Deed is void. *Perk. §. 42.*

But if an ordinary Man grants by his Surname only, without any Name of Baptism, or by his Name of Baptism without a Surname, there regularly the Deed will be void for Incertainty, unless there be something in the Deed to help to make it certain, or unless there be something *Ex post facto* to make it certain, as by the making of Livery, &c. which may supply it. And yet if a Man have six Sons, and he

he by Name, and his six Sons not naming them, makes a Deed of Grant; this may perhaps be good. 2 Bulst. 70. Perk. §. 38, 39, 54, 55, 56. 8 Co. 155.

But for such Things as pass by Livery, as Land, &c. altho' the Deed of Feoffment be made of it by a contrary Name of Baptism of the Feoffor or Feoffee, yet if Livery of Seisin be made duly upon it by and to the right Persons, it is good, and will take its Effect by the Livery of Seisin. Perk. §. 42.

A Corporation called *Minister dei pauperis domus de Donnington*, made a Lease by the Name of *John Litherland*, Minister of the Almshouse of God of *Donnington* beside *Newbury* in the County of *Berks*: And it was held good. *Moor's Rep.* Case 1194.

If a Dean and Chapter, Mayor and Commonalty, make a Deed by the Name of their Corporation, without any Addition of Christian or Surname; this may be good. Perk. §. 8, 42.

The Dean and Canons of the King's free Chapel of his Castle of *Windsor*, grant by the Name of the Dean and Canons of the King's Majesty's free Chapel of the Castle of *Windsor* in the County of *Berks*; and it is good. *Moor*, Case 195.

If a Corporation of *Decanus & Capitulum Ecclesie Cathedral. Sancte & Individ. Trinit. Carlic*, make a Deed by the Name of *Decanus Ecclesie Cathed. Sancte Trin. in Carlic ac totum Capitulum Ecclesie predict'*; this is good. 10 Co. 106. *Dyer* 278.

The Master and Chaplains of the Hospital of the late King H. 7. of the *Savoy*, made a Grant by the Name of *William Ugle*, Master of the Hospital of the King H. 7. called the *Savoy*, and the Chaplains of it, and it was not good. *Moor*, Case 367.

So if a Place and Persons be incorporate by the Name of the Dean of the King's free Chapel of *St. George the Martyr*, within the Castle of *Windsor*, and it makes a Deed by the Name of the Dean and Canons of the King and Queen's free Chapel of *St. George*, within the Castle of *Windsor*; it is good. 10 Co. 124.

Sayn *John* for Saynt *John*, is not good. *Andersf.* 211.

The Dean and Chapter *Ecclesie Cathedralis Christi de Oxon*, by the Name of the Dean and Chapter *Ecclesie Cathedralis Christi in Academia de Oxon*, made a Lease; and good. *Moor*, Case 493.

So is a Corporation by the Name of *Gardiani & Scholarium domus sive Collegii Scholarium de Merton in Universitate Oxonia*, and it makes a Deed *per nomen Custodis domus sive Collegii de Merton in Oxonia & Scholar' ejusdem domus*; this is not good. 10 Co. 125. *Moor*, Case 415.

Elizabeth and *Isabel* are several Names. *Andersf.* 212.

So is *Margaret*, *Marget* and *Margery*; so is *Gelyon* and *Julian*, *Agnes* and *Anne*, *Cozen* and *Cousin*. *Andersf.* 212.

But if the Mistake or Omission be in the Substance of the Name of a Corporation, then the Deed may be void: As where the Corporation is incorporate by the Name of *Præpositi & Collegii Regalis, Collegii beate Mariæ de Eaton juxta Windsor*, make a Deed by the Name of *Præpositi & Sociorum Collegii Regalis de Eaton*, &c. leaving out *Collegii beate Mariæ*; this is not good. 10 Co. 106.

But the Mis-naming of Corporations to avoid their own Leases and Grants is not to be suffered. *Jenk. Cent.* 6. c. 10.

If the greater Part of a Corporation agree to the Deed regularly in their Common Council, and fix their common Seal to it, it is good. 14 H. 8. 27. 21 E. 4. 27. 15 E. 4. 2. 14 H. 6. 17. *Davis's Rep.* 48.

The Dean and Chapter of the College of *Eaton* by that Name made a Lease, being incorporated by the Name of the Dean and Chapter of the College of *St. Mary of Eaton*; and it was held a good Lease. *Andersf.* Case 47. § p. 238.

If a Lease be made by the Dean and Chapter of the Cathedral Church of *Peterborough*, it being incorporated by the Name of, &c. Cathedral Church *Sancti Peterburgensis*, it is not good. *Andersf.* Case 47.

If the Dean and Chapter of *Christ-Church* in *Oxford*, incorporated by the Name of the Dean and Chapter of the Cathedral Church of *Christ*, &c. *Oxford*, of the Foundation of King H. 8. grant by the Name of the Dean and Chapter *Ecclesie Cathedralis Christi in Academia Oxon. ex fundatione Reg H. 3.* the Deed will be good, notwithstanding this little Mistake. *Poph.* 57. *Moor*, Case 493. See *Andersf.* Case 231.

A Bond made by the Name of *Edmond*, where his Name is *Edward*, is not good. *Godb.* Case 485. *Owen* 84. *Dyer* 279. 21 H. 7. 8. 33 H. 6. 19.

If a Deed be made by or to *Jobane B.* by the Name of *Jane B.* or to *Jane* by the Name of *Jobane*; it is good, for these two are one Name. 1 Leon. Case 204.

If *Eleanor* seals a Deed by the Name of *Ellen*, the Deed is not good, and she may plead *Non est factum* to it. *Moor*, Case 1260. 2.

The Queen made a Lease for Years of Land to the Men of *Chesterfield*, rendring Rent, by the Name of the Aldermen of *Chesterfield*, and they by this Name grant all their Interest to *Clark*; this Grant from the Queen was good, but the Grant by them was void. 1 Cro. 35.

A Hall in *Oxford* was founded by the Name of the Hall of the Scholars of the Queen in *Oxford*; if it be granted by the Name of the Provost, Fellows and Scholars of the College of the Queen in the University of *Oxford*, or by the Name of the Provost, Fellows and Scholars of the Hall or College of the Queen in the University of *Oxford*; the Grant would be good. 11 Co. 20, 22.

If a Bastard has got a Name by Reputation in the Place where he lives, or another Man has got another Name by common Esteem than his right Name, or is usually called by another Name than his true Name in the Place where he lives; in these Cases a Grant by these Names is good. 6 Co. 63. *Perk.* §. 41.

Names or Designations that have an equivocal *Amphibologie* in them; as for Example, *Puer*, for Male or Female; if not cleared to the contrary, will *prima facie* be taken for a Son. *Dyer* 337. & *sic de similibus*.

The Law does not favour Advantages of Misnomer in Conveyances; for if the Grantor or Grantee are usually called by a wrong Name, which they are commonly known by, it will not hurt the Deed, provided it contains sufficient Certainty to describe the Person or Thing. *Nomen dicitur a noscendo, quia notitiam facit: Et nihil facit error nominis cum de corpore constet*; for the Law respects much the Intent of the Parties, and as it may be collected from the several Parts of the Deeds, the Judges give Judgment. *Nihil tam conveniens naturali equitati, quam voluntatem Domini volentis rem suam in alium transferatam habere*.

And the Judges expound Deeds according to their Intent and vulgar Intelligence, and not according to the very Definition and strict Propriety of Words.

And therefore to make a Thing *in esse* pass by a Name, it is sufficient to call it by the Name it has been for some considerable Time called and known by in the Neighbourhood, as *Exeter House*, &c. and a Thing may get a new Name in two or three Years, by such a vulgar and common Reputation.

So Lands may pass by the Name of a Manor, or a Manor by the Name of Lands, especially where the Thing was originally what it is now called. *De nomine proprio non est curandum dum in substantia non erretur. Et nomina mutabilia sunt, res autem immobiles*. 6 Co. 63.

If the Variance between the Deed and the true Name of the Corporation be material or essential, either by Omission, Alteration or Addition; whether made to or by a Corporation, the Deed may be avoided.

But if the Variance be only literal or verbal, *in literis & syllabis (& non re & sensu)* so that the Sense by the express Words remains, or by necessary Implication, and the Description of it, imports a sufficient and certain Demonstration of the true Name of the Corporation, according to the Foundation, such nice and curious Misnomers shall not avoid the Deed. 10 Co. 103. 11 Co. 20.

Where a Corporation has divers Names, (as some of the antient Corporations have) it may give or take by either of its Names. 10 Co. 103.

If a Person or Corporation (Sole or Aggregate) be so described that he or it may be certainly distinguished from other Persons or Corporations; in these Cases the Omission, or in any Case the Misprision of the Name of Baptism, or of any Thing in the Name of the Corporation, will not hurt the Deed. *Nomen quasi rei notamen. Et nomina sunt notæ rerum. Nihil facit error nominis cum de Corpore constet*. 11 Co. 20. Dy. 278. Plow. 537.

So that the Sum of all this is, That a Person may grant by the Name whereby he is called or known.

And where a Duke, Marquis, Earl or Bishop, gives or grants by his Name of Honour or Dignity, without any Name, or with a false Name of Baptism: As the Duke of *Suffolk*, by the Name of the Duke of *Suffolk*, without any more Words; or by the Name of *William Duke of Suffolk*, where his Name is *John*, or the Bishop of *Norwich* grants in like Manner; these are good Grants, because there is but one such Duke or one such Bishop in the Kingdom.

So if a Dean and Chapter, Mayor and Commonalty, grants by the Name of their Corporation, without any Addition of Christian or Surname, it is good; especially

if the true Name appears in some other Part of the Deed; as where *John at Stile* recited by his Deed, that his Name is *John at Stile*, and by the same Deed grants by the Name of *Thomas at Stile*. Or *Alice at Stile*, reciting by her Deed that she is a Feme Covert, when in Truth she is Sole. *Fitz. Grant* 67. *Perk.* 9. 40, 41, 38, 42. 3 *H.* 6. 26.

But if an ordinary Man grants by his Surname only, without any Name of Baptism; or by his Name of Baptism, without any Surname at all: In these and such like Cases, for the most part, the Deed will be void for Incertainty, unless there be some other Matter in the Deed to help it, or some Matter done *ex post facto*, to supply it; for in some Cases where the Thing granted lies in Livery, such a Mistake or Incertainty in the Grant may be helped, by the Livery of Seisin upon the Deed afterwards. And so it is in the Names of Corporations; for if the Variance and Mistake, by Omission or Alteration, be only in some small Matter, so as it is literal and verbal only, and the Sense still remains either expressly or by necessary Implication, and the Description be such as imports a sufficient and certain Demonstration of the true Name of the Corporation, according to the Foundation thereof, it is sufficient, and the Grant or Gift will not be hurt by it. But if the Mistake or Omission be in the Substance or Essence of the Name, the Deed may be spoiled by it. 6 *Co.* 65. 10 *Co.* 122. 11 *Co.* 19. *Dy.* 120.

Therefore the safest Way is to name the Grantor and Grantee by their Names of Baptism and Surname. *Co. Lit.* 3.

5. A Person
able to con-
tract with.

S E C T. VI.

To whom Grants, Contracts, &c. may be made.

Grants, &c.

THE Person to whom a Contract or Grant, &c. is made must be capable to receive and take the Thing granted, &c.

All Persons Male or Female, Ecclesiastical or Temporal, and all Bodies Natural or Politick, are capable to take by Grant, or to be contracted with, unless disabled by their being *Non compos mentis*, &c. as before, as to the Disabilities to grant, &c.

To the King.

The King, for the Greatness of his Person, is disabled to take by Deed *in pais*; and therefore if a Feoffment be made to him there, and Livery of Seisin be made upon it, this will be void; but he is to take by Matter of Record, which is of a higher Nature than a Deed. *Fitz. Feit and Feoffment* 21.

Leases made to him by Colleges, Deans and Chapters, or any other having a Spiritual or Ecclesiastical Living, against the *Stat.* 13 *Eliz.* c. 10. are restrained by the same Act, as well as Leases made to common Persons. 5 *Co.* 14.

To both Hus-
band and
Wife.

A Lease is made to Husband and Wife for their Lives, the Remainder to the Heirs of the Survivor; this is a good Remainder notwithstanding the Incertainty. *Godb. Case* 167.

If a Lease be made to the Husband, *Habendum* to the Wife, the *Habendum* to her is void, for she is a Stranger to the Premises of the Deed. 3 *Leon.* 32, 33, 34.

If one demises his Term to *J. S.* and makes his Wife Executrix, and dies, she enters, and then takes another Husband, and they take a Lease from the Lessor, and then the Devisee enters, and grants all his Estate to the Husband and Wife; this shall be good, and shall enure as an Assent in the Executor, and so a good Grant. *Owen* 56. 3 *Leon.* 24.

Land was demised to Husband and Wife for their Lives, the Remainder to the Survivor of them for Years, the Husband granted over the Term of Years, and died: The Wife and not the Grantee shall have the Term of Years, for there is nothing in the one or other to grant till there be a Survivor: And so it is if the Wife dies after the Grant, and the Husband survives, yet he shall have the Term against his own Grant. *Popb.* 5.

If Land is given to a Man and such a Woman as shall be his Wife, the Man takes the Whole.

But if a Man makes a Feoffment in Fee to the Use of himself and his Wife that shall be, and afterwards he takes a Wife, his Wife shall take jointly with him, altho' all at first vests in the Husband. 1 *Co.* 101.

If a Feoffment in Fee was made before the *Stat.* of 27 *H.* 8. of Uses, to the Use of a Man and Woman and their Heirs, and they intermarry, and then the Statute

was made; they held by Moieties, for if he aliens, it is good for a Moiety. *Plow.* 58. But if a Reversion be granted to Husband and Wife, and before Attornment they intermarry, and then Attornment is good, they shall not have any Moieties; as where a Feoffment in Fee is made to a Man and Woman, with a Letter of Attorney to make Livery, they intermarry, and then Livery is made *secundum formam Chartæ*, they shall have no Moieties. *Plow.* 483.

If a Reversion be granted to a Man and a Woman, and afterwards they intermarry, and the Tenant attorns; they shall not take by Moieties, but by Entireties. 2 Co. 68.

If after the Stat. 27 H. 8. a Man makes a Feoffment to the Use of his Wife, and if she dies living the Husband, to the Use of the Husband and such Wife as he should after marry for Life for her Jointure; the second Wife shall take jointly with her Husband, or by way of Remainder after his Death. But if it be a Remainder of Land in Possession fallen, then she takes nothing. And a Remainder to a Woman for Life after the Death of her Husband, is not a Jointure within the Stat. of 11 H. 7. & 27 H. 8. c. 10. *Dyer* 340.

Husband and Wife are Jointenants for 108 Years, the Husband by Deed makes a Lease for 20 Years, to commence after his Decease, and dies, this Lease is good. *Moor* 395.

If an Estate in Fee-simple, Fee-tail, or for Term of Life, be made to a Feme Covert, or to her Husband and her, the Husband alone may disagree to it, and avoid it for both of them. *Lit.* §. 671. 1 H. 7. 10. 8 Co. 72. *Dy.* 51. 5 H. 7. 32.

If a Statute or Obligation be made to them two, or to her alone, during the Coverture, the Husband alone by Defeazance or Release may avoid it; and if an Obligation be made to her during the Coverture, the Husband by his Disagreement may avoid it. *Co. Lit.* 351. 48 E. 3. 12. 7 H. 6. 1.

A. in Consideration of the Marriage of his Son made a Feoffment, and took back To Husband an Estate to himself for Life, the Remainder to his Son and his Wife which should and Wife. be in Tail; the Marriage took Effect, the Father levied a Fine, and bound him and his Heirs to Warranty, and died; the Son was Attaint of Treason and executed, the Queen granted the Land to a Stranger in Tail, and after she restored the Wife: And it was held, that the Conveyance to the Son, and his Wife that should be, was good to make her a Purchaser. But after the Restitution of the Wife, it seems she has Right but to a Moiety of the Land. *Dyer* 122. *Co. Lit.* 187.

A Fine is levied to the Use of a Man's self, and such Wife or Wives as he shall marry, and after he marries, it is good: And it was held, that she shall take jointly with the Husband, being upon a Use; *contra* upon an Estate executed; so that it seems it is a good Name of Purchase. *Dy.* 274.

A Gift by Deed of Land to a Man and Margaret his Wife, and the Heirs of their two Bodies, her Name being Margery; the Gift is good, and the Heirs inheritable by it. 1 H. 5. 8 H. 7. *Haukford* in *Hawley's* Case.

If a Wife dies, the Term survives to the Husband; and *vice versa*, unless he has disposed it away. *Hob.* 3. To Husband alone.

Husband and Wife Jointenants for Life; the Husband alone accepts a new Lease, which is a Surrender, but voidable by the Wife if she survives. *Moor* 876.

The Queen may purchase and buy Land, or Goods and Chattels, as any Man may do, and her Contracts will bind her therein. But it is not so in the Case of other Women that have Husbands. *Co. Lit.* 3. a. To Wife alone, or to a Feme Sole, &c.

A Woman cannot take by the Gift or Grant of her Husband immediately and directly to her, but collaterally and by way of Use she may; but she may take by Purchase from others without her Husband's Assent, and if he disagrees, the Estate is devested; and if he agrees, she may waive it after his Death till she has agreed to it. *Co. Lit.* 3. *Perk.* §. 194.

A Man may not covenant with his Wife to stand seised to her Use, but he may covenant with another so to do; or he may make a Feoffment or other Conveyance to her Use; or he may surrender a Copyhold to her Use. *Co. Lit.* 112. 4 Co. 29.

A Feme Covert may be a Grantee in a Deed, and any Gift or Grant made to her will be good, till the Husband disagrees to it; so that if a Rent-Charge be granted to her, and the Deed delivered to her, her Husband not being privy to it, and he dies before any Disagreement to it, it is good altho' this happens before any Day of Payment; but if the Husband makes a legal Disagreement to it in his Life-time, this may

may avoid the Deed made to her. *Perk.* §. 43. And he that will avoid the Grant must shew that the Husband did disagree to it. *Co. Lit.* 2.

If the Husband dies, the Term survives to the Wife, unless he has disposed it away. *Hob.* 3.

An Estate made to a Feme Covert *de novo* shall vest till the Husband dissent, but a new Lease to her who was Lessee before, will not vest till the Husband assents to it. *Hob.* 204.

If an Annuity is granted to a Woman for Life, who after marries, Arrears incur, and she dies, whereby it is determined, the Husband shall recover them. So if one grants an annual Rent out of Land wherein he has nothing, yet this is a good Annuity to charge the Person of the Grantor in a Writ of Annuity. *Owen* 3.

If a Feoffment be made to a Feme Sole on Condition, and she takes a Husband who does not perform the Condition, and so forfeits the Estate, the Wife is barred and bound for ever. *8 Co.* 48.

And if a Feoffment be made to her, she takes nothing by it till he agrees. And if one be bound to enfeoff them, and he refuses, it is a Refusal of both. *Finch* 44.

And if a Lease be made of two Acres for Life, the Remainder of one of them (not naming which) to a Feme Sole, and she takes a Husband, the Tenant for Life dies, and the Husband makes the Election; by this she is barred and concluded for ever, and she shall not chuse again. *Perk.* §. 79.

If an Estate in Fee-simple, Fee-tail, or for Life, be granted or conveyed to a Feme Covert, or to her Husband and her, the Husband alone may disagree to it and avoid it for both of them. *Lit.* §. 671. *1 H.* 7. 10. *8 Co.* 72. *Dy.* 51. *5 H.* 7. 32.

To Wife alone, or to her and a Stranger.

If Land is devised to a Feme Executrix during the Minority of *A.* to hold to her own Use without Account, provided she keeps *A.* at School: This Term will go to the Husband by the Marriage, and he may dispose of it. *Hob.* 285.

Lessee for Years assigns a Term to the Wife of the Lessor, and to a Stranger; the Lessor bargains and sells the Land, the Stranger dies, the Husband dies, the Wife shall have the Term. *Moor* 171.

If the Husband discontinues his Wife's Land, and goes beyond Sea, and the Discontinuee lets it to the Wife for Life, and gives her Livery, hereby she will be remitted, and the Husband by his Disagreement afterwards shall not prevent it. *Lit.* §. 677.

If a Lease be made of two Acres for Life, the Remainder of one of them (not naming which) to a Feme Sole, and she takes a Husband, the Tenant for Life dies, and the Husband makes the Election; by this she is barred and concluded for ever, and she shall not chuse again. *Perk.* §. 79.

To an Infant.

A Lease for Years to an Infant rendring Rent, is not void, but voidable at the Pleasure of the Infant. Before the Rent-Day comes he may move it, but if he pays the Rent, and then becomes of Age before another Rent-Day, it seems he shall be charged with that Rent. *2 Co.* 320.

A Dean and Chapter makes a Lease for ninety-nine Years, to begin after a Lease for fifty Years in Being, the Lease for ninety-nine Years is assigned to *A.* and *B.* Infants, who before the fifty Years ended take a new Lease from the Dean and Chapter for the same Term and Rent, and under the like Covenants, the Lease for fifty Years ends; in this Case it was agreed, that an Infant may not surrender by Deed; and that this Surrender by Acceptance of the second Lease was void. *Cro. Eliz.* 360.

Where one is an Infant or Feme Covert, not having Power to contract at the Time of the first Delivery of a Deed, and before the second Delivery becomes of Age, or discover; in these Cases the Deed is not made good. *Cro. Car.* 35.

A Lease for Years made by an Infant to try a Title, is good; and he may make a Letter of Attorney to take a Livery upon a Feoffment for him. *Lane* 130.

But a Deed made to an Infant, because it is presumed to be for his Advantage generally, is good, *Perk.* §. 47. so far that it is not void, but voidable only at his Pleasure; and therefore an Infant may be a good Grantee, Feoffee, Lessee, &c. by a Deed or Conveyance.

And yet in this Case also he is at his full Age to agree to it, and so to perfect it, or he may then disagree to it, and avoid it. *Co. Lit.* 2. *Perk.* §. 4.

Therefore

Therefore if a Lease for Years be made by him, rendring Rent, it is but voidable; but if without Rent, it is at his Election to make it good or not, as he sees it to be for his Advantage or not. 1 *Brownl.* 120. *Co. Lit.* 2. 2 *Bulst.* 69. *Cro. Jac.* 310.

If a Feoffment be made to an Infant, and he makes a Letter of Attorney to take Livery; this it seems is a good Warrant. *Perk.* §. 14.

If a Lease in Being be assigned to an Infant, and he takes a new Lease, this will not be a Surrender in Law of the first Lease. *Cro. Eliz.* 360. *Cro. Jac.* 310. 2 *Bulst.* 69.

An Office whereof he is capable may be granted to an Infant, as to one of full Age. Or if it be another Office, so it be granted to him, to be exercised by him, or by his sufficient Deputy, it may be good. *Cro. Eliz.* 203, 400. *Marsh* 41, 42, 43.

An Infant under one and twenty Years of Age may bind himself Apprentice, and make a Deed of Contract for it, and Covenant perhaps that it may bind him, if it be an Incident Covenant to his Trade; but Collateral Covenants will not bind him. *Vide Winch* 63, 64. *Hutton* 63.

Altho' a Bastard can neither be Heir to another, nor have an Heir to himself, yet after he has once gotten a Name by common Reputation, either from him that is suspected to beget him, from his Mother, or otherwise, may by that Name give and take Lands or Goods by Deeds, as any other Man whatsoever may do. *Perk.* §. 26, 48, 49. *Co. Lit.* 2. 3 *Leon.* 69. *Noy* 35.

If a Limitation be made (by way of Use) to a Man's self for Life, and after to such Issue and Issues Males of the Body of *L. M.* from Eldest to Eldest, who by common Supposition or Intendment shall be adjudged or reputed to be begotten by *J. B.* on the Body of *L. M.* whether the said Issue and Issues Males so born of the said *L. M.* and reputed to be begotten on her by the said *J. B.* be *Per legem hujus Regni Angliæ adjudicati legitime* & mulierly begotten, or unlawfully and immulierly begotten betwixt the said *L. M.* and *J. B.* and to the Heirs of the Bodies of such Issue or Issues Males, *De seniori in seniore existen. nat. de prædict. L. in forma prædict.* and after they marry and have Issue, this is a good Limitation. So a Limitation to a Bastard is good, for it is Issue to its Mother. But not so to a reputed Son or Bastard before he is born. *Cro. Car.* 526. *Perk.* §. 26, 48.

For a Son in Reputation is enough to make one a Purchaser: And yet if *A.* have Issue three Sons, and the Eldest is a Bastard, and a Remainder is limited to the Eldest Issue of *A.* by this the *Mulier*, and not the Bastard, shall take. But in the Case before, by the special Words, it is otherwise, for *Modus & conventio vincunt legem.* *Noy's Rep.* 35.

And if one by Deed give all his Goods to his Children, and one of them is a Bastard, by this he shall have no Share in the Gift. *Quere*, if it be by Will. *Moor* 39.

And a Bastard may purchase by his reputed Name: And a Remainder limited to him, by the Name of the Son of his reputed Father, is good. But a Bastard cannot take a Remainder by the Name of Issue. *Co. Lit.* 3.

A Lessor cannot make a Feoffment to his Lessee for Life, Years, or at Will; for one may not give a Possession to one that has it before; and yet such a Feoffment may enure as a Confirmation. *Fitz. Facts and Feoffments* 26. *Perk.* §. 194, 197.

But any Civil Corporation, as Mayor and Commonalty, or the like, may be a good Grantee by Deed: And one may (with the King's Leave) give or grant his Land to any such Civil Corporation, as he may to any single Person. *To a Lessee.*

Yea, if any Member of a Corporation be seised of Land in his own Right, and in his natural Capacity, he may make a Feoffment of his Land to the Head or Members of the same Corporation, and so they may give and take Lands or Goods in a divers Capacity. 3 *Leon.* 197. *Perk.* §. 31, 32, 33.

One Tenant in Common, or a Coparcener, by Feoffment may convey his Part of the Land to his Companion, but one Jointenant may not; therefore a Feoffment by one, and to another Jointenant, is not good; but by a Release, or some other Way, the Thing is to be done. And Coparceners may both enfeoff and release one to another. *Co. Lit.* 48, 49. *Perk.* §. 197. *To Jointenants, Tenants in Common, or Coparceners.*

And in some Cases, a Feoffment between them may enure to some other Purpose. *Fitz. Facts and Feoffments* 26.

One Jointenant may make a Lease for Years of his Moiety to his Companion, as well as Tenants in Common and Coparceners may do. *Owen* 102, 103. *F. N. B.* 62.

One Coparcener may make a Feoffment of his Part of the Land to his Companion, or he may make a Lease or Release to him. *Co. Lit.* 194, 200, 318. *Perk.* §. 193.

M m m

Jointenants

Jointenants may give their Parts one to another by Release, Attornment, Livery or Ceremony, and such Release may be without the Word *Heirs* in the Deed. *Co. Lit.* 194.

A Lease for Life to *A.* the Remainder to *A.* for Years, is a good Remainder to *A.* *Jenk. Cent.* 6. Case 37.

To those in
Reversion or
Remainder.

A Limitation of Use on a Fine is to the Use of the Conusor for Life, and after his Death to the Use of his two Daughters, till *A.* his Son returns from beyond Sea, comes to his full Age, or dies, which of the said Times shall come first, and then to remain to *A.* who comes from beyond Sea; in this Case the Remainder is good, and the Daughters have a good Estate conditionally for their Lives, and the Words in the disjunctive (*or dies*) being in the End of the Sentence, make the Copulatives before to be disjunctive. So if one makes a Lease to *A.* and *B.* his Wife for Years, if he and his Wife, or any Child of their Bodies, shall so long live; the Wife dieth, yet the Lease continueth, therefore it is a good Lease at first for all the three Lives. *Cro. Car.* 270.

And if a Lease be made to one until he comes to his Age of twenty-one Years, and then that it shall remain over to another; this it seems is a good Remainder. *Cro. Car.* 270.

If *A.* seised in Fee of Lands leases them to *B.* for Years, the Remainder in Tail to *C.* the Remainder to the right Heirs of *B.* by this *B.* hath nothing in the Fee, but it is a Remainder contingent to the Heir of *B.* If *C.* die without Issue in the Life of *B.* the Remainder is void, for the Foundation and Support of it is gone; there must be a Freehold to support a Remainder when it happens, and here is none; for *B.* dying without Issue in the Life of *B.* and *B.* during his Life cannot have Heir. *Jenk. Cent.* 248. Case 38.

And if in this Case *B.* shall make a Lease for Years, this will be good for so long as his first Term lasteth, for he hath nothing in Remainder. And if *A.* makes a Lease for Life, the Remainder to the right Heirs of *J. S.* the Lessee for Life makes a Feoffment in Fee in the Life-time of *J. S.* none may enter for this Forfeiture but *A.* *Jenk. Cent.* 6. Case 38.

A. makes a Feoffment in Fee to *B.* to the Use of *C.* for Years, the Remainder to the Use of *B.* in Tail, the Remainder to the Use of the right Heirs of *A.* this Remainder is void as a Remainder, but it is a Reversion in *A.* And if he had not spoken of the Use in Remainder after the Tail, it had been a Reversion in *A.* And the Limitation of such a Use by *A.* having the Fee of the Use cannot make his Heir Purchasor. And a Lease for 1000 Years made by *A.* after the Death of the Tenant in Tail without Issue, is good; for this is extracted out of the Reversion. *Jenk. Cent.* 6. Case 38.

If *A.* leases Land for Life to *B.* the Remainder to the Heirs of the Body of *J. D.* *B.* in the Life of *J. D.* surrenders to *A.* the Lessor; this Lease, notwithstanding the Surrender, shall support the contingent Remainders to the Heirs of the Body of *J. D.* so that if he dies, having Issue in the Life of *B.* he shall have the Estate. *Jenk. Cent.* 6. Case 38.

And if there be Lessee for Life, the Remainder for Life, the Remainder to the right Heirs of *J. S.* and Lessee for Life makes a Feoffment in Fee to *J. S.* and dies in the Life of him in Remainder for Life, this Right of Remainder for Life shall support the contingent Estate. *Ibid.*

A. B. Tenant for Life, the Remainder to *C. B.* in Tail, the Remainder to the right Heirs of *A. B.* lets the Land to *J. S.* for four Years; afterwards grants the Reversion to one *R.* *Habendum* from *Midsummer* next for the Life of *A. B.* after *Midsummer* the Lessee *J. S.* did attorn to *R.* and after granted all his Term to him; this Grant of the Reversion by *A. B.* to *R.* of the Reversion to begin at a Day to come, is void, and the Attornment does not make it good. *Cro. Car.* 585.

To Heirs.

One gives Land by Deed to another for Life, Remainder *rectis heredibus masculis* of his Body, the Remainder to his right Heirs, and died, having Issue two Sons; Tenant for Life dies, the Eldest Son enters and dies having Issue a Daughter; in this Case she shall have the Land as Heir, and not the Youngest Son. 4 *H. 6. Champenon's Case, Dy.* 156. *Co. Lit.* 22.

To Executor
or Admini-
strator.

M. S. makes a Lease of Land to *W. S.* for eighty-nine Years, if *W. S.* shall so long live; the Remainder, after his Death, to the Executors or Assigns of the said *W.* for forty Years; after *W.* dies intestate, and the Administration is committed to *G. S.* his

his Wife: In this Case the Administrator shall hold it as a Thing vested in the Intestate. *Owen* 125, 126.

If a Lease be made to one for forty Years, if the Lessee lives so long, and after another Lease is made by Deed, by the Word *Demise*, to the same Lessee, *Habendum* to his Executors and Assigns for forty Years after the Expiration of the first Lease; *Quere*, if this Lease be good. And yet if a Lease be made for Life, with this Addition, *And that the Executors shall have it for certain Years after his Death*; this may be good. 3 *Leon.* 32, 33.

If A. makes a Lease to B. for ten Years, if B. shall live so long, the Remainder after his Death to the Executor or Assigns of the said B. for forty Years, B. dies Intestate, and an Administration of his Goods is granted; in this Case the Administrator is not an Assignee to take, nor shall he take as a Purchaser, but he shall take it as a Thing vested in the Intestate. *Owen* 125.

J. S. seised in Fee of Land, enfeoffs A. and B. and their Heirs, until they make a Lease of the Lands for divers Years to certain Uses, to begin at the Feast of *Philip* and *Jacob* next coming; the Feoffees enter, and make a Lease for Years of the Land, to begin from the Feast of *Philip* and *Jacob* next: In this Case there is only Matter of Trust in the Feoffees, and they are not to take Advantage by not Performance of it, but the Use shall be to the Feoffor. And this Lease altho' it be for a Day longer than was agreed by the Deed, yet shall be good. *Style* 188, 205.

Any Gift or Grant of Land to an Ecclesiastical Person in his natural Capacity is good, and shall be taken as a Gift or Grant to any other Man.

If any Lease be made to a Spiritual Person to Farm, against 21 H. 8. it is not void, for this Statute intends Leases made to such Persons before and not after the Feast of *St. Michael* mentioned in the Act. 3 *Leon.* 122.

A Person attainted of Treason or Felony may before or after his Attainder have and take by Deed, as any other Man may do: But that they have and take will be liable to the King and other Lord by Forfeiture. *Co. Lit.* 2, 42, 43. *Perk.* §. 26, 27, 28, 29, 182.

A Clerk convict may, and a Villain might have had and taken by Grant or Gift as another Man; and yet they might not and may not retain what they take; for the King or Lord, as the Case is or was, would have and will have it. *Perk.* §. 48.

Outlawed Persons in any Civil Actions may have and take by Deed as any other Man may do; but what they have and take will be liable to Forfeiture to the King and his Patentee by Law given to them. *Perk.* §. 26, 48. *Owen* 116.

A Person *Non compos mentis*, or dumb, blind and deaf, may have and take by the Gift or Grant of Lands, as well as another Man may do; and a Deed of Gift or Grant made to them is as good and effectual as a Deed made to any other Person whatsoever. *Co. Lit.* 2. *Perk.* §. 51.

An excommunicate Person may take Lands or Goods by the Gift or Grant of another Man, the same as any other Person may do. *Perk.* §. 182, 185.

So may a drunken Man, the same as when he is sober. *Wing. Max.* 570.

A Gift or Grant to a deformed Person having human Shape, or to a Leper, or such like Person, is good. *Co. Lit.* 2.

So to an Hermaphrodite, according to the most prevailing Sex. *Co. Lit.* 2.

The Gifts and Grants to dead Persons in Law, such as Monks, Friars, and other Religious Persons formerly were, are utterly void in Law.

And therefore if J. S. be seised of an Acre of Land in Fee, and he joins with such a Person in the Grant of a Rent out of it; this will be void as to the Person disabled, the dead Person, and good against J. S. only, and it shall be said to be his Grant. *Perk.* §. 4, 5, 6, 48. *Co. Lit.* 3.

A Person not in Being at the Time of the Gift or Grant made, as *Primogenit*, the first-born of J. S. and J. S. has no Child, or the like, can neither be a good Grantor nor Grantee; And altho' such a one be afterwards born, it will not mend the Case. But a Remainder so limited may be good, if any such Person shall happen to be when the Remainder falls. *Ow.* 40.

The Grant of an Office for Life, the Remainder to a Successor, is void as to the Successor, *Moor*, Case 1094.

S E C T. VII.

What is a sufficient Name for a Donee, Grantee, or other Person to whom a Contract may be made.

6. A sufficient Name of a Grantee.

GRantees, &c. must not only be Persons in Being, and capable to take by Grant, &c. by the Name in the Deed mentioned, but they must also be sufficiently named and described one way or other; and he himself, and not a Stranger, must take by the Deed; and all Bodies Natural or Politick, that are not disabled by Law, may be Grantees, and take by Deed; and all Persons that may be Grantors may be Grantees. And some others that cannot grant or give, yet may take or receive. And a Grant made to two, three or twenty such Persons, is good. *Co. Lit. 2, 3. Perk. §. 43.*

If a Grant be never so well made in all the Parts of it, besides the Omission of the Name of the Grantee, if it does not express who shall take by it, it is void.

There are divers Sorts of Names and Nominations of Persons, or Bodies Politick or Corporate, that may take, whereof there are divers Sorts; as first, the proper Names or Surnames, wherein notwithstanding there may be Ambiguity of a Gift or Grant to my Son *John*, having two of that Name, perhaps may be made good by an Averment which *John* is meant.

There are also other Nominations or Descriptions, as by some Dignity, Office, or the like; as the Earl of *Hertford*, Lord Treasurer, and the like: And this will admit of a Description made good by Reputation, tho' not by Truth; as Land will pass even by Conveyance to one by the Name of *Son* who is a *Bastard*, by the Name of Wife who is not such, if he or she be so reputed or known by that Name. *27 E. 3. 85. 1 Bulst. 3.*

But the safe Way in the Cases of common Persons is, to name the Parties Grantor or Grantee, &c. by their Names of Baptism and Surname. *Co. Lit. 3.*

For where the Grant intends to describe the Person of the Grantee by his proper Name, and omits or mistakes his Christian Name or Surname; commonly the Deed is void, unless there be some special Matter to help it.

And yet if the Grant does not intend to describe the Grantee by his known Name, but by some other Matter, there it may be good, by a Description of the Person without either Name of Baptism or Surname. *Co. Lit. 3.*

A Bishop by the Name of Bishop of *London*, may take without any other Name. *Co. Lit. 3. 1 Bulst. 21.*

A Grant to *J. S.* or *J. N.* is void for Incertainty; and a Delivery of the Deed to one of them will not make it good. *11 H. 7. 13.*

If I be known by the Name of *Edward Williamson*, and my Name is *Edward Anderson*, and Lands are given to me by the Name of *Edward Williamson*, this is a good Name of Purchase. *Godb. Case 47.*

By which I may take by a Devise, and so it seems also by Grant: And yet a Bond made by the Name of *Edmund* where his Name is *Edward*, is not good. *Godb. Case 485. Ow. 84. Dy. 279. 21 H. 7. 8. 33 H. 6. 19. Non facit error nominis si constet de persona.*

If a Deed be made by or to *Johane B.* by the Name of *Jane B.* or to *Jane* by the Name of *Johane*; it is good, for they are one Name. *1 Leon. Case 204.*

If a Man marries, and has Children called by his Name, and after he is divorced from his Wife, yet the Children by that Name may have or take. So one that has a Child before Marriage usually called by his Name. *6 Co. 63.*

If one gives me a House by Word, and makes a Writing of the Gift, either by a contrary Name of but Baptism of him or me; this Gift by Word is good, but by Deed is void. *Perk. §. 42.*

Land was given to a Man and to *Margaret* his Wife, and to the Heirs of their two Bodies, and her Name was *Margery*, but Livery of Seisin was well executed; this was held good, and that the Wife and her Heirs should inherit accordingly. *2 Bulst. 303.*

So if a Deed of Grant be to *W.* and *Emme* his Wife, and her Name is *Emelin*; or to *Alfred Fitz-James*, by the Name of *Etheldred Fitz-James*. *Bro. Nofue 9. Confirmation 30.*

So to *Wat Style* by the Name of *Wat Down*. *9 E. 4. 43. 2. vide ante §. 5.*

If a Grant be to Ro. Earl of Pembroke, for Henry; or to Jo. for George Bishop of Norwich; these are good Grants. *Bro. Nofme* 9. *Confirmation* 30. 6 Co. 65.

A Grant *Deo*, to the Church, to the Poor, or to the Church-wardens, without more, or to three or four of a Parish, not naming whom, or to one of the Sons of W. who has many Sons, is void for Incertainty. *Perk.* §. 39, 54, 55, 56. *Plowd.* 6. 8 Co. 155. 2 *Bulst.* 50.

A Grant to the Wife of J. S. or *Primogenito filio*, or to the second Son, or to the youngest Son, or *seniori puero*, or *omnibus filiis*, or *filiabus* J. S. or *omnibus liberis* J. S. or *omnibus exitibus* J. S. or to the right Heirs of J. S. or to the next of Blood of J. S. in these Cases the Grants that are made to Persons by these Words may be good, for the Person is well enough described. *Bro. Donne* 17, 31, 50. *Fitz. Donne* 1. Co. Lit. 3. *Perk.* §. 52, 55, 56. 37 H. 6. 30.

A Deed or Grant to the Inhabitants or Parishioners of D. or to the Commoners of such a Waste, or to the Lord or Tenants of such a Manor, is not good. Co. Lit. 3. 10.

So to the Lord and his Tenants bound and free. *Perk.* §. 52, 55. 12 H. 7. 28. 37 H. 6. 30.

Yet Church-wardens may take a Gift of Goods for Church or Poor.

If a Deed or Grant be to one that is a Party to the Deed, and to another that is a Stranger to the Deed, it is good only as to the Party, and void as to the Stranger, but by way of Remainder it may be to a Stranger: And therefore if one grants a Lease for Life, and after grants to a Stranger, that the Tenant for Life shall have the Fee, it is void. 11 H. 7. 13. Co. Lit. 3. 10. *Et sic de similibus.*

And yet this Case was, R. gave the Reversion of Lands which his Wife held for her Life to S. *Habend. post mortem* of his Wife, in *liberum maritagium cum J. filia ejusdem R.* by this she took in Tail with her Husband. Co. Lit. 21. 1 Co. 15.

A Grant to the Father and his Son, without any other Description of him, altho' he has but one Son, yet it is good. *Cro. El.* 10. Father and Son.

If a Bastard gets a Name by Reputation in the Place where he lives, he may grant by that Name, and it will be good. Co. Lit. 3. 6 Co. 36. So a Grant to him by that Name will be good. *Hob.* 32. Bastard.

A Grant to John Holt, who is a Bastard, usually called by that Name, is good, in Case of the King or Subject's Grant.

So to J. H. Son of J. H. who is so in Reputation only, is a good Name of Purchase.

But if any such Grant of the King or Subject be to him by the Name of John the Son of Thomas, without a Surname, it is not good if he be a Bastard.

One may not purchase by a Christian Name only; if one therefore gives Lands to T. Gray his Son, by him begotten on the Body of J. O. and in Truth T. G. is a Bastard, of the Donor's begetting, begotten upon J. O. whose Name was not Jane Onwell, but Jane Punt, but used to be called and known by that Name; this is a good Gift or Grant by such Name, or by her right Name. 1 Leon. Case 69.

Puer may be a good Name of Purchase for a Male or Female; and yet if it be no ways cleared to the contrary, it shall *prima facie* be taken for a Son. *Hob.* 32. Puer.

A Grant to J. S. Wife of W. S. whereas she is Sole, is good.

A Grant to one of the Children of W. (who has but one Child) not naming nor describing which Child, is void for Incertainty. *Bro. Donne* 31.

But to the first Son of W. without more Addition, and W. has two Sons, this is certain enough, and a good Grant. *Perk.* §. 14.

So if a Grant be to him or her that shall be the first Child of J. S. and he has no Child at the Time of the Grant, it is void.

So if a Grant be made to the Wife or Child of J. S. when there is no such, it is void. As where a Grant is to J. S. and to his first-born Son; or to J. S. and her that shall be his Wife, and at the Time of the Grant he has neither Wife nor Son; in these Cases the Grant is void as to the Wife and Son, and J. S. shall have all by the Grant. 1 Co. 101. 2 Co. 31. *Perk.* §. 52, 54.

A Grant to W. or D. is void for Incertainty, and the Delivery of the Deed to one of them will not make it good. 11 H. 7. 13.

If a Lease be made for Life, the Remainder to the Mayor and Commonalty of B. and there is no such Corporation, this is not good. And altho' the King do after create such a Corporation, yet this will not make it good.

So a Remainder limited to John the Son of J. S. who has no such Son at that Time, but afterwards has such a Son; this is not good.

If a Grant be made to one of the Infants of *W.* a Grant thus penned is void for Incertainty. *Dy. 91.*

So if it be *Seniori & dignissimo filio.* *Dy. 91.*

A Bargain and Sale made to one by the Name of a Knight, who is not a Knight, is good enough. *Cro. Jac. 240.*

Where a Deed was to *R. E. Knight, Lord Evers,* and he was not a Knight, but he was *Lord Evers,* it was held good. *1 Bulst. 21. 2 Bulst. 240.*

So Deeds of Grant made to such Persons by such mistaken Names. *27 E. 3. 83.* is good, *Utile per inutile non vitiatur.* *6 Co. 64, 65.*

So if a Grant be made by or to *Robert Bishop of E.* and his Name is *Richard Bishop of E.* it is good. *1 Bulst. 21. Perk. §. 36.*

If a Grant be made to the right Heirs of *W. W.* being then living, it is void, for there can be no such whilst he lives.

And so is a Grant to the first Child of *W.* or to the Wife or Child of *W.* no such being at the Time of the Deed made.

But if such a Deed be to another, the Remainder to the Heirs of *W.* or as before; this may be good, if *W.* dies before the particular Estate ends: As if a Rent-charge be granted to *J. S.* for Term of his Life, the Remainder in Fee to the right Heirs of *J. K.* and *T. K.* is alive, and the Deed is delivered to *J. S.* in this Case it is good conditionally, (*i. e.*) if *T. K.* be dead, and has an Heir when the Remainder falls; but otherwise not.

So if Land be leased for Life, the Remainder to the right Heirs of *J. S.* he being then alive at the Time of the Lease, &c. for here is one named that is capable at the Commencement of the Lease. *Perk. §. 52.*

But if a Rent be granted to the right Heirs of *J. S.* he being then alive, the Remainder to *T. K.* the Grant is void.

And if a Man seised of a Rent-charge in Fee grants it to a Stranger for Life, and the Tenant of the Land attorns, &c. and after by another Deed the Grantor grants the Reversion of the same Rent to the right Heirs of *J. S.* he being then alive; this Grant is void. *Perk. §. 53.*

But if *J. S.* had been dead at the Time of the Grant of the Reversion, it had been otherwise. *Idem.*

If *J. S.* has Issue two Sons, and a Rent is granted to the first Son of *J. S.* and by no other Name; this is a good Grant, if the Deed be delivered, &c. But if *J. S.* has no Son, and a Grant be to him that shall be the first Issue of *J. S.* whether he be Son or Daughter; it is void. *Perk. §. 54.*

A Grant to *W.* for Life, the Remainder to the first, second or third Son, or to all the Sons, or to all the Daughters, or all the Children of *W.* may be good; so with a Remainder to him that shall first come to *St. Paul's* such a Day, or to him that *W.* shall name in three Days, if any one comes, or any one be named by him in the Name, is good; *Id certum est, quod certum reddi potest.*

But a Deed of Grant to four of the Parishioners of *Dale,* not naming them, is void.

So a Deed of Grant to *W.* or *W. S.* in the disjunctive, with a Distinction, is void. *Perk. §. 56.*

A Grant of Goods to the Church-wardens of *D.* is good, but not a Grant of Lands.

A Lease for Years to such a Person as *W.* shall name, is not good; tho' a Lease for so many Years as *W.* shall name is. *Moor, Case 911.*

A Woman Covert cannot take any Thing by the Gift of her Husband, but she may purchase Lands of others without Assent of her Husband, and this by her own right Name. *Co. Lit. 3.*

If a Corporation be made by the Name of *Majoris & Burgensum Burgi Domini Regis de Lynn Regis,* and a Deed is made to them by the Name of *Majoris & Burgensum de Lynn Regis,* leaving out *Burgi Regis,* it is good enough. *10 Co. 122, 123.*

If one releases his Common by the Words *Renunciavit Communiam,* by this it may be released; but if he does not say to whom he renounces the Common, it is void. *Plow. 162.*

If a Lease be made to two, *Habendum* to one of them, and to a third Person not named in the Deed, it will be void as to the third Person, and the other two shall take by it. *3 Leon. Case 60.*

If the Variance between the Deed and the true Name of the Corporation be material or essential, either by Omission, Alteration or Addition, whether made to or by a Corporation, the Deed may be avoided: But if the Variance be only literal or verbal,

verbal, *in literis & syllabis* (*& non re & sensu*) so that the Sense by the express Words remains, or by necessary Implication, and the Description of it imports a sufficient and certain Demonstration of the true Name of the Corporation, according to the Foundation, such nice and curious Misnomers shall not avoid a Deed. 11 Co. 20. 10 Co. 103.

And where a Corporation has divers Names, as some of the ancient Corporations have, it may give or take by either of its Names. 10 Co. 103.

If an Obligation be made to a Corporation named *Abbas Monasterii beatæ Mariæ*, by the Name of *Abbati Monasterii beatæ Mariæ extra muros Civitatis Ebor'*; yet because in Truth the Abbey was within York, though it was *Extra muros*, it was held good, *Et sic de similibus*. As in a Deed of Grant to *Christ-Church* in Oxford, named *Ecclesiæ Christi in Universitate Oxoniæ*. Co. Lit. 3.

A Grant of Land or Rent in Possession to the right Heirs of *J. S.* *J. S.* being then living, is void; for there can be no such Person *in rerum natura*, for no Man can be Heir to another that is living. But such a Grant to one by way of Remainder is good, if so be that *J. S.* dies before the particular Estate ended, and before the Remainder happens. Co. Lit. 101. 2 Co. 31. Perk. §. 52, 54.

S E C T. VIII.

Of the Things to be contracted for, granted or conveyed.

THE seventh Thing incident to a good Deed is a *Thing to be contracted for*; 7. A Thing therefore it may be necessary to make a regular Division of *Things*, and then to shew which of them may be conveyed or contracted for, and by what Means. to be contracted for.

(A) *The Division of Things.*

AS to the Division of Things, they are (1) either *Ecclesiastical or Spiritual*, or *Ecclesiastical or Temporal*, (2) *Temporal or Lay*.

First, *Ecclesiastical or Spiritual Things*, are such as are so either, (1) *in their own Nature*, or (2) *in their Use*. Ecclesiastical in their Nature.

I. *Ecclesiastical Things in their own Nature*, are either (1) *Dignities*, or (2) *Benefices*.

Ecclesiastical Dignities are of two Kinds; (1) *Superior*, as *Archbishopricks, Bishopricks*; or (2) *Inferior*, as *Dignities in Cathedral Churches, viz. Dean, Chancellor, Præcentor, &c.*

And *Ecclesiastical Benefices* are likewise of two Kinds; (1) *With Cure*, as *Parsonages, Vicarages, &c.* Or (2) *Without Cure*, as *Prebends, Ecclesiastical Hospitals, &c.* Hale's Anal. §. 25.

II. *Ecclesiastical Things in their Use*, are Churches, Chapels, Church-yards, &c. In their Use, which are (1) *Parochial*; or (2) *Not Parochial*, as *Chapels of Ease*.

Secondly, *Temporal, or Lay Things*, are of two Kinds; (1) *Some are Juris Temporal Publici*; and (2) *Some are Juris Privati*.

I. Those Things that are *Juris Publici*, are such as, at least in their own Use, are *Juris Publici*, common to all the King's Subjects; and are of these Kinds, viz. 1. Common Highways. 2. Common Bridges. 3. Common Rivers. 4. Common Ports, or Places for the Arrival of Ships.

II. Those Things that are *Juris Privati*, are of two Kinds; (1) *Things Real*; and *Juris Privati*, (2) *Things Personal*. Hale's Anal. §. 23.

Things Real are of two Kinds; (1) *Corporeal*; and (2) *Incorporeal*. Things Real.

Corporeal Things Real, are such as are *manurable*; and they again are of two Kinds; (1) *Simple*, and (2) *Aggregate*.

Things Corporeal which are *Simple*, are generally comprehended under the Name of *Corporeal*, *Lands*; which are yet distributed into several Kinds, according to their several *Qualifications*, and accordingly are demandable in Writs; as, *A Messuage, a Cottage, a Mill, a Toft, a Garden, an Orchard, Arable Land, Meadow, Pasture, Wood, Marsh, Moor, Furze and Heath*, and divers other Appellations.

Things Corporeal which are *Aggregate*, are such as consist of Things of several *Natures*, whether they be *all Corporeal*, or the *principal Part Corporeal*, but the other Part

Part *Incorporeal*; because that Part which is *Corporeal* in them, gives it the Denomination of *Corporeal*; and they pass without Deed, for the most Part, as Things *Corporeal* do, and are of several Kinds, viz.

1. *Honours*, consisting of many *Manors*.

2. *Manors*, consisting of, 1. *Things Corporeal*, as *Demefnes*; and 2. *Things Incorporeal*, as *Reversions* and *Services*. *Manors* are of two Sorts; *Manors in Right*, and *Manors in Reputation*. (1) *Manors in Right*, where there are *Demefnes* and *Freeholders*. And (2) *Manors in Reputation*, as *Conventiary* or *Customary Manors*, consisting of *Copyholders* only.

3. *Rectories*, consisting of *Glebe* and *Tithes*, which are not only *Ecclesiastical*, but are often *Temporal* or *Lay*.

4. *Vills*, *Hamlets*, *Granges*, *Farms*, &c. are a Kind of *Corporeal Things* Aggregate, for they consist of *Houses*, *Lands*, *Meadows*, *Pastures*, *Woods*, &c.

Incorporeal.

Things Incorporeal, are of a very large Extent, but may be reduced into two Kinds; (1) *Things Incorporeal in their own Nature*; or (2) *Things Incorporeal not in their own Nature*.

Things Incorporeal in their own Nature, are of very great Variety, and hardly reducible into general Distributions; but most of them follow, viz.

1. *Rents* reserved or granted; as *Rent-service*, *Rent-charge*, *Rent-seck*.

2. *Services Personal incident to Tenures*; as *Homage*, *Fealty*, and *Knights-service*.

3. *Advowsons* of all Sorts, *Donative* or *Presentative*.

4. *Tithes* of all Sorts, *Personal*, *Prædial*, and *Mix'd*.

5. *Commons* of all Sorts, as *Common of Estovers*, and of *Pasture*, *Appendant* and *Appurtenant*; for *Cattle* certain, and for *Cattle sans Number*, *Separabilis Pastura*.

6. All Kinds of *Proficua capienda in alieno solo*; as *Herbage*, *Pawnage*, &c.

7. All Kinds of *Pensions*, *Proxies*, (*Procurations*) &c.

8. *Offices* of all Sorts.

9. *Franchises* and *Liberties* of all Sorts; (1) Such as are the *Flowers of the Crown*, and Part of the King's *Royal Revenue*; as *Waifs*, *Strays*, *Felons Goods*, *Goods of Persons outlawed*, *Prifage*, *Wreck*, *Treasure-Trove*, *Royal Fish*, *Royal Forfeitures*, *Fines*, *Issues*, *Amerciaments*, *Forests*, &c. (2) Such as are not Parcel of the King's *Royal Revenue*, but either lodged in him, or created by him; as *Counties Palatine*, *Markets*, *Fairs*, *Tolls*, *Courts-Leet*, *Hundred-Courts*, *Liberty to hold Pleas*, *Returns of Writs*, *Bailiwicks of Liberties*, *Warrens*, *Ferries*, and the like.

10. *Villeins*.

11. *Dignities*, as *Dukes*, *Marquisses*, *Earls*, *Viscounts*, *Barons*, &c.

Things Incorporeal not in their own Nature, are so called in Respect of the Degree or Circumstance wherein they stand, as *Reversions*, *Remainders*, *the Estate of Lands*.

The common Incident of these *Incorporeal Real Things Temporal* is, that they do not pass from one to another without Deed. *Hale's Anal.* §. 24.

Things Personal.

Things Personal, are of two Kinds; (1) *Things in Possession*, or (2) *Things in Action*.

Things Personal in Possession, are *Money*, *Jewels*, *Plate*, *Household-Stuff*, *Cattle* of all Sorts, *Emblements*, &c.

Things Personal in Possession, are (1) *Debts*, due either by *Contract*, or by *Specialty*, by *Deed* or *Obligation*, or by *Recognizance*. (2) *Goods*, whereof the Party is *devested*, or *out of Possession*. (3) *Rights of Damages uncertain*, as *Covenants broken*, &c. 4. *Legacies* not paid or delivered. (5) *Personal Things in Contingency*, as *Accounts*, and many more. Also *Annuities*, which are partly in *Possession*, for they are grantable over; and partly in *Action*, because not recoverable but by *Action*. *Hale's Anal.* §. 23.

(B) *What Things may be contracted for or conveyed; and by what Means or Instrument.*

AS to what Things may be conveyed, I have before (in *Chap. I. §. 2.*) given a little Sketch, but am now obliged to be more full and particular, as I have made a copious Division of *Things*, and intend now to shew not only what may be conveyed, but where the Conveyance may be without Deed, or it must be by Deed; and if so, by what Deed, &c.

1. There are some Things that are grantable not only at first, and *de novo*, but afterwards *in infinitum*; and some Things are grantable at first, but are not afterwards grantable over to another Man.

2. There are some Things that are grantable by any Man and to any Man whatsoever; and there are some Things that are grantable only by the King to a Subject, and not by one Subject to another.

3. There are some Things that are grantable alone, and by themselves, or with other Things; and there are other Things that are not grantable, but with some other Thing to which they belong and are appendant: As a Court-Baron to a Manor, Common appendant to Land, and Common of Estovers to a House. *5 H. 7. 7. Perk. §. 104.*

4. There are some Things that are grantable by or without a Deed by Word of Mouth only; and there are other Things that are not grantable otherwise than by Deed. *Bro. Don. 10.*

5. And there are some Things also in their own Nature that are grantable, yet in Respect of the Estate and Property that the Owner has in them are not grantable: As for Example:

1. All Corporeal and Immoveable Things, such as are said to lie in Livery, as Honours, *Things that lie in Livery, as Honours, &c.* *Isles, Villages, Manors, Messuages, Cottages, Lands, Meadows, Pastures, Woods, Advowsons, Moors, Marshes, Furzes, Heaths, Mines, Quarries, and the like; and some Incorporeal Things that are incident and appendant to them, are grantable from any Man to another Man in Fee-simple, Fee-tail, for Life or Years at first, and transmissible and assignable afterwards by the Grantee thereof in infinitum at Pleasure. Co. Lit. 20.*

All Persons and Bodies, except Corporate Bodies, may give or grant any Thing that lies in Livery, as Manors, &c. in Fee-simple, Fee-tail, for Life or Years to a Subject, as well without as by a Deed; but nothing may be given or granted to the King by a Subject by Word or Deed but it must be by some Matter of Record. *Perk. §. 62, 64. 4 H. 7. 17. 16 H. 7. 3. Plow. 150.*

It is a Rule, that all Manner of Estates in Fee-simple, Fee-tail, for Life or Years, and for Years present and to come in Land, or the Profits thereof, are grantable by or without a Deed. *Bro. Done 19.*

An Estate for Life or Years of Land may be made by Word of Mouth, without a Deed: But where it is an Estate for Life, there it must be (if it be in Possession) with Livery; if of a Reversion, there must be an Attornment to perfect it. *Cro. Car. 482. Moor, Case 31.*

And yet if I lease Land for Life or Years to one, the Remainder in Fee to a Stranger without a Deed, this may be good for the Remainder also, if Livery be made to the Tenant for Life or Years. *Perk. §. 61. Cro. Jac. 122.*

A Grant of Land, & *unum Ovile*, *Anglice* a Sheep-walk, *cum pertinentiis* in D. is good, without a Deed for the Sheep-walk. *Cro. Jac. 419.*

The Father Tenant for Life, the Remainder to his Son for Life, the Son purchases the Reversion in Fee, the Father cannot in this Case surrender to him without a Deed. *Cro. Car. 269.*

A. devises that his Executors shall sell his Land; the Executors may sell without Deed, for the Vendee will be in by the Will. *1 Leon. Case 38.*

Bodies Corporate or Politick may not give or grant any of the Lands, Goods or Chattels belonging to their Corporations, otherwise than by Deed. *Perk. §. 64.* *Corporations, Lands, &c.*

And yet the Grantees of such Lands, Goods and Chattels, after their Grant of them, may grant them by Deed or without Deed as other Men may do. *Ibid.*

The Grant of a Monopoly is not good. *11 Co. 87.*

A Grant may be of a Moiety, third, fourth or fifth, or other certain Part of a Manor, or of Land, and by the Name of a third, fourth, fifth, or other certain Part, and good. *Co. Lit. 190.* *Monopoly, Moiety, third or fourth Part of Land.*

So of a third or fourth Part of Tithes, and the like. *Dyer 84.*

2. And all Incorporeal Things, such as are said to lie in Grant, as Rents and Services; *Things that lie in Grant, as Rents, &c.* and of these not only such as are reserved upon any Estate made of Land, but such as are granted out of Land, Seniorities, Commons, Vicarages, Advowsons in Gross, Estovers, Dignities, Ways, Waters, Fishings, Franchises, Ferries, Leets, Waifs, Estrays, and some Offices. All these and the like Things are grantable by one Man to another in Fee-simple, Fee-tail, for Life or for Years at first, and *de novo*, but they are grantable and assignable over, *in infinitum*. But these Things may not be granted

granted otherwise than by Deed. *Co. Lit.* 144. *Fitz. Grant* 145. *Perk.* §. 87, 91, 103. *Bro. Grant* 3. 3 *H.* 6. 20. 9 *H.* 6. 12.

And if a Man has a Rent reserved on a particular Estate, he may grant over Parcel of it.

And of whatsoever a Fine may be levied, a Grant by Deed of the same Thing may be made.

A Grant of an Acre of Land covered with Water, is good. *Co. Lit.* 4.

Any Man that has any Estate in Fee-simple, Fee-tail, for Life or Years, in any Land, &c. or Profit Appender out of it, may grant it over from Man to Man *in infinitum*. *Bro. Done* 9. *sed vide* concerning *Fines* and *Recoveries*, post.

And he that has any such Estate may charge it with Rent, or otherwise at his Pleasure. *Bro. Done* 19.

Rents and Services reserved upon any Estate, and Rents granted out of Land (it is said) are grantable over *in infinitum*; but one may not grant Rent out of a Rent, nor may one grant over a Rent which he has till he has Seisin of it. *Perk.* §. 88, 89. *Bro. Grant* 171.

Any Man that has a Rent, Common, or other Profit out of another Man's Land in Fee-simple, Fee-tail, for Life or Years, may grant it over at his Pleasure; and this is grantable from Man to Man *in infinitum*. *Bro. Done* 9.

But an Estate at Will is not grantable over.

If an Estate be made to a Man and his Heirs without any Word *Assigns*, yet he may assign it at his Pleasure, for *Assigns* is included in the Word *Heirs*. *Bro. Done* 19.

A Rent-charge of what Nature soever it be is grantable over. *Cro. Jac.* 282. And yet if it be *pro concilio impendendo*, it is not grantable over. 7 *Co.* 27.

Some Things are so intire, that cannot be severed by Grant; as if one holds three Acres of Land of me by 12 *d.* Rent, and I grant the Services of the third Acre; this Grant is void, for he must have all or none.

But if one holds Land of me by Homage, Fealty, and a certain Rent; I may grant the Rent, and keep the Seignior. *Fitz. Grant* 19, 79.

A Rent is grantable over before a Man has received it. *Perk.* §. 87.

Incidents.

That which is inseparably incident to another, as Fealty to some Estates, Common appendant to Land, the Court of Piepowders to a Fair, are not grantable away from the Things to which they are annexed. *Plow.* 379. 11 *Co.* 77.

Statute.

A. was indebted to *B.* 2000 *l.* by a Statute, *B.* makes his Wife his Executrix, and dies, she marries with *J. S.* who is indebted to the King by Bond in the Court of Wards; *J. S.* and his Wife by Deed inrolled assigned the Statute to the King for Payment of the Debt; and it was held good. *Cro. Eliz.* 324.

Such Things as lie in Grant and not in Livery generally may not in their first Creation, nor afterwards by way of Grant or Assignment be given or granted by one Man to another in Fee-simple, Fee-tail, for Life or Years, otherwise than by Deed, except in some special Cases. *Co. Lit.* 40. *Dy.* 139. *Perk.* §. 60. 1 *Brownl.* 40.

So that if a Rent be granted to me but for Years only, I may not grant it over without a Deed.

But if a Rent or Service be Parcel of a Manor, or incident to it, or to any other Thing that is in its own Nature grantable without a Deed; there by the Grant of the Principal, the other as Accessary may pass without Deed. *Co. Lit.* 49. *Perk.* §. 91.

If the Lord will grant his Rent or Services of his Tenants to a Stranger, or release them to the Tenants themselves, it must be done by Deed. *Co. Lit.* 38, 39. *Perk.* §. 63.

If there be Lord and Tenant by Fealty, and the Service of yielding the tenth Sheaf of Corn before it be sowed; this Service may not be granted by the Lord for Years without Deed, unless it be in Case of Partition, Exchange, Dower, or the like. *Bro. Grant* 54.

A Partition in some Cases may be without Deed. *Cro. Car.* 95.

A Reservation of Rent to make an Equality in Case of Assignment of Dower, or of a Partition, may be without any Deed at all. *Co. Lit.* 169. *Hob.* 153.

Rents or Services may be given or granted in Case of a Partition by one Coparcener to another to make an Equality of Partition without Deed; but generally in other Cases such Things as lie in Grant may not be granted, nor may they be surrendered but by Deed. *Co. Lit.* 338.

Common of Pasture, of Turbary, of Estovers, of Fishing, is grantable in Fee-simple, in Tail, for Life or Years, from Man to Man *in infinitum*.

And yet it is said, that if a Common in Grofs and without Number be granted to a Man and his Heirs, that this is not grantable over.

But if it be a Common for a certain Number of Beasts, it seems to be otherwise; and altho' the Grant be not to him and his Assigns, yet it is assignable. *H. 16 Jac. B. R.*

But for Common appendant or appurtenant to Land for all his Beasts Levant and Couchant upon the Land, and Common of Estovers to burn in a House certain, these Things are not grantable without the Land or House itself to which they are appendant or appurtenant. *Cro. Jac. 15. 1 Brownl. 32, 42. 2 Brownl. 226, 227.*

But Common appurtenant for Beasts certain may be granted over. *Cro. Jac. 15.*

Grantee for Life of a Common of Pasture *sans Number*, or of a Corody non-certain, cannot grant it over, unless it be granted to him and his Assigns.

But a Grantee of a Common for Beasts certain, or of a Corody certain, or of any Manner of Common certain, or of an Advowson, or of a Villain, or of a Rent, or the like, may grant it over altho' it be not granted to him and his Assigns. *Perk. §. 103. 1 Brownl. 32, 42. 2 Brownl. 226, 227. Cro. Jac. 15.*

But almost any Thing, Land, Money or Debts, is grantable to the King. *Dy. 2. 9 Co. 96.*

A Grant of Common of Pasture, of Estovers, Turbary, Fishing, and the like, must be by Deed, and not without, unless it be in Case of Partition, or of Appendency, as incident to some Corporeal Thing.

Therefore if a Grant be made to me by Word of Mouth of Common for twenty Beasts in his Manor, it is not good; nor may I grant this over to another, unless it be by Deed.

But if one has Common of Pasture appendant or appurtenant to his Land, he may grant his Land with the Common appendant or appurtenant thereto by Word of Mouth only, and without Deed. *Perk. §. 61. Cro. Jac. 189. 15 H. 7. 8.*

Common appurtenant in Land may pass by a Grant of the Land *cum pertinentiis*, without any Deed at all; as Land may with an Advowson and a Rectory with Tithes. *Cro. Jac. 519.*

A Grant of Common, or of a Sheep-walk in the Nature of Common, may not be demised without a Deed.

Except in *Norfolk*, where a Sheep-walk is known by the Name of Land, there it may pass without a Deed. *Cro. Jac. 419, 519.*

A Way over another's Ground, either *de novo*, or in Being, may not be granted A Way, otherwise than by Deed. *2 Cro. 189.*

And yet if the Ground to which the Way belongs be so granted as the same passes by a verbal Grant, the Way will also pass, altho' it be not named, and perhaps without the Words *cum pertinentiis*. *Cro. Jac. 189.*

Reversions and Remainders of Land are grantable from Man to Man *in infinitum* in Fee-simple, Fee-tail, for Life or Years.

And if I have a Tenant for Life of three Houses, I may grant the Reversion of two of them.

And if I have the Reversion of three Houses, and four Acres of Land, I may grant the Reversion of two Houses, and of two of the Acres of Land. *Co. Lit. 338. Cro. Eliz. 78.*

And a contingent Remainder, altho' it be barrable by Recovery, &c. yet it is not grantable. *Hutt. 118.*

And if Tenant in Tail be of an Acre of Land, the Remainder to his right Heirs, he may not grant over this Remainder by itself, and yet the Tenant in Tail may bar it by a common Recovery.

And if a Grant be to *J. S.* of Land for Years, the Remainder to the right Heirs of *J. D.* this Remainder is not grantable so long as *J. D.* shall live. *Perk. §. 73, 88. Sed Qu.*

The Reversion of an Office regularly is not grantable by a Subject. By the Lord Chancellor and two Chief Justices *in Cancellaria*. *M. 5 Car. 9 Co. 96. 5 E. 4. 3.*

If a Lease be made to one for Life, the Remainder to the right Heirs of *J. S.* (*J. S.* being then alive) this Remainder is not grantable by any Body, but it may be released, or otherwise barred, for it is in Abeyance. *Perk. §. 87.*

And

Common of
Pasture, Tur-
bary, Fishing,
Estovers, &c.

Reversions
and Remain-
ders.

And yet it is said, that if Tenant in Tail be of an Acre of Land, the Remainder to his right Heirs, that he may grant this Remainder over. But *Quære*, which way? *Perk.* §. 88.

Reversions and Remainders are not grantable, nor can they be surrendered otherwise than by Deed. *Co. Lit.* 338.

Such Hereditaments as are transitory, and arise by Grant, and not by Livery, as Reversions and Remainders expectant or dependant upon a particular Estate, may not be granted but by Deed; for it is a Rule, that a Reversion or Remainder may not be granted in Fee-simple, Fee-tail, for Life or Years, without a Deed, unless where it is Parcel of a Manor, or upon a Partition by one Coparcener to another. *Dy.* 174. *Perk.* §. 161.

If a Lease be made of Land, or the like Thing, for Life or Years, with a Remainder over in Fee-simple, Fee-tail, or for Life; this may be good without any Deed in Writing for the Remainder, and yet this Remainder is not grantable over to another without a Deed. *Perk.* §. 61. 4 *H.* 7. 17. *Plow.* 150, 433. 16 *H.* 7. 3. *Lit.* §. 60. *Bro. Grant* 104.

If a Lessee for twenty Years makes a Lease for ten Years, he may grant the Reversion without a Deed: But in this Case if there be a Rent reserved, there must be a Deed and also an Attornment of the Tenant, or the Rent will not pass. 3 *Leon.* Case 368.

So in all Cases where a Reversion is granted, altho' it be by Deed, yet Attornment must be had to it. *Cro. Jac.* 122, 519. *Plow.* 433. *Perk.* §. 62.

A Remainder after an Estate for Life may be granted without Deed; but a Reversion, unless it be for a Term of Years only, is not grantable without Deed. *Perk.* c. 1.

If a Lease be made for Life to *A.* the Remainder to the right Heirs of *J. S.* (then living) this Remainder is not grantable at all with or without a Deed. *Perk.* §. 87.

Tenant for Life, the Remainder for Life, the Remainder in Fee; in this Case he that is in Remainder for Life cannot (it seems) surrender to him in Remainder in Fee without a Deed, for that which cannot commence without a Deed, as a Rent, Reversion, Common, Advowson in Gross, &c. cannot be granted without a Deed. *Poph.* 137. 19 *H.* 6. 33. 14 *H.* 7. 3. *Sed vide Poph.* 137. where it is said, That if there be Tenant for Life, the Remainder for Life, the Reversion in Fee, and he in Remainder for Life gives his Indenture of Demise with the Assent of the first Tenant for Life upon the Land to a Stranger in the Absence of the Lessor, and says, that he surrendered to him in Reversion, and this was a good Surrender. And there it was held, That Tenant for Life in Remainder might surrender his Estate without a Deed, where his Estate begins without Deed; but that he might not grant it over without Deed. *Poph.* 137. 19 *H.* 6. 33. 14 *H.* 7. 3.

If there be Tenant for Life, the Remainder to *A.* and *B.* Sons of the Tenant for Life, for their Lives, and *B.* purchases the Reversion; the Father and *A.* his Son may not surrender their Estates without Deed. *Cro. Car.* 269.

Interesse Termini.

An *Interesse Termini*, which is a Lease for Years to commence *in futuro*, is grantable over to another before the Term begins, whether it be a Lease of the Land itself, or any Profit appender out of it. *Co. Lit.* 46. *Perk.* §. 91.

A Man may grant Common or Rent, though a Stranger used to take it. *Perk.* §. 98.

The Interest and Estate that a Man has by Extent upon an Execution is grantable over.

Things annexed to a Freehold, Trees or Wood.

Trees are grantable from Man to Man *in infinitum*; and these Things the Grantee may take after the Death of the Grantor; as if a Grant be of ten Loads of Wood in a Wood, or of three Acres of Wood towards the North Side thereof, it is good.

And if one grants me certain Cords of Wood by the Assignment of the Grantor, the Grantee before the Assignment may grant this over: And therefore if the Grantor before Assignment grants to another so much Wood in the same Place as to make 6000 Cords at the Election of the Grantee, and after the Grantor makes an Assignment according to the first Grant to the Assignee thereof, who cuts the Wood, and the second Grantee takes it away, the first Grantee may have Trespass against him for it. *Moor.* Case 955. 5 *Co.* 24.

Corn on the Ground, Trees on the Ground, and Fruit of the Trees standing on an Estate in Fee-simple, Fee-tail, or for Life, are only looked upon as a Chattel Personal; and therefore I may grant them away without Deed, although not severed. *Perk.* §. 57, 59.

If a Man gives me Trees growing upon his Land, the Gift is good without Deed.

Perk. §. 57.

But if Tenant in Tail gives me a Tree growing upon the Land, and dies before I have cut it down, and the Issue enters into the Land where the Tree is growing; if I cut down the Tree, he may have an Action of Trespafs, because the Tree is annexed to the Freehold, and by the Gift becomes of the Nature of the Land. *Perk. §. 58.*

But if the Donor of the Tree had been sole Tenant of the Land in Fee-simple in his own Right, it had been otherwise. *Ibid.*

But if Tenant in Tail gives me his Corn growing upon the Land, and dies before I have severed it from the Land; I may afterwards sever the Corn and take it, because the Executors of the Tenant in Tail would have been intitled to it. *Perk. §. 59.*

If a Man be seised in Fee of a House, he may give or sell the Timber, Stone, or other Materials thereof, and the Donee or Grantee may take it after the Donor's or Grantor's Death. *Co. Lit. 144.* And this may be without Deed. *Perk. §. 57.*

A Man may grant the Vesture or Herbage, that is, the Grass on the Ground, and not the Ground itself. *Br. Donne 10.*

A Grant of the Vesture or Herbage must be by Deed. *Noy 54. Lane 54.*

17 E. 4. 6.

Franchises, as Views of Frankpledge, Perquisites of Courts-Leets, Conusance of Pleas, Fairs, Markets, Felons Goods, Waifs, Estrays, Hundreds, Ferries or Passages, Warrens, and the like Things, are grantable in their first Creation, and afterwards grantable over from Man to Man *in infinitum*. *16 H. 7. 4. Co. Lit. 314.*

The Profits of a Mill, Ferry, Corrody, County, and the like, are not grantable without a Deed. *15 H. 7. 8.*

Fairs, Markets, Warrens, and such like Things, or the Profits thereof, are not grantable otherwise than by Deed. *15 H. 7. 8.*

But a Hundred, some say, may be granted without Deed. *15 H. 7. 8.*

A Privilege to hold Land without Impeachment of Waste, cannot be granted without a Deed. *9 Co. 9.*

Advowsons (it is said) are grantable in Fee-simple, for Life or Years, from Man to Man *in infinitum*. *Perk. §. 90.*

Advowsons in Gross cannot be granted nor surrendered otherwise than by Deed. *Co. Lit. 338.*

And the Grantee of the Grantee of an Advowson is to have both Deeds in Court; but in Case of a Partition between Parcenors, this is grantable without Deed. So where it is incident to a Manor or Parcel of Land, by the Name of the Manor or Land, it may pass without Deed. *1 Co. 1. Dy. 29. 21 E. 3. 38. Plow. 150.*

E. 4. 47. Winch 34.

Rectories, Tithes, and a Portion of Tithes, are grantable from Man to Man *in infinitum*. *Perk. §. 90. Stat. 32 H. 8. ch. 7. Co. Lit. 338.* But a Parsonage or Rectory, altho' it consists of nothing but Tithes besides the Church and Churchyard, and altho' it has no House or Glebe belonging to it, yet it may be granted without a Deed in Fee-simple, Fee-tail, for Life or Years, and there the Tithes and Offerings may pass as incident. *15 H. 7. 8. 16 H. 7. 2. 19 H. 8. 12. 21 H. 6. 43.*

All this is agreed. *1 Brownl. 98. 2 Brownl. 11. Hutton 54.*

But Tithes alone, or a Portion of Tithes, Oblations, Mortuaries or Obventions, are not grantable by themselves without a Deed; and therefore a Lease Parol of Tithes, although it be for Years, is not good. *15 H. 7. 8. 16 H. 7. 1. 19 H. 8. 12. 21 H. 6. 43.*

Tithes may pass for Years by way of Agreement without a Deed, but by way of Lease it will not pass otherwise than by Deed. And yet a Lease for one Year may be of Tithes by Word of Mouth. *Godb. Case 149.*

A Parson of a Church may grant his Tithes from Year to Year, or for Years, to the Parishioners themselves, or to Strangers.

He may grant all the Wool he shall have for Tithe the next Year.

Or all his Tithe of Lambs or Sheep, or other Tithe, as one may grant his Deer or Conies in his Soil. *Vide 38 E. 3. 6. Noy 121. Fitz. Grant 40. Owen's Rep. 103. Hetley's Rep. 107. Popb. 141. Heb. 195. Telv. 94.*

A Composition may be made by a Parson with one of his Parishioners for their Tithes from Year to Year, or it may be made for Years by way of Retainer or Discharge, without a Deed, but not for the Life of the Parson. And a Parson may grant his Tithes from Year to Year without Deed. But this Agreement must be with the Party him-

- self, and not with another for him. Neither may this Interest be assigned without a Deed. But Tithes alone, or a Portion of Tithes, Oblations, Mortuaries or Obventions, are not grantable by themselves without a Deed. *E. 3 Jac. Hawk's Case. M. 8 Jac. Dr. Longworth's Case, Noy 121. 15 H. 7. 8. 16 H. 7. 8. Cro. Car. 188, 249. Perk. §. 62.*
- But some say it is not grantable by way of Lease for Years without Deed. And it is said, that if a Parishioner agrees with the Parson, that he and his Assigns shall be discharged of Tithes for the Time that he shall be Parson there, this is not good; or if it be, it is not assignable over. *Noy Rep. 121. Godb. Case 449. Owen 103. Hetley 31. 2 Leon. Case 98. Telv. 95.*
- Next Avoidance or Presentation.** The next Avoidance of a Church, and the next Presentation to a Church when it shall be void, is grantable; and being granted, it is assignable from Man to Man. But when a Church is void, the present Presentation, which is but a Thing in Action, is not grantable over. *Perk. §. 90. Dyer 283. Andersf. Case 32.*
- The next Presentation upon an Avoidance to a Church may not be granted without a Deed. *Plow. 150. Bro. Done 410. 5 H. 7. 35. 9 E. 4. 47.*
- Title of Lapse.** A Title of Lapse to a Parsonage before it falls, is not grantable over; for it is but an Office or Matter of Trust. *Hob. 154.*
- Pensions.** Pensions are grantable at first, and so afterwards. *Perk. §. 90.*
- Chattels Real.** Chattels Real, as Leases for Years, and the like, may be granted from Man to Man *ad infinitum*, and Leases for Years (be they present or future) are so grantable. *Perk. §. 91.*
- A Lease for Years of Land may be granted absolutely, or by way of Mortgage, and that by a verbal Agreement without any Deed. *1 Leon. Case 22.*
- Personal.** All Chattels Personal, as Oxen, Horses, Sheep, Plate, Household-Stuff, Apparel, Corn, Wood, Trees and Grass cut; and also Corn, Grass and Fruit of the Trees growing upon the Ground, and Wool on Sheeps Backs, are all regularly grantable from Man to Man *in infinitum*. *Dy. 58, 305. Plow. 142, 147. Perk. §. 88, 90.*
- A Man may grant for Years the Corn which he shall have upon his Ground, or the Wool which he shall have upon his Sheep's Back; but he may not grant the Wool of his Sheep which he shall afterwards buy. *Hob. Case 171. Perk. §. 90.*
- And a Man may give or grant to another the Apparel on his Back. *Perk. §. 90.*
- Real and Personal.** It is a Rule, that all Chattels Real and Personal may be granted (if they be in Possession) by one Man to another *in infinitum*, without any Deed, except in some special Cases. *Perk. §. 57.*
- And therefore if I make Parol Gift or Grant of a Lease for Years, or grant or sell my Sword, Spear, Plate, Wood, Ore, Horse, Cow, Sheep, or Chest, the Gift or Grant is good. *Perk. §. 57, 60. Bro. Done 9. Plow. 150. Dy. 370. Lane 36, 37.*
- And in these Cases there needs no Ceremony of Livery and Seisin, and the like; nor any giving of Money in the Name of Seisin. *Cro. Jac. 122. Lane 36, 37. Plow. 150. 3 H. 7. 35.*
- Emblements.** Emblements are grantable from Man to Man *in infinitum*; and the Grantee may take them after the Death of the Grantor.
- If one sells or gives the Corn growing upon his Ground by Word of Mouth, the Gift or Sale is good. *Perk. §. 57.*
- But if Tenant in Tail gives me his Corn growing upon the Land, and dies before I have severed the same from the Land, yet I may after sever the Corn and take it, for the Executors of the Tenant in Tail would have had it if no such Gift had been made. *Perk. §. 59.*
- Annuity.** An Annuity granted *pro Concilio*, unless granted to him and his Assigns, is not grantable over. *Dy. 2.*
- But if the Grant be to him and his Assigns, he may grant it over to another. *7 Co. 28. Moor, Case 18.*
- If an Annuity be granted to me *pro Concilio in posterum impendendo*, I cannot grant it over, if it be not granted to me and my Assigns. And *Quære*, whether I may then grant it? *Perk. §. 101.*
- An Annuity is not grantable at first, nor grantable over afterwards but by Deed. *7 Co. 33.*
- Money.** One may give Money; as where I give one Money on Condition, if he does such a Thing to have it, otherwise to repay it again. *Fitz. Grant 6. Done 12.*
- Money may be given or granted with or without a Deed. *Ibid.*
- Fera Naturæ.** Things that are *Fera Naturæ*, as Conies, Hares, Deer, and the like, unless they become tame, are not grantable.

But Dogs, and especially Mastiff Dogs, Hounds, Spaniels, and such like, are grantable.

And so are Hawks, Pheasants and Partridges made tame. *Bro. Done* 34.

A Licence, Authority, Possibility or Thing suspended, may in some special Cases perhaps be granted over after they are given and made. *3 Co. 2.*

But generally Licences and Authorities, after they are granted for the Lives of the Parties, or for Years, are not assignable over by the Grantees of them, or any other; and therefore if a Man gives me Power by Letter of Attorney to make Livery of Seisin, or a Licence to walk over his Ground, or in his Garden, I may not grant this to another. *13 H. 7. 113. 12 H. 7. 25. Co. Lit. 314. Perk. §. 88, 89.*

If *A.* sells a Manor to *B.* in Fee, and *B.* in the Deed covenants that *A.* his Heirs and Assigns, shall dig for Ore in such a Place (a great Waste) within the Manor, without Interruption of *A.* his Heirs and Assigns; this Power is grantable over. *Godb. 17, 18.*

A. lets a Wine Tavern to *B.* for Years, and *B.* covenants with *A.* every Month for the Wine there spent, and to pay him so much a Ton: This was held not grantable nor assignable over to another. *Godb. 120.*

It is a Rule, that an Election, Covenant, Condition, Assent, Licence or Liberty, cannot be created and annexed to an Estate of Inheritance or Freehold without a Deed. *Dy. 281.*

A Licence to take the Profit of another's Soil, is not grantable over without a Deed. *Cro. Jac. 575.*

But if the Licence amounts to a Lease, (as sometimes it does) it is otherwise. *Ibid.*

So of a Licence for Common of Pasture, or Feeding of Cattle. *Ibid.*

So a Licence to hunt in another's Park for a certain Number of Beasts, is not good without a Deed. *Ibid.*

But a Power to receive a Rent upon a Condition of Re-entry, may be without a Deed. *Cro. Car. 22, 188.*

A Power of Revocation to be in Writing, may be by a Will as well as by a Deed. *Hob. 311, 313.*

A Rent or Service suspended, whilst it so continues, is not grantable over; and therefore if the Lord disseises the Tenant, or the Tenant enfeoffs the Lord upon Condition, the Lord cannot grant over the Seigniorship during this Suspension. *2. Rents or Services suspended.*

And yet if one has a Rent in Fee out of my Land, and he purchases the Land for Life or Years; the Rent is grantable even whilst the Estate of the Land continues.

So if a Tenant makes a Lease for Life or Years of the Tenancy of the Land, the Lord notwithstanding that may grant the Seigniorship.

And yet if the Tenant makes a Lease to another Man for Life, and the Lord grants the Seigniorship to this Tenant for Life in Fee; in this Case the Grantee of the Seigniorship may not grant it over, because it was never *in esse*. *Co. Lit. 314. 16 H. 7. 4. Perk. §. 88, 89.*

So any Thing wholly in suspense, whilst it is so, is not grantable. *Co. Lit. 314.*

If Land be granted to two Men and the Heirs of their two Bodies; in that Case, altho' they have several Inheritances after their Death, yet neither of them may grant away his Estate after his Life. *Co. Lit. 282.*

A bare Possibility of an Interest which is incertain, is not grantable.

But if it be such a Possibility as is coupled with some present Interest, it is grantable over. *1 Co. Chedington's Case. 4 Co. 66. 5 Co. 24. 10 Co. 51.* As if a Lease be made to me and my Wife, the Remainder to the Survivor of us; or a Term of Years is granted for Life, with a Remainder over. *4 Co. 66. 5 Co. 24. 10 Co. 51. Dy. 244. 3 Leon. 205. 1 Bulst. 191.*

It is a Rule, that no Possibility, Right or Title to Land, or Thing in Action, may be given or granted to a Stranger, by Act of the Party; but these may be released to the Tertenant. *10 Co. 46, 51.*

If I have four Houses in Execution upon a Statute, and by Course of Time it will endure thirteen Years, and afterwards two of the Houses are taken from me by *Elegit* for fifteen Years; yet I have such an Estate remaining in me as I may grant away. *4 Co. 66. 5 Co. 24. 10 Co. 51. Dy. 244.*

Things in Action, and whatsoever is of that Nature, as Causes of Suit, Rights and Titles of Entry or Action concerning Inheritances, or a Personal Thing, are not grantable over but in special Cases; as if one disseises me of Land, or takes away my Goods, I may not grant over this Land, or these Goods, till I have got the Seisin. *Things in Action, and Right and Title of Entry.*

Seisin and Possession of them: Nor may I grant the Suit which the Law gives me for my Relief in these Cases to another Man. 5 Co. 24. 10 Co. 48. Co. Lit. 214. Hob. 241. Dy. 244. Perk. §. 85, 86.

Condition. I may not grant over a Rent which I am disseised of. 10 H. 7. 22. And if I make a Feoffment to another Man on Condition, that if I do such a Thing I shall have the Land again; in this Case I may not before nor after the Time of the Performance of the Condition grant over the Condition to another.

But the Condition may go with the Reversion of Land in many Cases.

And yet all these Things may be released to the Parties; for it is a Rule, that every Right, Title or Interest in præsentis or futuro, by the joint Act of all, that it may be barred or extinguished. Co. Lit. 214.

Things in Action, as a Right or Title of Action, that depend only in Action, and Things of that Nature, as Rights and Titles of Entry, to any Real or Personal Thing, are not (as before is mentioned) grantable at all, but by way of Release to the Tenant of the Land, &c. whereby it may be extinguished; but this cannot be done without Deed. And therefore if a Man takes my Goods as a Trespasser, or I deliver him my Goods to keep, and afterwards I am willing to give him these Goods, it must be by Deed. 6 H. 7. 9. Dy. 91, 126. Doct. & Stud. 16. 6 Co. 50. 5 Co. 24. 10 Co. 48. Co. Lit. 214. Perk. §. 85, 86, 87.

Bonds, Obligations, Especialties, may be assigned over; as if J. S. be indebted to me, and I indebted to J. B. I may assign that Debt to J. B. with the Assent of J. S. otherwise not.

And if a Bond be to perform the Covenants of a Lease, and he assigns the Lease, he may then assign the Bond also.

But if the Covenant be first broken, and then he assigns it over, this will be Maintenance if the Assignee sue on the Bond.

But if he assigns over the Lease, and after the Covenant is broken, *contra*.

But if he assign over the Bond, and reserve the Lease in his own Hand, and then the Covenants are broken, and the other sues on Bond, this is Maintenance. Godb. 81.

And if one owes me a Debt by Bond, Bill or otherwise, I may not grant over this Debt to another; but I may make a Letter of Attorney to any one to sue for it, and receive it for me, or for himself, or I may give the Writing to another, and he may cancel it, or give it to the Obligor himself. Co. Lit. 232. 3 Co. 32. Perk. §. 86.

But Debts in some Cases are assignable to the King. Cro. Car. 155, 170.

And yet Bills of Exchange, by Custom; and Promissory Notes, by Statute; are assignable over, and the Assignee may sue in his own Name.

If I have a Judgment against another for Debt and Damages, I cannot grant or assign it away, for a common Person cannot assign over a Debt as the King may do. Cro. Jac. 179, 180.

But a Bankrupt's Debt may be assigned by the Commissioners of Bankrupts. Style 62, 63, 348.

If one takes my Goods from me, or another that has them, or I buy Goods of another Man, and suffer them in his Possession, and a Stranger takes them away, I may not give them to any other but the Trespasser himself. Perk. §. 92. Fitz. Done 3, 7.

But all these may be released to the Parties themselves. 5 Co. 24, 97. 6 Co. 50. Perk. §. 85. Co. Lit. 330. 2 Brownl. 224. 6 H. 7. 9. 10 H. 7. 22.

An Annuity is grantable at first; and (as it seems) an Annuity so granted in Fee or for Life is grantable over, and yet it is but a kind of *Chose in Action*. Moor, Case 18. Q.

For if an Annuity be granted by the Grantor and his Heirs to a Stranger and his Heirs, it seems to some, that the Grantee may grant it over, because it is an Inheritance in him. *Tamen Quære*. For the Grantee has not any Remedy for it but by Action. Perk. §. 87. who there likewise makes another *Quære*, if the Annuity had been for Life, &c.

Damages. Damages to be recovered in a Suit for Trespass or Battery, &c. is not assignable over. Godb. 81.

Offices. Offices are grantable at first.

But the great judicial Offices of the Kingdom, as the Office of the Lord Chancellor, Chief Justices, or Chief Baron, or of other of the Justices or Barons, and such like Offices, are not grantable over; nor are they to be executed by a Deputy, except in Case of the Justices of the Great Sessions of Wales, who have Power to depute

depute by Statutes. *Perk. Tit. Grants. Co. Lit. 233. Cro. Eliz. 263. 3 Leon. Cafe 58. Plow. 379.*

Judicial Offices are not grantable in Reversion, nor to Persons unskilful or incapable; nor may they be granted for Years. *1 Co. 3. 41. Plow. 379.*

Altho' the Sheriff's Office is not grantable over, yet it may be executed by Deputy, if the Sheriff pleases, or he may execute it himself.

But inferior Offices that are Offices of Trust and Confidence, especially if they concern the Grantor, as the Office of a Steward of Courts, Bailiff, Receiver, Chamberlain, Carvet, and the like, altho' they are grantable at first, yet they are not grantable over by the Officer to any other Person, except in the Case of a Peer, unless they are granted to them or their Assigns; nor are they to be executed by Deputy, unless the Grant gives him Power to make a Deputy. *Perk. §. 101, 111. Co. Lit. 144, 232. Godb. Cafe 200. 9 Co. 49. Dy. 2.*

Offices of Trust generally are not grantable or assignable over, as the Office of a Philazer is not grantable over. *Dyer 7. Plow. 379.*

So neither of the *Marshalsea*.

Nor is the Reversion of such an Office after a Grant of it for Life grantable to another.

Nor is such an Office grantable for Years, but for Life, or at Will. *9 Co. 96. 39 H. 6. 34.*

Nor is the Office of the Clerk of the County belonging to the Sheriff's Office grantable away by the King himself, but it must go with the Sheriff's Office. *4 Co. Mitton's Cafe.*

Offices (for the most Part of them) are not grantable at first, nor grantable over without a Deed. *9 Co. 9.*

And yet some inferior Offices, as Stewardships of Courts, Bailiwicks, and the like, are grantable without Deed; and the Lord may retain such Officers into his Service by Word of Mouth, without any Deed. *Ibid.*

A Lord may retain a Steward of a Court for a Time, as for a Year or more, and that he shall have so much for his Pains, without Deed; and if he keeps the Court, he may have Debt against the Lord for his Wages; but he may not have a Writ of Annuity without a Deed for it. *Dy. 270.*

A Dignity, as of an Earl, or Viscount, if it be granted, it must be by Deed. *7 Co. 33.*

Trusts and Confidences being Personal Things, are not grantable over, but where they are granted to a Man and his Heirs, or to him and his Assigns, and in some special Cases there also. *Perk. §. 98.* Trusts or Confidence.

An Act or Office of Trust is not grantable over, *Hob. 154.* but where it is granted to one and his Assigns. *Perk. §. 100.*

Matters of Trust generally are not grantable over. *Perk. §. 99, 111. Plow. 379.*

One may not make a Deputy to execute an Office of Trust, unless his Grant do by express Words enable him to do it. *Perk. §. 100.*

An Use in some Cases is grantable over. *Plow. in Manxell's Cafe.*

Use.

Uses before the Statute of Uses, were but in Nature of a Trust and Confidence; and so are such Uses still as are out of the Statute, as Uses of Leases for Years, and of Goods and Chattels; and as they might have been granted by Word, so perhaps the Uses of Goods and Chattels may be so granted still; but an Use that is within the Statute is always to be raised by Deed or Matter of Record, and will not arise; nor can it be charged or transferred without a Deed. *Dy. 229. Jenk. Cent. 5. Cafe 99.*

And it is a Rule, that no Use of Land will pass at this Day, especially of a Reversion or Remainder Estate, but by Deed in Writing, or by way of Livery, save only in some Cities, Villages and Boroughs, where by a special Custom of the Place, a Freehold may pass by a Bargain and Sale by Word only, without any Writing, Livery or Inrolment. *Jenk. Cent. 6. Cafe 32. Stat. 27 H. 8. c. 10.*

The Uses of a Fine may be declared without a Deed. *Poph. 105.*

A Distress taken for Rent, it seems was not by the Common Law grantable, no Distress.

not even to the King himself. *Vide 37 H. 6. 10. Bro. Done 16.*

But now since the Statute of the 2d of William and Mary, *Seff. 1. (Chap. 5.)* if the Tenant does not pay the Lord his Rent, or replevy the Things distrained for it within five Days after Notice given of the Distress made, they may be appraised and sold.

Deeds.

A Man may give or grant away his Deeds at his Pleasure, and he that has the Gift or Grant of them may cancel or dispose of them as he pleases; and the Heir and Executor concerned herein is remediless. 25 H. 8. 5. Co. Lit. 322.

Rules as to
Grants, &c.
by or without
Deed.

That which cannot commence without a Deed, as a Rent, Reversion, Common, &c. the same cannot be granted over or conveyed without a Deed. Popb. 137.

But that which takes Effect by Livery without a Deed may be granted without a Deed. Ibid.

That which is grantable only by Deed, may be granted by a Deed Poll as well as by Indenture.

And that which may not be granted without Deed, may not be surrendered without Deed. Noy's Compl. Lawyer 102.

A Surrender, Release and Confirmation, in some Cases may, and in some Cases may not be without a Deed.

That which may be granted by Word without any Deed, may be surrendered without any Deed. Noy's Compl. Lawyer 102.

Rules as to
Revocations,
Releases, De-
feasances,
&c.

Whatsoever may be granted, the same may be revoked *eodem modo* as it is granted, and Things are dissolved as they are contracted.

And whatsoever executory Thing is created by Deed, the same by Consent of all Parties may be revoked by Deed.

And so Warranties, Obligations, Rents, Charges, Annuities, Covenants, Leases for Years, Uses, and the like, may by Defeasance, Revocation, Release, or such like, by the Consent of all Parties to the Creation of it, or concerned in it, be defeated and avoided. And so a Right or Title to Land may be discharged. 1 Co. 113. 4 Co. 1. 5 Co. 26.

8. Apt Words
required by
Law.

S E C T. IX.

What Words the Law requires in a Deed or Instrument of Conveyance.

THE eighth Thing Lord Coke observes to be necessarily incident to a Deed is, *apt Words required by Law.*

Fee-simple.

Apt Words are requisite in a Deed made either to pass or to create an Estate.

Littleton (*Tenures*, §. 1.) says, If a Man would purchase Lands or Tenements in Fee-simple, it behoves him to have these Words in his Purchase, *To have and to hold to him and to his Heirs*; for these Words, *his Heirs (only)* make the Estate of Inheritance in all Feoffments and Grants.

Upon which Lord Coke (*Co. Lit.* 4. a.) observes, that Littleton puts Lands only for an Example; for his Rule extends to Seignories, Rents, Advowsons, Commons, Estovers, and other Hereditaments of what Kind or Nature soever.

And that (*Co. Lit.* 8. b.) here Littleton treats of Purchases by natural Persons, and not of Bodies Politick or Corporate; for if Lands be given to a sole Body Politick or Corporate, (as to a Bishop, Parson, Vicar, Master of an Hospital, &c.) there to give him an Estate of Inheritance in his Politick or Corporate Capacity, he must use these Words, *To have and to hold to him and his Successors*; for in these Cases without the Word *Successors* no Inheritance passes; for as the Heir inherits to the Ancestor, so the Successor succeeds to the Predecessor, and the Executor to the Testator. But it appears here by Littleton, that if a Man at this Day gives Lands to J. S. and his Successors, this creates no Fee-simple in him; for Littleton, speaking of natural Persons, says, that these Words, *his Heirs*, make an Estate of Inheritance in all Feoffments and Grants, whereby he excludes these Words, *his Successors*. And yet an antient Grant must be expounded as the Law was taken at the Time of the Grant: A Chantry Priest incorporate took a Lease to him and his Successors for a hundred Years, and afterwards took a Release from the Lessor to him and his Successors, and it was adjudged that by the Release he had but an Estate for Life, for he had the Lease in his natural Capacity, for it could not go in Succession, and *his Successors* gave him no Estate of Inheritance for want of these Words, *his Heirs*.

And that (*Co. Lit.* 9. a.) if the King by his Letters Patent gives Lands *Decano & Capitulo, habendum sibi & hæredibus & successoribus suis*; in this Case altho' they are Persons in their natural Capacity to them and their Heirs, yet because the Grant is made to them in their politick Capacity, it shall enure to them and their Successors.

And so if the King grants Lands to *J. S. habendum sibi & successoribus sive hæredibus suis*, this Grant shall enure to him and his Heirs.

B. having divers Sons and Daughters, *A.* gives Lands to *B. & Liberis suis, & a lounr Heires*, the Father and all his Children take a Fee-simple jointly by Force of these Words, *their Heirs*; but if he had no Child at the Time of the Feoffment, the Child born afterwards shall not take.

These Words, *his Heirs*, do not only extend to *immediate Heirs*, but to his *Heirs remote*, and most remote, born and to be born, *Sub quibus vocabulis hæredibus suis, omnes hæredes propinqui comprehenduntur, & remoti, nati, & nascituri.* And *hæredum appellatione veniunt hæredes hæredum in infinitum.* And the Reason wherefore the Law is so precise to prescribe certain Words to create an Estate of Inheritance, is for avoiding of Uncertainty, the Mother of Contention and Confusion.

The Necessity of the Word *Heirs* or *Successors*, as the Case requires, is therefore absolutely necessary in Conveyances of Estates of Inheritance; for as *Littleton* (in the same Section) observes, That if a Man purchases Lands by these Words, *To have and For Life. to hold to him for ever*; or by these Words, *To have and to hold to him and his Assigns for ever*: In these two Cases he has but an Estate for Term of Life.

One seised of Land in Fee-simple, and having a Son going to be married, he being Fee simple. upon the Land, used these Words: *In Consideration of this Marriage I do here, reserving an Estate for my own and my Wife's Life, give unto thee and thy Heirs for ever, these Lands, &c.* This seems to be a good Conveyance of the Land. *Poph. 47.* A fortiori therefore if it be by Deed. But there must be Livery or Attornment upon it in both Cases.

Where Tenements are given by one Man to another, with a Wife, (who is the In Tail. Daughter or Cousin to the Giver) in Frank-marriage; which said Gift has an Estate of Inheritance by these Words, *Frank-marriage annexed to it*, altho' it be not expressly said or rehearsed in the Gift (that is to say) *that the Donees shall have the Tenements to them and to their Heirs between them two begotten.* And this is special Tail. *Lit. §. 17.*

These Words *in liberum maritagium*, create an Estate of Inheritance in special Tail, as *Littleton* says; but this had need of some Interpretation; for if Lands be given by these Words *in Frank-marriage*, according to the Rules of Law, then do these Words create an Estate of Inheritance in special Tail; for the Consideration of Marriage is in that Case more favoured in Law than any other Consideration: But tho' the Gift be in these Words, yet if it be not consonant to the Rules of Law in other Things requisite thereto, there they create but an Estate for Life. *Co. Lit. 21. a. b.*

And therefore observe, that there are four Things incident to Frank-marriage.

First, That it be given for Consideration of Marriage either to a Man with a Woman, or, as some have held, to a Woman with a Man; for in *6 E. 3. 33.* in *Peirs de Saltmarsh's Case*, a Man gave Land to his Son in Frank-marriage; and *F. N. B. 172.* takes the Law also to be so; and *7 E. 4. 12.* per *Moyle* against a new Opinion in *Temp. H. 8.* *Br. Tit. Frank-marriage*, the former Books being not remembered.

Secondly, That the Woman or Man that is the Cause of the Gift be of the Blood of the Donor; but it may be made as well after Marriage as before, and it may be with a Widow, &c.

Thirdly, If the Gift be made of such a Thing as lies in Tenure, that the Donees hold of the Donor at the Time the Estate in Frank-marriage is made. A Rent-service may be given in Frank-marriage, because it may be holden; and so may a Rent-charge or Rent-seck, as *F. N. B.* holds; and it appears in our Books, that a Common was granted in Frank-marriage.

Fourthly, That the Donees shall hold freely of the Donor till the fourth Degree be past; and therefore if Land be given to a Woman, with a Son of the Donor in Frank-marriage, there passes an Inheritance; but if the Donee, who is the Cause of the Gift, be not of the Blood of the Donor, then there passes but an Estate for Life if Livery be made. Also if Lands be given to a Man with a Woman of the Blood of the Donor *in liberum maritagium*, the Remainder in Fee either to a Stranger or to the Donees, they have no Estate-tail, because there is no Tenure of the Donor; but if in that Case the Remainder had been limited to another in Tail, reserving the Reversion in Fee to the Donor, there the said Words *in liberum maritagium* create an Inheritance, because the Donees hold of the Donor. And this is the Cause that it is held,

held, That a Man cannot devise Land in Frank-marriage, because the Donee cannot hold of the Donor. And *Cestuy que Use* before the Statute 27 H. 8. could not have made a Gift in Frank-marriage, because the Reversion was in the Feoffees. And if the Donor gives Lands in *liberum maritagium*, reserving a Rent, this Reservation shall take no Effect till the fourth Degree be past, but the Frank-marriage is good; for if the Reservation should be good, then the Donees could not have an Estate-tail for want of the Words, *of the Heirs of their Bodies*. Co. Lit. 21. b.

The Words in *liberum maritagium*, are such Words of Art, and so necessarily required, as they cannot be expressed by Words equipollent, or amounting to as much; as,

If a Man gives Lands to a Man with his Daughter, in *connubio soluto ab omni servitio*, &c. there passes in this Case but an Estate for Life, for seeing these Words in *liberum maritagium* create an Estate of Inheritance against the general Rule of Law, the Law requires that they should be legally pursued.

But then it may be demanded if a Man had given Lands at the Common Law, in *libero maritagio*, whether had the Donees a Fee-simple without the Word *Heirs*, because all Gifts in Tail were Fee-simple by the Common Law before the Statute of *Westm. 2.* which Statute did not create any Estate in Fee-tail, but out of an Estate in Fee-simple? To this it is answered, that these Words in *liberum maritagium*, did create an Estate in Fee-simple at Common Law: And it is holden in 31 E. 3. Gard. 116. *Per ceux parolx in Frank-mariage les Donees averont les terres a eux & a leur Heires parenter eux engendres, & ce est dit especial Tail*, (i. e. By these Words in Frank-marriage, the Donees shall have the Lands to them and their Heirs between them begotten, and this is called special Tail.) But yet between Donees in Frank-marriage and Donees in special Tail there are many notable Diversities. If the King gives Land to a Man and a Woman, and the Heirs of their two Bodies, and the Woman dies without Issue, yet the Man shall be Tenant in Tail after possibility. But if the King gives Land to a Man with a Woman of his Kindred in a Frank-marriage, and the Woman dies without Issue, yet the Man in the King's Case shall not hold it for his Life, because the Woman was the Cause of the Gift; but it is otherwise in the Case of a common Person. If Lands be given to a Man and a Woman in special Tail, and they are divorced *causa præcontractus*, both shall hold the Lands for their Lives; but in Case of Frank-marriage, if they be so divorced, the Woman shall enjoy the whole Land, because she was the Cause of the Gift. If Lands held in Socage be given in special Tail, and the Donees die, the Issue being within the Age of fourteen Years, the next of Kin of the Part of the Father or of the Part of the Mother, which can get the Custody, shall have it; but in Case of Frank-marriage the Heir of the Part of the Mother shall have it, because, as it has been said, she was the Cause of the Gift. Co. Lit. 21. b. 22. a.

Words in
Deeds in
general.

A Deed made by Words in the *preterperfect Tense*, is as good as that which is made by Words in the *present Tense*; but it is best to make it in both Tenses. 1 Leon. 25. As *batb* given, &c. and by, &c. do give, &c.

Land was given to A. in Tail, the Remainder in Fee to his Sisters, being his Heirs at the Common Law: A. made a Deed in this Manner, viz. *I the said A. have given, granted and confirmed, for a certain Piece of Money, &c. without the Words of bargained, sold: And the Habendum was to the Feoffee with Warranty against A. and his Heirs; and a Letter of Attorney was to make Livery and Seisin: And the Deed was in this Manner, To all Christian People, &c. It was inrolled within one Month after the making of it, and altho' it was in the Form of a Deed Poll, yet it was indented; four Months after the Delivery of this Deed, the Attorney made Livery of Seisin. A. died without Issue, and the Sisters entred, and the Feoffee ousted them of the Land, and thereupon they brought an Action of Trespass: And the Opinion of the whole Court was for the Sisters; for here is not any Discontinuance, for the Conveyance is by *Bargain and Sale*, and not by *Feoffment*, because the Livery comes to Sale after the Inrolment, and the Warranty shall not hurt them: And altho' in the Deed there is not the Word *Indenture*, and the Words are in the first Person, yet as the Parchment is indented, and both Parties have put their Seals to it, it is sufficient. Also it was agreed *per Cur'*, That by the Words, *Give for Money, Grant for Money, Confirm for Money, Agree for Money, Covenant for Money*, if the Deed be duly inrolled, Lands pass both by the Statute of Uses, and by the Statute of Inrolments, as well as upon the Words *Bargain and Sale*. And by *Catline, Wray and Whiddon*, the Party ought to take by way of Bargain and Sale, and he has not Election to take the Land*

Land by way of Livery; but when all is in one Deed, and takes Effect equally together, the Grantee has such Election; but in this Case the Bargain and Sale (the Deed being inrolled) prevents the Livery, and takes his full Effect before. And by *Wray and Catline*, if he in Reversion upon a Lease for Years grants his Reversion to his Lessee for Years by Words of *Dedi, Concessi, Feoffavi*, and a Letter of Attorney is made to make Livery of Seisin, the Donee cannot take by the Livery, for the Lessee has the Reversion presently. 3 *Leon.* 16, 17.

Perkins (§. 158.) says, it has been held, that a Man shall be bound by the Speaking of another Man, by Averment thereof in putting his Seal to it, and delivering of it as his Deed: As, if a Man be Obligee in a Debt, or Covenant by Writing, *Et ad majorem hujusmodi rei securitatem, inveni A. de B. & C. de P. fidejussores, quorum unusquisque in toto & in solido se obligavit.* And notwithstanding that none speaks the same but their Principals, yet if the others put their Seals to it, and deliver the same Writing as their Deed, then they allow of that which the Principal speaks, and so they themselves are become Principals; and so it has been holden. *Perkins* cites 40 *E.* 3. *Cov.* 16. *T.* 4 *E.* 1. *Obli.* 16. but concludes with *Tamen Quære.*

And yet *Perkins* goes on thus in the next Section, (*viz.* 159.) And it is to be known, that at this Day a Man shall be bounden by putting his Seal to a Deed indented, and Delivery of the same, and yet the Words within the Deed are spoken only by another Man.

And therefore if a Man makes a Lease to me, of my own Land by Deed indented, for Years, without saying any more; by this Deed I shall be concluded, and yet there is no Speech of mine in the Deed.

And if there be Father and Son, and the Father is seised of an Acre of Land in Fee, and a Stranger leases the same Acre to the Father by Deed indented for Years, and the Father dies; now the Lessee by this Deed shall conclude the Heir of the Lessor to say, that his Father died seised in his Demesne as of Fee, and yet there is nothing said by the Father, &c.

And *Perkins* in the 160th Section says, that it is said, that if a Deed indented be made between two, and Words relating to both of them are used in the Deed, but the Words of one of them are in the first Person, and the Words of the other in the third Person; all the Words in the Deed shall be taken to be the Words of him who spake in the first Person, which saying is little or nothing to the Purpose. *Sed Quære.*

A Deed is good without the Words, *In cujus rei testimonium, &c.* *Ow.* Case 5, 33. *Cro. Jac.* 456. If it be duly sealed and delivered. *Bulst.* 300, 301, 302. 1 *Leon.* 25. *Bendl.* 155.

Yet if the Deed say, that the Party has put his Hand, and not his Seal to it; if he does put his Seal to it, it is good enough. *Hetley* 29.

And yet in *Hetl.* 88. it is said, that altho' *A.* Serjeant said, That if the Words, *In cujus rei testimonium* were wanting in a Deed, that the Deed is not good, and that all Covenants, Grants and Agreements, which come after those Words in a Deed, are not of Force, nor may be pleaded as Parcel of the Deed. *Hetl.* 136, 137. But the Law seems to be otherwise. *Dy.* 19. *Hughes's Abr.* 591.

A Deed is good without the Words, *Sealed and delivered in the Presence, &c.* if it be sealed and delivered, and there are Witnesses to prove it; and altho' the Witnesses Names be not endorsed, if they can prove the Sealing and Delivery, it is well enough. *Co. Lit.* 6.

But it is not material in a Deed, whether it be drawn in the first or in the third Person, so as the Words be aptly applied; for if it be in the third Person, *viz.* *Quod præsens scriptum Testatur, &c. quod idem A. dedit & tradidit, &c.* Or if an Obligation be made in the third Person, *viz.* *Me A. B. debere T. D. &c. 20 l. &c.* These are good Deeds notwithstanding 38 *E.* 3. *c.* 4. which is provided for Obligations made beyond Sea only. And if the Words of a Deed indented run in the first Person, it is as good as if it was made in the third Person. 2 *Co.* 5. *Dy.* 6. *Fitz. Feoffment* 5. 3 *Leon.* Case 39.

A Feoffment was made by the Words *Bargain and Sale*, without the Words *give* Words in and grant; and being executed by Livery or Attornment, it was held good. 1 *Leon.* Feoffments. Case 31.

If the Disfeisor enfeoffs a Stranger by Deed in these Words, *Sciant presentes, &c. quod ego*, the Disfeisor naming him, *per assensum & consensum* the Disfeisee, and name him, *Dedi, Concessi & hoc præsentis, &c.* to a Stranger, &c. and this is done before any

Words in
Gifts and
Grants.

any Entry made by the Disfeisee; in this Case these Words, *per assensum & consensum* of the Disfeisee, altho' it be true, will not make the Deed good. *Perk. §. 156.*

The Words *Dedi & Concessi* (hath given and granted) are the most apt and proper Words for all Kinds of Gifts and Grants: And yet they may be made by other Words, and good enough. *35 H. 6. 8. Plow. 57, 154.*

If he in Reversion upon a Lease for Years grants his Reversion to the Lessee for Years by the Words *Dedi, Concessi & Feoffavi*, (hath given, granted and enfeoffed) by these Words the Reversion will pass. *3 Leon. Case 39.*

If a Man by the Words *bargain and sell*, only grant the Reversion of his Tenant for Life, and the Tenant attorns, yet this Grant is not good to pass, unless the Deed be inrolled, for these are not proper Words to make a Grant. *Godb. 7.*

But if Tenant for Life in Right of his Wife, and he in Reversion, shall by Indenture *bargain, sell and alien* the Reversion, and the Land to *A.* and his Heirs for Money, and the Deed has not the Word *Grant* in it, nor is it inrolled within the six Months: By the Words *alien the Reversion*, if there be Attornment the Reversion passes; but a Reversion will not pass by the Words *bargain and sell* without Attornment. *Cro. Jac. 210. Godb. 7.*

In Leases for
Lives or Years.

Leases for Years may be made almost by any Kind of Words that declare the Intent and Agreement of the Parties to have the Land, and take the Profits for a certain Number of Years; as to say, *I will that you shall have my Land in D. from henceforth for twenty-one Years*; or *I do give you Leave or Licence to hold my Lands in D. for twenty-one Years*. For in these Cases the Words *Demise* and *Grant* are not absolutely necessary to make a Lease for Years. One says, *I will you shall have a Lease for twenty-one Years of my Land in D. paying 10l. Rent*, make a Lease in Writing, and I will seal it: These Words between Persons make a good Lease presently. *Moor's Rep. Case 31. Cro. Car. 33.*

The Words *covenant, grant and agree*, that another shall have Land for so many Years, are apt Words to make a Lease for Years, and shall enure as a Lease. *Cro. Jac. 91, 92. Cro. Eliz. 150.*

And such Words will make a good Reservation of Rent also. *Idem.*

A Lease made by the Words *demise, grant, bargain and sell*, is good: And it may be made for one or more Months or Years. *Hetley 82.*

A Tenant in Tail of Land, entred into a House built upon it, and said, *Brother, I here demise unto you my House as long as I live, paying 20l. per Ann. to me, and finding me my Board and Washing, and keeping me a Horse*; this is not a good Lease without Livery, but the Delivery of a Turf, Twig, or any Thing from off the Land, makes it good. *Poph. 47. 6 Co. 26.*

If a Man makes a Lease for Life by Deed, with a Proviso *that if the Lessee shall die within sixty Years, that his Executors shall have so many of the sixty Years as shall be to come at the Time of his Death*; this is a good Lease for the sixty Years, determinable upon the Lessor's Death, but not a good Lease for the sixty Years after his Death, by Reason of the Incertainty, and yet it may amount to a good Covenant for that Time. *Dy. 150, 253. 1 Co. 145.*

But to say, *I will you shall have my Land for Life, with Livery*, is a good Lease for Life. *Jenk. Cent. 5. Case 2.*

Articles of Agreement were made between *A.* and *B.* thus: *It is agreed between the Parties, That A. doth let the Land for and during five Years, to begin at the Feast of St. Michael next following; provided that B. pays A. yearly, during the Term, at the Feast of St. Michael and the Annunciation of the Virgin Mary, 120l. by equal Portions: And the Parties do covenant, That a Lease shall be made and sealed according to these Articles, before the Feast of All Saints next ensuing.* This is a good Lease presently; and this Proviso will be good for the Reservation of the Rent. *3 Co. 486. Noy's Rep. 57.*

If *A.* covenants with *B.* *that he shall have his Land*, this will make a Lease for the Time.

So if I have a Lease, and covenant with another that he shall have it, and this for the Time agreed upon, as that he shall have it till *5l.* be paid, or for so many Years, this is good.

But if it be till *20l.* be levied, there must be Livery, or else it will be but at Will.

But a Covenant to suffer a Man to enjoy his Land for such a Time as before will not make a Lease, it is but a Covenant. *27 H. 8. 1. Dy. 96. Plow. 309. 3 Bulsh. 252. 14 H. 8. 14.*

So if a Man leases his Land, being of a certain yearly Value, till his Debts be paid, it is but a Lease at Will without Livery made, but then it is a Freehold. 6 Co. 35.

3 Bulst. 100.

But if one covenants that another shall have his Lands till the Arrears of Rent are paid. *Quere*, What Lease this is? Bulst. 25, 250.

And yet if a Lease be made of Land till 100l. be paid to me, and Livery of Seisin is made, it is a good Lease for Life, determinable on the Payment of the 100l.

21 Aff.

The most usual and proper Words whereby to make a Lease, is, *demise, grant, and to farm let*, with a *Habendum* for Life or Years; yet such a Lease may be as good in other Words; for whatever Words will amount to a Grant will amount to a Lease.

And so the Words *give, betake, commit, place*, or the like, may make a Lease.

And if I covenant and grant with B. *that he shall enjoy my Land for twenty Years*; or I promise him to *suffer him to enjoy my Land for twenty Years*, either of these make a good Lease.

And yet if A. covenants with B. to levy a Fine to him and his Heirs, which shall be to the Use of him and his Heirs; provided that if A. pays B. and his Heirs 10l. at the End of thirteen Years, that then the Fine shall be to the Use of A. and his Heirs; provided that if B. pays not A. 100l. at the End of thirteen Years, that then A. shall re-enter, &c. And A. covenants with B. by the same Deed, That B. his Heirs, Executors and Assigns, shall quietly hold the Premises from Michaelmas next for thirteen Years, and yearly thenceforth for ever, if the 10l. be paid, or the 100l. be not paid at a yearly Rent, according to the Intent. In this Case the Covenant does not make a Lease, but shall enure only as a Covenant, and his Payment of a Rent will not alter the Case. *Evans's Case*, Trin. 5 Jac. B. R. Co. Lit. 5, 52. F. N. B. 270. Bro. Leases 72. 15 H. 7. 1.

And if I license B. to hold my Land for twenty one Years, this will be a good Lease for twenty-one Years. 5 H. 7. 6. Cro. Jac. 172.

But if I give a Bond, with a Condition for the quiet Holding of Land for three Years; this is no Lease for the Time. *Ibid.*

If A. mortgages his Land to B. on Condition to re-enter, if A. pays him 100l. such a Day; and B. covenants and agrees with A. that A. shall take the Profits till such a Day; this will be no Lease from B. to A. but a Covenant only. And yet see *Bridg. Rep.* 13, 14. That if one mortgages Land to another, on Condition, that if 10l. be paid at Michaelmas, the Deed shall be void; provided that the Mortgagee shall not enter, but that I shall hold the Land till Michaelmas; this may be a good Lease till Michaelmas. *Quere Diversitatem?*

It is a Rule, that any Words which import an Agreement between the Parties, that the Lessee shall enjoy the Land for a certain Time, may make a Lease. As, if I make a Bailiff of my Manor for certain Years, and that he shall have the Profits without any Interruption; this may be a good Lease for Years. 5 H. 7. 1.

If I say to J. S. being in my House, *Here I demise to you my House and Land for so long as I live*; this is a good Lease to him, if Livery and Seisin be made upon it, *Et sic de similibus*. 6 Co. 26.

A Lease for Years cannot by Agreement of the Parties be made to the Heirs of the Lessee, nor intailed to the Heirs of his Body; and therefore if a Lease be made to J. S. and his Heirs, or to J. S. and the Heirs Male of his Body; this cannot go so, but the Executors of J. S. shall have it, and may dispose of it, and the Heirs will have nothing to do with it. 2 Co. 24. 10 Co. 87.

If two agree by Word of Mouth, that one of them shall have such a Piece of Land for twenty Years; this is a good and perfect Lease made by this Agreement, altho' they agree to have a Writing made of it afterwards, for that will be but a Confirmation of it: But if the Agreement be, that such a Writing shall be made, or that a Lease shall be made of such a Thing between them and put in Writing, so that the Agreement has Reference to the Writing, and implies an Intent not to perfect the Agreement till the Writing be made; in that Case the Lease is not a perfect Lease till the Writing be made. *Per Justice Jones at Gloucester Assizes. Shep. Law of Com. Assur.* 87.

Articles of Agreement were made between A. and B. thus: *Articles, &c. First of all A. doth demise his Close to B. to have it for forty Tears, and a Rent reserved, with a Clause of Distress, &c. In Witness whereof, &c.* And afterwards there was written in the same Paper a Memorandum, that these Articles are to be ordered by Counsel of both Parties, according to due Form of Law; and because the Intent of both Parties appeared

appeared by that Memorandum, and the Lease was drawn by the Counsel, but never sealed, (for the Parties disagreed about Fire-bote) it was ruled by the Court that the Articles were not a sufficient Lease. *Noy's Rep.* 128.

One seised of a Prebend, made a Lease of Part of it with these Words: *Cum omnibus commoditatibus, emolumentis, proficuis & advantagiis eidem præbendæ spectantibus seu aliquo modo pertinentibus*. By this the Advowson does not pass. *Hob. Case* 379.

If an Indenture of Lease be made between *A.* of the one Part, and *B. C. and D.* on the other Part; and therein *A.* demises Land to *B.* *Habendum for eighty Years, if B. lives so long; and if the said B. dies, or aliens the Premises within the Term, then his Estate shall cease;* and then the Lessor grants the Land to *C.* for so many Years of the said Term as shall be then to come, after the Death or Alienation of the said *B.* if he lives so long: In this Case this is a good Lease to *B.* for so many Years as he shall live of the eighty Years; but the Lease to *C.* afterwards is not good, for the Term is ended by the Death of *B.* But if the Words of the second Demise be, *Habendum during the Residue of the eighty Years, and not during the Residue of the Term;* in this Case the second Demise to *C.* will also be good. *1 Co.* 153. *Dy.* 253.

Words in Assignments of Leases.

If a Lessee for Life by his Deed says to me, *I give, grant, bargain and sell my Interest in such Land to you for twenty Years, Habendum in such Manner and Form as I do hold the same:* This will be a good Assignment for so many Years as the Lessor shall live. *1 Leon.* 255.

Words in Patents.

The Words of a Patent will bind the Patentee and his Assigns, and enure as a Covenant without the Word *Covenant*. *Cro. Jac.* 522.

An Use.

If a Man on the Marriage of his Son expresses these Words, upon the Land, *My Son A. after my Wife's Death and mine, I give this Land to thee and thine Heirs for ever;* nothing will pass thereby, for an Use cannot arise at this Day without a Deed, and in this Case there is neither Deed nor Livery to pass the Remainder. But in some special Places, Cities, and the like, by Custom of the Place it may pass by way of Bargain and Sale by Word. *Dy.* 297. *Fitz. Testament* 111. *Jenk. Cent.* 6. *Case* 32.

But the Uses of a Fine may be declared without a Deed. *Poph.* 105. Yet in all Cases it is the usual, safest and most certain way to declare the Uses and Trusts by Deed in Writing.

If one has Issue two Sons, and by Deed, in Consideration of Marriage, gives his Land to his Younger Son, and to his Heirs after his Death, but no Livery is made, the Father dies, the Eldest Son enters; this shall not enure by way of Covenant, to raise an Use to the Younger Son, but by the Word *give* it shall enure to pass the Estate; and if Livery be not made, it is not good. *Hughes's Abr.* 1209.

S E C T. X.

Of Sealing Deeds.

9. Sealing.

THE ninth Thing necessarily incident to a good Deed is Sealing.

Sealing of Deeds in old Time was not used in *England*; for the *Saxons* used only to subscribe their Names, and add the Sign of the Cross, and to set down a great Number of Witnesses. And afterwards the *Normans* brought in with them the Custom of Sealing Deeds; but this was only introduced by Degrees; for first the Kings and a few of the Nobility used it, and to seal with their Seals of Arms; afterwards all the Nobility used it, and then the Gentlemen; and about the Time of *Edw. 3.* all Men began to use Sealing of Deeds, which has been continued ever since, so that now it is of Necessity, inasmuch that if a Deed be never so well written before and deliver'd afterwards, yet if it be not sealed between the Writing and Delivery, it is not a good Deed; but if a Stranger seals it by the Allowance or Commandment precedent, or Agreement subsequent of him that is to seal it before the Delivery of it, it is as well as if the Party to the Deed did seal it himself: And therefore if another Man seals a Deed of mine, and I take it up after it is sealed, and deliver it as my Deed; this is said to be a good Agreement to and Allowance of the Sealing, and so a good Deed. And if the Party seals the Deed with any Seal besides his own, or with a Stick, Key, or any such Thing which makes a Print, it is good. And altho' it be a Corporation that makes the Deed, yet they may seal with any other Seal besides their common Seal, and the Deed will be never the worse. And if there be twenty to seal one Deed, and they seal all upon one Piece of Wax, and with one Seal, yet if

if they make distinct and several Prints, this is a very sufficient Sealing, and the Deed is good enough. *Terms de la Ley, Tit. Fait. Co. Lit. 225. 2 Co. 4, 5. Perk. §. 129, 130, 131, 132, 134.*

If a Feoffment be made to two with Covenants, and one of them seals it, and the other does not, but he who does not seal it survives and occupies the Land, he is bound by the Seal of his Companion. *Hughes's Abr. 590. Dy. 13.*

A. and B. his Son join in a Deed to grant an Annuity, and A. sets his Hand and Seal, and a Label is put for the Son, but he never sealed it, the Deed is void as to his Son, and shall not bind him. *Dy. 227.*

If two make a Deed, and one of them seals it at one Time, and the other at another Time; this is as good as if they sealed it together. *Lane 32.*

If there be two Parts of an Indenture of Lease, and the Lessee seals his Part, but the Lessor does not seal, it is all void, as to the passing of Estates, Covenants and Bonds to perform it. *Telv. 18, 19.*

But if a Feoffor, Donor or Lessor, seals that Part of the Indenture which belongs to the Feoffee, &c. the Indenture is good altho' the Feoffee never seals the Counterpart belonging to the Feoffor, &c. *Co. Lit. 229. Cro. Eliz. 212.*

Altho' a Condition may be pleaded by Indenture, sealed with the Seal of the other Party, yet a Conveyance cannot be pleaded by Deed not sealed by the Party, Agent, Feoffor, Grantor, Lessor, &c. *3 Leon. Case 138.*

If a Deed concludes with these Words, *In Witness whereof I have bereunto set my Hand*; and the Party writes his Name, and puts his Seal; this is a good Deed, altho' no Mention be made of his putting his Seal to it. *Hetley 75.*

S E C T. XI.

Of Delivering Deeds.

19. Delivery.

THE tenth and last Thing which Lord Coke observes to be necessarily incident to a good Deed, is the Delivery thereof. *Co. Lit. 35. b.*

A Delivery is necessarily incident to a good Deed; for if it be never so well written and sealed, and it is not delivered by the Party himself, or by some other Person by his Agreement or Assent, it is of no Force.

Therefore I shall shew, what is a good Delivery of a Deed, or not.

1. With Respect to the Person who makes it.
2. With Respect to the Person to whom it is made.
3. With Respect to the Time.
4. With Respect to the Place.
5. With Respect to the Manner and Order of the Delivery.

First, *Of the Delivery of a Deed with Respect to the Person who makes it.*

THE Delivery of a Deed is either *Actual, i. e.* by doing something and saying nothing, or else *Verbal, i. e.* by saying something and doing nothing, or it may be by both, or there is a Delivery in Deed and a Delivery in Law. *3 Co. 7. 2 Co. 4, 5.*

And either of these may make a good Delivery and a perfect Deed; but by one or both of these it must be made, for otherwise altho' it be never so well sealed and written, yet the Deed is of no Force, nor may any Use be made of it as a Deed. *Cro. Jac. 136, 137. Perk. §. 137.*

And tho' the Party to whom it is made takes it to himself, or happens to get it into his Hands, yet it will do him no good, nor him that made it any hurt, until it be delivered. *Cro. Jac. 263.*

And a Deed may be delivered by the Party himself that makes it, or by any other by his Appointment or Authority precedent, or Assent or Agreement subsequent, for *omnis ratibitio mandato æquiparatur*; and when it is delivered by another that has a good Authority, and pursues it, it is as good a Deed as if it were delivered by the Party himself; but if he has no Authority, or does not pursue his Authority, then it is otherwise. *Perk. §. 137. 9 H. 6. 37. 11 Co. 28. 3 Co. 35. Cro. Eliz. 167.*

And therefore if a Deed, or the Contents thereof, be read or declared to a Man that is to seal it, and he (being illiterate) delivers it to a Stranger and bids him examine

amine it, and if it be so as it was read to him, then to deliver it as his Deed, otherwise to re deliver it to him again that made it; in this Case if the Deed be in Truth otherwise than it was read, and yet notwithstanding he to whom it was delivered delivers it to him to whom it is made, this Delivery will not avail, neither is the Deed by this Delivery become a good Deed. *Perk. §. 137. 9 H. 6. 37. 11 Co. 28. 3 Co. 35. 47 E. 3. 3.*

If the Writing of a Presentation by the Patron of a Church be sealed, it needs not be delivered; but the Patron must be consenting to the Clerk's taking and making use of it, or it will not be good. *Telv. 7.*

If a Deed Poll be delivered by one of the Parties to the other, and by him re-delivered to the other; this shall be the Deed of both of them. *Cro. Car. 483.*

If a Lessee for Years grants his Term by Deed, and seals it in the Presence of several Persons, and of the Grantee himself; and the Deed is at that Time read but not delivered, nor does the Grantee take it away with him, but leaves it behind him in the Place, and does not countermand it; this is a good Delivery in Law. *4 Co. 7. Shelton's Case.*

And yet if a Deed that is written and sealed in my Name, and brought me, and I am desired to deliver it as my Deed, and I say, *Do you such a Thing, and take it as my Deed, otherwise not*; this is not my Deed till the Condition be performed. *Cro. Eliz. 835.*

Or if I say, *Take it to you, I will not deliver it as my Deed*; this is not my Deed. *Cro. Eliz. 835.*

But if it be once delivered to the Party himself as my Deed, it cannot afterwards be defeated but by a Condition in Writing. *Ibid. Quare.*

If an Indenture be made by *A.* and *B.* to *C.* and *C.* seals his Part, and delivers it to *A.* and *B.* but they do not deliver that Part, &c. yet this is a good Deed to charge *C.* who delivers it. *Cro. Eliz. 212.*

An Indenture made by a Dean and Chapter, and in their Chapter-House they put their Seal to it, and make a Letter of Attorney to *J. S.* to enter, and make Delivery upon the Land, which he does; this is a good Lease, but it is not good till it be delivered. *Cro. Eliz. 167.*

If a Deed Poll be made by *A.* to *B.* with mutual Covenants from one to the other; *B.* delivers it first to *C.* then *C.* delivers it to *B.* this is a good Delivery to bind both Parties. *Cro. Eliz. 483.*

The Deed of a Corporation needs no Delivery, for when it is made by common Consent, and the common Seal put to it, it is perfected. *1 Leon. Case 119.*

Secondly, *Of the Delivery of a Deed with Respect to the Person to whom it is made.*

A Deed may be delivered to the Party himself to whom it is made, or to any other by sufficient Authority from him; or it may be delivered to any Stranger, for and on the Behalf and to the Use of him to whom it is made, without Authority from him.

But if it be delivered to a Stranger without any such Declaration, Intention or Intimation, unless it be in Case where it is delivered as an Escrow, it seems this is not a sufficient Delivery. And yet if an Obligation be made to the Use of the third Person expressed by the Deed, and the Obligor delivers it to him to whose Use it is made, this is said to be a good Delivery. *Dy. 162, 167. Perk. §. 137. Co. Lit. 36.*

If a Deed be delivered to the Use of two, if one of them who is particularly named will agree to it, and if he will not agree that the other shall be made acquainted with it, and one of them dies without being privy to the Deed, this will not be a good Deed. *Moor 448.*

And if a Deed be delivered to a Stranger, to the Use of him to whom it is made, this Delivery is good; and altho' he to whose Use it is delivered dies before Notice or Agreement, yet the Deed is good; but it is otherwise where it is to take Effect upon a Condition precedent. *Moor 448.*

If one grants a Rent to a College in Fee by Deed, and delivers the Deed to a Stranger to the Use of the College, and the College seals the Counterpart of the Indenture; in this Case it was held, that the Stranger might receive the Deed to their Use.

Use, without any Letter of Attorney, and that their Sealing of the Counterpart was an Agreement and Confirmation of it. *Cro. Car.* 862.

If a Deed Poll be made by *A.* to *B.* with mutual Covenants; *B.* delivers it first to *C.* and *C.* afterwards to him; this is a good Delivery to bind both Parties. *Cro. Eliz.* 483.

If a Deed be indented, and he who makes it seals and delivers his Part, but the other does not seal and deliver his Part, yet he shall be bound by it. *Cro. Eliz.* 212.

A Stranger may receive a Deed to the Use of a Corporation without a Letter of Attorney; and their Sealing of the Counterpart of it will amount to a sufficient Agreement to it. *Cro. Eliz.* 862.

Thirdly, Of the Delivery of a Deed with Respect to the Time.

IF a Deed be delivered before or after the Day of the Date of it, yet it is good enough; but if it be delivered before it be sealed, it is good for nothing; and where it is delivered before the Date, yet in the Pleading of it it must not be so set forth. *2 Co.* 4. *Plow.* 492. *5 Co.* 117.

But if no Time be shewn of the Delivery, it shall be taken to be delivered at the Time of the Date of it. *3 Leon.* Case 227, 357.

If a Deed be dated 15th November 23 *Eliz.* and is not sealed or delivered till the 18th November 26 *Eliz.* yet it is good; and he who made it may not plead *Non est factum* to it, but if there be Occasion, perhaps by a special Plea he may help himself. *Cro. Jac.* 136.

If a Deed be made by two, and one delivers it one Day, and the other another Day, this is good: And *prima facie*, every Deed shall be intended to be delivered the Day of the Date of it. *Latch* 61.

If three seal a Deed at one Time, and a fourth at another Time, and then it is delivered by them all, it is not the Deed of any of them till the Delivery. *Cro. Car.* 263.

If an Obligation be dated the first of May, and the first of June following the Obligee makes a Release dated the first of March, and delivers it the first of June; by this the Obligation is not released. *Cro. Eliz.* 14.

If an Obligation be made with a Condition to do something by a Day, and the Obligation is not delivered at the Time, so that it is now impossible to be done; in this Case the Condition will be gone, and the Obligation single. *Telv.* 35, 138.

A Deed takes Effect by the Delivery, and be the Delivery before or after the Date, it is not material; and if delivered before the Date, and one of the Parties dies before the Date, yet the Deed is good. *2 Co.* 4.

Fourthly, Of delivering Deeds with Respect to the Place.

THE Delivery of a Deed is always intended to be in the Place where it is made. *Plow.* 491.

If a Man pleads a Release, or other Deed made at such a Place, *viz.* at *D.* in the County of *M.* he shall not say it was delivered at any other Place than where it bears Date. *Perk.* §. 150.

And therefore if an Action of Debt be brought by Administrators, and they declare, that the Administration was committed to them in *London*, and the Letters of Administration bear Date in another Place, and in another County, the Declaration shall abate; for he who pleads a Deed is not to vary from the Place where it bears Date; but he against whom a Deed is pleaded may say it was made by Durefs of Imprisonment at another Place and in another County than it bears Date. *Perk.* §. 151.

Fifthly, Of delivering Deeds with Respect to the Order and Manner of the Delivery.

IF I have sealed my Deed, and after I deliver it to him to whom it is made, or to some other by his Appointment, and say nothing; this is a good Delivery.

So if I take the Deed in my Hand, and use these or the like Words, *Here take him, or this will serve; or I deliver this as my Deed, or I deliver him you;* these are Deliveries.

So

So if I make a Deed of Land to another, and being upon the Land, I deliver the Deed to him in the Name of Seisin of the Land; this is a good Delivery.

So if the Deed be sealed, or lying in a Window, or on a Table, and I use these or the like Words, *There he is, take it as my Deed*; this is a good Delivery, and perfects the Deed; for as a Deed may be delivered by Words without Deeds, so may it also be delivered by Deeds without Words. 9 Co. 137. Dy. 192, 167. Co. Lit. 36, 49. 35 Aff. pl. 6.

But if a Man seals and acknowledges before a Major or other Officer appointed for that Purpose a Writing provided for a Statute or Recognizance, this Acknowledgment before such an Officer shall not amount to a Delivery of the Deed, so as to make it a good Obligation if it happens not to be a good Statute or Recognizance. Adjudged 7. 37 Eliz. B. R.

If one seals and delivers a Deed to L. to be delivered to the Obligee, who refuses it, but L. leaves it at the Place; this is a good Delivery, and a good Deed. Anderf. Case 8. Dy. 1. 5 Co. 119.

If a Patron draws a Presentation in Writing, and puts his Seal to it, and leaves it in his Study, and the Party for whom it is happens to get it, without the Privy or Licence of the Patron, and brings it to the Bishop, and he is thereupon instituted and inducted; yet it is all void. Telv. 5.

Where a Deed by the first Delivery of it is good, though it be not good to pass the Thing granted, the second Delivery of such a Deed is void.

And therefore if one who has Right to Land in the County of L. is out of Possession, makes a Lease, and delivers it by Letter of Attorney to the Attorney, to the Use of him to whom it is made; the Lessor enters into the Land, and according to his Warrant delivers it; in this Case the Lease is void, because delivered in the County of L. when he had nothing in the Land: And yet it was held, that altho' the first Delivery was void to pass a Thing, yet it was his Deed, and the second Delivery was void. Cro. Eliz. 483.

If a Corporation makes a Deed to J. S. and a Letter of Attorney to J. D. to deliver the Deed and the Possession, (then in the Hands of two Tenants) the Attorney enters into the Possession of one of them, and there delivers the Deed, and afterwards he does the like in the Possession of the other; this is without Question good for the Land in the Possession of the first, and so for the other, if they be only Tenants at Will; but if Tenants for Life or Years, it is doubtful, for a Deed may not have a double Delivery. Cro. Eliz. 181.

If a Deed becomes void by Disagreement, as where one covenants with two Covenantees to stand seised of Land, and one of the Covenantees gives Notice that he utterly refuses, and thereupon the Covenantor rases out his Name every where, and puts in another Name; this Deed will not be good without a second Delivery of it. Moor, Case 448.

Delivery of a
Deed as an
Escrow.

The Delivery of a Deed as an Escrow, is where one makes and seals a Deed, and delivers it to a Stranger until certain Conditions be performed, and then to be delivered to him to whom the Deed is made to take Effect as his Deed. Cro. Jac. 86.

And so a Man may deliver a Deed, and such a Delivery is good, but in this Case two Cautions must be heeded:

First, That the Form of Words used in the Delivery of a Deed in this Manner be apt and proper.

Secondly, That the Deed be delivered to one that is a Stranger to it, and not to the Party himself to whom it is made. Lane 6. Dy. 24. Cro. Jac. 86. Cro. Eliz. 835, 884, 520.

The Words therefore that are used in the Delivery must be after this Manner: *I deliver this to you as an Escrow, to deliver to the Party as my Deed, upon Condition that he deliver you 20 l. for me; or upon Condition that he deliver up the old Bond be bath of mine for the same Money, or as the Case is; or else it must be thus: I deliver this as an Escrow to you to keep until such a Day, &c. upon Condition, that if before this Day he to whom the Escrow is made shall pay to me 10 l. or give to me a Horse to enfeof me of the Manor of Dale, (or perform any other Condition) that then you shall deliver this Escrow to him as my Deed.* Kelw. 88. 14 H. 8. 22. Perk. §. 140. 9 Co. 137. Co. Lit. 36, 48. 3 Co. 835. Lane 6.

But if when I shall deliver the Deed to the Stranger, I shall use these or the like Words, *I deliver this to you as my Deed, and that you shall deliver it to the Party, upon certain Conditions; or I deliver this to you as my Deed, to deliver to him to whom it is made*

made when he comes to London; in these and such like Cases the Deed takes Effect presently, and the Party is not bound to perform any of the Conditions.

Cro. Jac. 85.

An Escrow must be delivered to a Stranger; for if I seal my Deed, and deliver it to the Party himself to whom it is made as an Escrow upon certain Conditions, &c. In this Case let the Form of the Words be what it will, the Delivery is absolute, and the Deed shall take Effect as his Deed presently, and the Party is not bound to perform the Conditions; for *In traditionibus Chartarum non quod dictum sed quod factum est inspicitur*. Fitz. Facts and Feoffments 4, 13, 15. Perk. §. 140, 141, 142, 138, 143.

But in the Cases before, where the Deed is delivered to a Stranger, and apt Words are used in the Delivery thereof, it is of no more Force until the Conditions be performed than if I had made it, and laid it by me, and not delivered it at all; and therefore in that Case, altho' the Party gets it into his Hands before the Conditions be performed, yet he can make no Use of it at all, neither will it do him any good.

Ibid.

But when the Conditions are perform'd, and the Deed is delivered over, then the Deed shall take as much Effect as if it were delivered immediately to the Party to whom it is made, and no Act of God or Man can hinder to prevent this Effect then, if the Party that makes it be not at the Time of making thereof disabled to make it. He therefore that is trusted with the Keeping and Delivery of such a Writing, ought not to deliver it before the Conditions are performed, and when the Conditions are performed, he ought not to keep it, but deliver it to the Party according to the Authority to him given. 3 Co. 35. Fitz. Facts and Feoffments 13.

For it may be a Question, whether the Deed be perfect before he hath delivered it over to the Party according to the Authority given him.

Altho' an Escrow is well delivered into a third Man's Hand, yet if either of the Parties to the Deed dies before the Conditions be performed, and the Conditions be after performed, the Deed is good, for there was *traditio inchoata* in the Life-time of the Parties, & *postea consummata existens* by the Performance of the Conditions, it takes Effect by the first Delivery without any new or second Delivery, and the second Delivery is but the Execution and Consummation of the first Delivery. And therefore if an Infant or Woman Covert deliver a Deed as an Escrow to a Stranger, and before the Conditions are performed the Infant is become of full Age, or the Woman is become Sole, yet the Deed in these Cases is not become good; and if she be Sole at the first, and Covert at the last, yet it is good, and not avoided by the Marriage; and yet if a Disseisee makes a Deed purporting a Lease for Years, and delivers it to a Stranger out of the Land as an Escrow, and bids him enter into the Land, and deliver it as his Deed, and he does so, this is a good Deed, and a good Lease; so that to some Purposes it has Relation to the Time of the first Delivery, and to some Purposes not. 3 Co. 35, 36. Perk. §. 9.

In Case where a Deed is merely void and takes no Effect by its first Delivery, as where a Woman Covert seals and delivers a Deed, or the like, and she after being Sole after her Husband's Death delivers the Deed again, in this Case the Deed is become good.

So where a Deed originally good doth become void by Matter *ex post facto*, as by breaking the Seal, or the like, if the Party to the Deed seals and delivers it again, by this Means the Deed is become good again.

But regularly there may not be two Deliveries of a Deed, for where the first Delivery takes any Effect at all, the second Delivery is void. Perk. §. 154. 11 H. 6. 24.

And therefore it is held, that an Infant, or a Man by Duress of Imprisonment, makes, seals and delivers a Deed, &c. (in which Cases the Deed is not void but voidable) and after the Infant being of full Age, or the Man imprisoned being at large, delivers this Deed again the second Time; this second Delivery is void, *Debile fundamentum fallit opus*. Perk. §. 154. 5 Co. 119. Cro. Eliz. 37, 483. Dyer 51.

So if a Man be disseised, and makes a Lease for Years in Writing, and delivers the Deed, and after delivers it upon the Ground; this second Delivery is void, for the first Delivery made it his Deed; but if he had delivered it as an Escrow to be delivered as his Deed upon the Ground, this had been a good second Delivery. Co. Lit. 48.

Altho' a Writing or Escrow that is not sealed and delivered in Manner as aforesaid may not be used nor pleaded as a Deed, yet it may serve and be used as an Evidence and Proof of the Agreement contained therein; and whatsoever may be done by Word without Writing, may much more and better be done by Writing unsealed or sealed, tho' it be not delivered as aforesaid.

CHAP. V.

Of the formal or constituent Parts of Deeds, and the Ceremonies used on the Execution thereof.

SECT. I.

Of the Parts of Deeds in general.

IN every Deed there are two considerable Parts:

1. The *external* or *material Part*, that is, the Vellum, Parchment or Paper, Writing and Wax, which are treated of in the last Chapter, §. 2, 3, 10. as Things incident to a good Deed.

2. The *internal* or *intellectual Part*, that is, the Sense, Virtue and Operation of the Words therein contained, relative to the Matter intended to be conveyed, &c. which is chiefly the Subject of this Chapter, treated under the formal and constituent Parts of Deeds.

Deeds for the most part consist of these formal and orderly Parts, viz. the Premises, Habendum, Tenendum, Reddendum or Reservation, Condition, Warranty and Covenants; but all these are not essential Parts of a Deed, for a Deed may be good altho' it has not all these Parts, or it be not drawn and made in so formal and orderly a Manner.

SECT. II.

Of the Premises.

(A) *Premises, what.*

THE Premises of a Deed is all the forepart of the Deed, or all that is written before the Habendum.

And yet the Word *Premises* is sometimes taken for the Thing granted, &c. by a Deed; as, in the Habendum, &c. after a Recapitulation of the Things granted, &c. it is usual to say, *And all and singular other the Premises hereby granted, &c.*

A Man makes a Lease for Years of a Farm, (except one Close called N.) the Lessee covenants to do several Things concerning the Premises; the Word *Premises* shall not extend to the Close excepted, but only to that which is *prædimissa*. 11 Co. 50. b. 51. a.

(B) *The Office of the Premises.*

THE Office of the Premises in a Deed is twofold:

First, To name rightly the Person who makes the Deed; as the Feoffor, Donor, Lessor, &c. and the Person to whom it is made; as the Feoffee, Donee, Lessee, &c. Concerning this see the last Chap. §. 5, 6. & infra.

Secondly, To comprehend the Certainty of the Thing to be conveyed by the Deed, either by express Words, or such as by Reference may be reduced to a Certainty; (and as to this see the last Chapter, §. 9.)

The Premises is to express the Certainty of the Thing granted, and the Habendum is to express the Quality of the Estate.

A Bargain and Sale by Indenture without expressing to whom, altho' the *Habendum* be to *A. B.* who is Party to the Deed, is not good; because the Office of the *Habendum* is only to limit an Estate, and not to give any Thing, and there ought to be Grantor and Grantee in the Premises of the Deed, otherwise it is void. *Cro. Eliz.* 903. *pl.* 6. 585. *pl.* 15. *Moor*, Case 1236.

There is a Diversity between an Estate implied in the Premises, and an Estate expressed; for if *A.* grants a Rent to *B.* generally, this by Implication and Construction in Law is for Life: But if the *Habendum* is for Years, this is good, and qualifies the Generality and Implication of the Premises. *2 Co.* 14. *a.* 24, 25. *8 Co.* 154. *Hob.* 170. *Co. Lit.* 183. *2 Roll. Abr.* 65, 66. *Cro. Eliz.* 254.

The Premises shall stand altho' the *Habendum* is repugnant thereto and void; as if a Man enfeoffs another, and in the Premises gives to him and his Heirs, *Habendum* to the Feoffee and his Heirs for twenty Years or Life; this Deed shall take Effect by the Premises, and not by the *Habendum*, for by the Premises and Livery a Fee is given, and the *Habendum* is void. *2 Co.* 23. *b.* 24. *a.*

If in the Premises I enfeoff *A.* and *B.* of two Acres, *Habendum* one of the Acres to *A.* and the other to *B.* the *Habendum* is void. *3 Leon.* 126. Case 178. *vide Hob.* 172.

If a Man grants a Term *Habendum* after his Death, this passes by the Premises; for the Premises are sufficient to carry it, and the *Habendum* shall not destroy it. *Cro. Eliz.* 255. *pl.* 27. *Dyer* 272.

(C) *The Contents of the Premises.*

AS the Premises in a Deed is all that is written before the *Habendum*, it generally contains, (1) The Date, (2) The Parties Names and Description, (3) The Recital, (4) The Consideration, (5) The Receipt, (6) The Grant, &c. (7) The Things granted or conveyed, and (8) The Exception.

(D) *The Date.*

THE Date of a Deed is the Description of the Time in which the Deed is made, which is done by the Day of the Month and the Year of the King's Reign, or the Year of our Lord, or by both the Year of the King's Reign and Year of our Lord.

It is either placed at the Beginning of the Premises, or at the End of the Consequence or Conclusion of the Deed.

In Deeds indented it is seldom (if ever) put any where else but at the Beginning, thus:

This Indenture made the 26th Day of March in the 19th Year of the Reign of, &c. and in the Year of our Lord 1746.

But in Deeds Poll the Date is usually in the Conclusion, or the *In cujus rei Testimonium*, &c.

Anciently the Date of a Deed was many Times omitted, and the Reason thereof was, that the Limitation of Prescription or Time of Memory did often in Process of Time change; and then it was held for Law, that a Deed bearing Date before the limited Time of Prescription was not pleadable, and therefore they made their Deeds without Date, to the End they might alledge them within the Time of Prescription. But the Date of Deeds was commonly added in the Reigns of *Edward* the Second and *Edward* the Third, and so ever since. *Co. Lit.* 6. *a.*

(E) *The Parties Names and Addition or Description.*

THE Parties or Persons contracting are the very efficient Causes of the Instruments or Deed of Conveyance, for by their Consent they are agreed upon and made.

And such Persons are either *active* or *passive*.

1. An *active Person* in a Deed is he who makes it, or gives, grants, enfeoffs, demises, releases, confirms, parts with, covenants or promises any Thing, or shortly he who makes any Contract or Bargain to or with any other, and is named according to the Contract: As the Donor, Grantor, Feoffor, Lessor, Releasor, Confirmor, Bargainor, &c.

2. A

2. A *passive Person* in a Deed is he to whom it is made, and who takes thereby, who is likewise differently named, according to the several Natures of the Contracts to or with them made; as Donee, Grantee, Feoffee, Lessee, Releasee, &c.

In Regard to the Parties two Things are to be particularly observed, *viz.* their *Capacities* and *Names, Addition or Description.*

First, As to their *Capacities*, the *active Persons* who make any Deeds should be Persons able to do it, or void of all Impediments, either Natural or Civil. *Of which see the last Chapter, §. 4.* And the *passive Persons* to whom Deeds are made should be no ways disabled to take by Deed. *Of which see the last Chapter, §. 6.*

And *Secondly*, As to the Names and Addition or Description of the Parties, it is requisite that they should be certainly named by their Names of Baptism and Surnames, with lawful and sufficient Additions of Place, Estate, Degree, Mystery or Occupation, to distinguish them from all other Persons of like Name, whether such Person be *King, Prince, Duke, Marquis, Earl, Viscount, Baron or Lord*, which are Names of great Nobility and Honour: Or he be a *Baronet, Knight, Esquire or Gentleman*, which as a Distinction are termed Names of less Nobility or Honour: Or he be a *Teoman, Husbandman, Artificer or Labourer*: Or else if he be any Ecclesiastical Person, as *Archbishop, Bishop, Archdeacon, Dean, Parson, Vicar, Clerk, &c.* Or if it be any Corporation, or Body Civil or Politick, having Covent and common Seal; as *Bailiff and Burgeesses, Mayor and Commonalty, or other Fraternity, &c.* *See the last Chapter, §. 5, 7.*

The Names and Descriptions of the Parties are generally written in this Manner: **This Indenture made, &c. Between A. B. of the Parish of — or of S. (a Town or noted Place) in the County of — Gent. of the one Part, and C. D. of the same Place, or of the Parish of — (&c. as the Case is) in the County of — Teoman, of the other Part.** For more Examples, see the Second Part.

(F) The Recital.

Recital, what.

A Recital is the Setting down or Report of something done before. As of Deeds, Wills, &c. shewing the Derivation of a Title intended to be conveyed, and of many other Things. *Of which see the Second Part, Tit. Recital.*

Where placed.

The Recital usually follows the Names and Descriptions of the Parties thus: **Between A. B. of, &c. and C. D. of, &c. Whereas one V. S. late of, &c. in and by his last Will and Testament, bearing Date the — Day of — which was in the Year, &c. (after Payment of his Funeral Expences, &c. therein particularly mentioned) did give, &c. Relation, &c. And whereas, &c.** *See the Second Part.*

Where need-
ful or not.

When a Man is to take any new Estate from the King of a Thing whereof there is an Estate in Being, there the former Estate if it be good and of Record must be rehearsed and recited in the Deed, or else the second Grant will not be good; but in Case of a common Person there needs no such Recital; neither when a Man is to derive an Estate out of a former, or assign over a Term of Years, is it needful there should be any Recital of the former Estate in Being. *Shep. Touch. 76.* Yet it is frequently done.

Where Mis-
recital will
hurt a Deed.

If one recites or rehearses an Estate made for Term of Years, and then after grants over that Term to another, and mistakes in the Recital, this Mistake may make all void.

As if a *Fieri Facias* come to a Sheriff to levy a Debt, and he by Writing recites, that the Defendant hath a Term of Years, and then grants over that Term to another, and mistakes in the Recital, this Mistake may make all void; as if a *Fieri Facias* comes to the Sheriff to levy a Debt, and he by Writing recites that the Defendant has a Term of Years, and supposes it to begin 1 *Maii*, 2 *Jac.* when in Truth it begins the 20th of *August*, and then sells the same Term; in this Case the Sale is void; but if he adds these Words in the Deed, *And all the Interest that the Defendant had in the Land*; or if he sells it for a certain Number of Years only, this Grant may be good notwithstanding the Misrecital. *Shep. Touch. 77.*

If one recites a former Lease to be made such a Day to *J. S.* and then makes a new Lease to begin after the End of the former Lease, and mistakes the Date of the old Lease; in this Case the Deed is good notwithstanding the Mistake. *Ibid.*

If one grants a Reversion, and in reciting the Lease in Possession mistakes the Date of it only, and recites all the Rest truly; this will not hurt the Grant, no more

more than where a Man recites that such Land came to him by Forfeiture, and then grants it by Name; for in this Case altho' it did not come to him by Forfeiture, but by Surrender, yet this Mistake will not hurt; and yet in Case of the King such a Misrecital may make the Grant void. *Ibid.*

If I grant to *J. S.* all the Lands in *Dale* which I purchased from *J. D.* or which came unto me by Descent from *J. D.* or I give all my Goods to *J. S.* which I have as Executor to *J. D.* and in Truth I have no such Lands or Goods, but I had them by some other Means, or of some other, in these Cases and by this Mistake the Deed is void; but if I grant to *J. S.* all my Lands in *Dale* by Name, as *Whiteacre*, which I purchased of *J. D.* and in Truth I did purchase them of another, in this Case this Mistake will not hurt the Deed; so if I grant twenty Loads of Wood in *Dale* in the great Wood which I had of the Grant of my Father, but of the Grant of another, in this Case the Grant is void. *Ibid.*

If I recite by my Deed, that I am possessed of such an Interest in certain Lands, and assign it over by the same Deed, and thereby covenant to perform all Covenants in the Deed, if I be not possessed of such Interest the Covenant is broken. *1 Leon. Case 164.*

A Recital often is put at the End of the Parcels, of *which vide post.*

(G) The Consideration.

THE Consideration is the Motive or Cause why a Deed is made.

It may be of Money, Goods, natural Affection, &c. which is most commonly and properly expressed in the Premises, tho' it may be put in the Consequence, and in some Cases it may be omitted. *1 West. Symb. §. 55.*

If in the Premises it is expressed in this Manner: **This Indenture made, &c. Between, &c. (Whereas, &c. if there be Recitals) Witnesseth that for and in Consideration of the Sum of — Pounds of lawful British Money by him the said C. D. to him the said A. B. in Hand paid, before the Sealing and Delivery of these Presents.**

See more concerning Considerations in the next Chapter, where each Sort of Deeds are particularly treated.

(H) The Receipt.

A General Receipt for the Consideration is sufficient, but if the Sum is large, as a valuable Purchase for the Land, there if the Deed is called in Question whether fraudulent or no, it is absolutely necessary to prove either Payment of the Money, or a Receipt under Hand and Seal, or else endorsed on the Back of the Deed. *1 Leon. 30. Moor 304. 1 Lev. 308.*

The Receipt for the Consideration Money is usually contained in the Deed thus: — *For and in Consideration of the Sum of — Pounds of lawful Money of Great Britain, by him the said C. D. to him the said A. B. in Hand paid, before the Sealing and Delivery of these Presents; the Receipt whereof be the said A. B. does hereby acknowledge, and thereof acquit and discharge the said C. D. his Heirs, Executors and Administrators.*

Yet notwithstanding this Sort of a Receipt is contained in the Premises of the Deed, it is the common Practice likewise to endorse a Receipt, which is signed by the Receiver, and witnessed. *See the Form in the Second Part.*

(I) The Gift, Grant, &c.

SUCH Words must be used in every Instrument, as the Nature of the Contract requires they should be agreeable to such Words as are requisite and expressed in the other Parts of the Deed.

In Feoffments, Feoffavi, Dedi, or Concessi; or **Hath given, granted, enfeoffed and confirmed; and by these Presents Doth give, grant, enfeoff and confirm, unto, &c.**

In a Bargain and Sale, Barganizavi & Vendidi. Or thus: **Hath granted, bargained and sold; and by these Presents doth grant, bargain and sell.**

The Words *Demise* and *Grant* have been adjudged to amount to a Bargain and Sale without other Words. *1 Vent. 141. 1 Mod. 1. Cro. Eliz. 166.*

U u u

Sometimes

Sometimes the Word *Grant* is left out, because it amounts to a general Warranty without a special Covenant. *Shep. Prec. p. 73.*

Altho' it is good and very proper that the Words *Bargain and Sale* should be in the Deed, they being the Words mentioned in the Statute of Inrolments, or the 27 H. 8. c. 16. yet they are not absolutely necessary, for other equivalent Words may be used to take Effect by that Statute: For whatsoever Words upon valuable Considerations would have raised an Use at Common Law, the same amount to a Bargain and Sale within the Statute; as,

Where a Man by Deed indented and inrolled covenants in Consideration of Money to stand seised to the Use of his Son in Fee; this by Reason of the Inrolment is a good Bargain and Sale, and yet there is not one Word of Bargain and Sale in the Deed. 2 *Inst.* 672. *Carter* 66, 78. *Cro. Jac.* 210. *Cro. Eliz.* 166.

In *Gifts*. *Wath given, granted and confirmed*; and by these Presents *Doth give, grant and confirm.*

In *Leases*. *Wath demised, granted and to Farm letten*; and by these Presents *Doth demise, grant and to Farm let and set.*

In a *Lease and Release*.

First, As to the Lease, or rather Bargain and Sale. *Wath granted, bargained and sold*; and by these Presents *Doth grant, bargain and sell unto the said C. D. his Executors, Administrators and Assigns.*

The Word *Grant* will make the Land pass by way of Use. 2 *Mod. Rep.* 252, 253.

If the Words *Bargain and sell*, in Consideration of Money, be in the Lease, an Use will arise by the Statute of Uses.

So if in Consideration of Money one doth *Demise, &c.* 1 *Mod. Rep.* 262, 263.

Secondly, As to a Release, *Remise* or *Relaxavi*; or *Wath granted, bargained, sold, remised, released, and for ever quitted claim and confirmed*; and by these Presents *Do grant, bargain, sell, remise, release, and for ever quit claim and confirm.*

The Words *Remise, Release and Quit-claim*, are necessary in every Release; they are *Littleton's* Words in §. 445.

But there are other Words of Release, as *Renunciare & Acquietare.*

So likewise if the Lessor grants to the Lessee for Life, *that he shall be discharged of the Rent*, this is a good Release. *Lit. §. 532. Co. Lit. 264. b.*

In a *Confirmation*, *Confirmavi, Ratificavi*; or *Wath granted, ratified and confirmed*; and by these Presents *Do grant, ratify and confirm unto (the said) C. D. (of, &c.)*

The Word *Demise* may amount to a Confirmation. *Lit. Rep.* 270. *Plece.* 187. *Dyer* 178.

The Words *Dedi, Concessi & Confirmavi*, are as good, and Work without Livery. *Lit. Ten. §. 531. Lit. Rep.* 270. *Co. Lit.* 301. 2 *Sand.* 96, 97.

Volo that the Lessee for Years shall have for his Life, is a good Confirmation. *Lit. Rep.* 270.

In a *Surrender*. *Wath granted and surrendered*; and by these Presents *Do grant and surrender to, &c.*

In an *Assignment*. *Wath granted, bargained, sold, assigned and set over*; and by these Presents *Doth grant, bargain, sell, assign and set over.*

For more relating to Words required by Law, see the last Chapter, §. 9.

(K) The Things granted or conveyed.

AS to the Matters, Things and Facts, of which Instruments are to be made, I have in the last Chapter, §. 8. made a copious Division, and in §. 9. treated of apt Words required by Law to express those Things, therefore less is necessary to be mentioned here.

I being now come to that Part of the Premises where the Things conveyed are named and described, it may be proper to make the following Observations:

First, All that is conveyed must be set down; for if any Thing more be put down in the *Habendum* than is in the Grant in the Premises of the Deed, it will not pass.

Secondly, The Things conveyed should be set down in Order.

1. The more worthy Things before the less worthy; as a *Manor* before a *Messuage*, a *Messuage* before *Land*, *Arable Land* before *Meadow*, and *Meadow* before *Pasture*, &c.

2. General Things before special Things.

3. Particular Things after this Order: (1) A Messuage, (2) A Toft, (3) A Mill, (4) Barns and Out-buildings, (5) Gardens, (6) Orchards, (7) Arable Land, (8) Meadow, (9) Pasture, (10) Wood, (11) Furze and Heath, (12) Commons and Rents.

This is not necessarily required, for a Deed may be good in Law if they be otherwise placed.

Thirdly, If there be a Certainty in the Thing granted, as it is described, and it can by any circumstantial Matter within the Grant be found out, altho' there be not an orderly and formal Description of it by the Quality of the Thing, the Boundaries, &c. yet the Deed herein may be good, and the Thing may pass well enough.

However, it is best that the Things granted be carefully set down, and certainly described, by the *Quality, Quantity and Situation* thereof, and by any Thing else that may ascertain it; for Omissions and Misnaming of *Things* are dangerous; and if any Thing granted be altogether incertain, and not reducible to a Certainty, the Grant will be void in that Part, and nothing will pass.

Fourthly, Any Thing may be granted by the Name whereby it is and has been usually called within nine or ten Years, altho' it be an improper Name, or not its first or true Name.

Fifthly, By the Grant of any House, Land, or the like Thing in Possession, the Reversion thereof, and the Rent reserved upon any Estate made thereof, will pass.

Sixthly, If the Thing granted be named only in the *Habendum* and not in the *Premises*, it will not pass.

Seventhly, By the same Words as Things may be excepted they may be granted.

This Part of the *Premises* follows the Words of the Grant or other Deed, thus: *Path granted, &c. and by, &c. Doth grant, &c. unto the said C. D. his, &c. All that Messuage or Tenement, &c. with their and every of their Appurtenances, situate, lying and being in E. in the Parish of F. in the County of G. late in the Tenure or Occupation of H. and now in the Tenure or Occupation of, &c. adjoining Eastward to, &c. together with, &c. Vide a great Variety of Forms in the Second Part.*

It is usual in this Part of the Deed after the Grant of the Things in particular, and before the general Words, (as well as after the Names and Additions of the Parties before mentioned) to interpose by way of Recital, from whom the Lands, &c. came to him that makes the Deed, in this or the like Form, (*All which said Premises were heretofore in the Possession of one L. M. and by him conveyed to O. B. and his Heirs, by whom the same were afterwards conveyed to the said A. B. and his Heirs.*)

For more Examples see the Second Part.

As to Recitals, observe that,

1. It is very necessary that a Recital should be in the *Premises* in one of the Places before mentioned, to shew how the Land came from one to another, whereby the Grantee may know how to make good his Title to it; but where he has all the Title Deeds in his own Hands, there is no need of such Recital.

2. Great Care ought to be taken where any such Recital or Reference is made, that it be truly and rightly done, otherwise it will do more hurt than good.

3. The Deed is good without any such Recital.

The general Words used after the particular Words are safe and best to be used, for it is better to have too many than too few Words. The general Words sometimes begin — *And all Houses, &c. Vide the Second Part.*

And sometimes the Words, *And all the Estate, &c.* are added; but this ought only to be when he who makes the Deed parts with all his Estate; for when he only grants a lesser Estate out of a greater, then to add such Words would be unreasonable and inconsistent.

This Part of the *Premises* generally concludes with these Words — *Together with all Deeds, &c. Vide the Second Part.*

As to the Grant of Deeds in this Manner, observe,

1. That however Deeds generally will follow the Land, and without granting them the Purchaser will have them, yet it is not amiss to use this Clause, for one cannot be too sure and cautious.

2. It is reasonable that the Purchaser should have all the Deeds, unless the Seller have more of the same Land, for then it is reasonable that he keep them to defend the Title of his own Land, or unless he has granted them away.

Where the Title Deeds concern other Lands besides these now conveyed, the Vendor usually grants Copies of such Deeds.

(L.) The

(L) *The Exception.*

1. Exception,
what.

THE *Exception* is a Clause whereby the Donor, Feoffor, Grantor, or other Person contracting, excepts or takes a particular Thing out of a general Thing granted or conveyed.

The Thing excepted is exempted and does not pass by the Grant, neither is it Parcel of the Thing granted; as if a Manor be granted excepting one Acre thereof, hereby in Judgment of Law that Acre is severed from the Manor.

An *Exception* excepts clearly, but a *Saving* does not. *Carter* 99.

A *Saving* never amounts to a Gift of any Thing. *T. Raym.* 359.

An *Exception* out of an *Exception*, or a *Saving* out of a *Saving*, makes a Thing as if it had never been excepted. *Cro. Eliz.* 372. pl. 19.

Rules and Examples concerning Exceptions in Deeds.

Rule 1.

Of what it
may be.

It must be of such a Thing as he who makes the Exception may have, and does belong to him.

For if the Exception be of such a Thing as the Grantor cannot have nor does belong to him by Law, as if a Lessee for Years assigns over all his Term in the Land, excepting the *Timber Trees, Earth or Clay*; this Exception is not good. *Shep. Touch.* 79. 5 Co. 12. b.

But if a Lessee for Life makes a *Lease* for Years, or Lessee for twenty-one Years makes a *Lease* for twenty Years; or Tenant by the *Curtesy*, or in *Dower*, grants over their *Estate*, excepting the *Timber-Trees*, these are good Exceptions.

And if a Lessee for Life or Years opens a Coal Mine, and then assigns over his *Estate*, excepting the *Mines*, or the *Profits* thereof; these are void Exceptions. *Shep. Touch.* 79.

Rule 2.

It must not be the whole Thing granted, but a Part thereof only.

An Exception that goes to the whole Thing granted or demised, is a void Exception. *Cro. Eliz.* 6. pl. 2. 244. pl. 1.

As if one grants all his Lands in *Lambhurst*, except the *Manor* of *Hodley*, and he has no other Lands in *Lambhurst* than the said *Manor*, the Exception is void. *Cro. Eliz.* 6.

A Man cannot grant an *Estate*, and reserve a Part of the *Estate*; as, to make a Feoffment in Fee, and reserve a *Lease* for Life; or grant an *Advowson*, and reserve the *Presentation* for his Life. *Shep. Touch.* 79.

The Exception must be of Part of the Thing, and not of Part of the Estate.

Rule 3.

Of what it
must be.

The Thing that is excepted must be Part of the Thing granted before, and not of some other Thing.

The Exception is always of a Thing granted, and a Thing *in esse*, and not of a new Thing, which was not before mentioned or granted. *Dyer* 59. a. pl. 11.

If the Exception be of another Thing than the Thing granted; as if one grants a *Manor* or *Land*, excepting *Twelve-pence*, or excepting the *Tithes*, or excepting one Acre of Ground which is no Parcel of the *Manor* or the *Land* before granted;

Or if one grants the *Land* descended to him on the Part of his Father, excepting the *Land* descended to him on the Part of his Mother, these Exceptions are void. *Shep. Touch.* 78, 79.

Rule 4.

The Thing excepted must be of such a Thing as may be severed from the Thing granted, and not of inseparable Incidents. *Dyer* 59. a.

Exceptions of several Incidents are good.

But if inseparable Incidents; as if a *Manor* be granted, excepting the *Court-Barrow*; or *Land* be granted, excepting the *Common* appendent thereto belonging; these Exceptions are void. *Shep. Touch.* 79.

A Grant of a *Manor*, excepting the *Courts*, is void, for a *Manor* cannot be without *Courts*. *Hob. 101.*

But a Man may grant a *Manor*, excepting any of the *Demefnes* and *Services*, so as a real *Manor*, not a reputative *Manor*, be left. *Hob. 170.*

If a Man has but *one Close* in *Dale*, and he grants all his *Lands* in *Dale*, excepting that *one Close*, this Exception is void. *Hob. 170. Moor, Cafe 1239.*

If a Man makes a *Lease* for *Life* of a *Manor* to which an *Advowson* belongs, and he excepts the *Advowson*, if he grants over the *Reversion*, the *Advowson* will not pass, because it is severed and dismembered from the *Manor*, and thereby is become an *Advowson* in *Gross*. *11 Co. 50 a.*

But if one has a *Manor* in which he has *Parks* and *Fish ponds*, and he grants the *Manor* for *Life*, except the *Game* and *Fish*, and afterwards grants the *Reversion* of the *Manor*, by this the *Game* and *Fish* will pass. *11 Co. 50. b.*

If I let my *Rectory*, excepting the *Glebe*, it is a void Exception: So of a *Lease* of a *Manor*, excepting the *Demefnes*, for a *Rectory* cannot be without *Glebe*, nor a *Manor* without *Demefnes*. *Winch 23.*

Rule 5.

It must be of a particular Thing out of a general, or of a Part of an intire Thing, and not of a Particular out of a Particular, or the whole Thing itself granted.

If the Exception be of a particular Thing out of a particular Thing; as if one grants *Whiteacre* and *Blackacre*, excepting *Blackacre*; or grants twenty Acres of Land by particular Names, excepting one Acre of them; these Exceptions are void. *Shep. Touch. 79.*

For the Grant shall be taken most strongly against the Grantor. *Carter 104.*

An Exception of a Thing granted by a special Name in the Premises, is void; but it is good for a Thing granted in the Premises by general Words; and altho' it is by special Name excepted, yet the Exception is void. *Moor, Cafe 1236.*

A lets to B. a *Rectory* for Years, excepting the *Mansion-House* of the *Rectory*, saving to B. (the Lessee) a *Chamber*; this is an Exception out of an Exception, which is good, and shall make it pass by Force of the *Lease*; for this Exception or Saving makes the Thing excepted, as if it never had been let: So a *Saving* out of a *Saving*, makes it as if it had never been excepted, and then it passes by Force of the *Lease* at first. *Cro. Eliz. 372. pl. 19.*

Rule 6.

An Exception must be conformable to the Grant, and not repugnant thereto.

If it is repugnant to the Grant, it subverts it utterly and takes away the Fruit of it; as if one grants a *Manor* or *Land* to another, excepting the *Profits* thereof; or makes a *Feoffment* of a *Close* of *Meadow* or *Pasture*, reserving or excepting the *Grass* of it; or grants a *Manor*, excepting the *Services*; these are void Exceptions. How it must be made.

So if one grants his *House*, *Chambers*, *Cellars* and *Shops*, excepting his *Shops*; it is said this is no good Exception.

And if one grants his *Meadow* and *Pasture* Grounds, except his *Meadow* Grounds; this Exception is not good, no more than if one grants *two Manors*, or *two Acres*, excepting one of them.

And yet if a Man makes a *Lease* for Years of a *Mill*, excepting the *Profits* thereof during the *Life* of the Lessor; it is said, this has been adjudged a good Exception. *Sed Q.* For the Exception of the *Profits* of a Thing is the Exception in Effect of the Thing itself. *Shep. Touch. 79.*

An Exception that crosses the Grant, or is repugnant thereto, is void. *Hob. 72, 170. Vide Moor, Cafe 1236.*

Rule 7.

The Thing excepted must be certainly described and set down. As,

If a Man grants all his *Lands* in *Essex*, saving, besides, or except his *Lands* in *Dale*; or all his *Lands* in *Dale*, excepting one *House* or one *Acre* in certain; or one *House*, excepting one *Chamber* in certain; these and such like Exceptions are good. *Shep. Touch. 78.*

And if one grants a *Manor*, excepting one *Tenement*, (Parcel of the *Manor*) or excepting the *Services* of J. S. (who holds of the *Manor*) or excepting one *Close*; or excepting one *Acre*; or excepting the *Advowson* Appendant; or excepting the

X x x

Woods;

Woods; or *excepting* twenty Acres of Wood; or *excepting* all the Grofs Trees; these are good Exceptions. *Ibid.*

And if one grants a *Messuage* and *Houses* thereunto belonging, *excepting* the *Barn*, or *excepting* the *Dove-house*, it seems this is a good Exception; for they may pass by the Grant of a *Messuage*, &c. *Ibid.*

And if one grants *Land*, *excepting* the *Timber-Trees* thereupon, or *excepting* the *Trees thereupon*; or if a Man sells a *Wood*, *excepting* twenty of the best Oaks, and shews which in certain; these are good Exceptions. *Ibid.*

So if one has a *Manor* wherein is a *Wood* called the *Great Wood*, and he grants his *Manor*, *excepting* all the *Woods* and *Underwoods* that grow in the *Great Wood*, and all the *Trees* that grow elsewhere; this is a good Exception.

And if one grants a *Messuage* and all the *Lands* and *Tenements* thereunto belonging, *excepting* one *Cottage*; this is a good Exception.

And if one grants a *Reversion*, *excepting* the *Rent*; this is a good Exception of the *Rent*, and doth keep it from passing by the Grant.

So if a Man has a *Rent-charge* out of *Land*, and he releases his *Right* in the *Land*, except the *Rent*, the Exception is good.

So if the Lord releases to his Tenant *Salvo Dominio suo*, &c. this is a good Exception.

If one grants *all his Horses*, except his *White Horse*; this is a good Exception of the *White Horse*.

If a Man be seised of a *Manor*, and lease it by Deed indented for *Life*, *Exceptis & reservatis quod bene liceat* to the Lessor *succidere, dare & vendere omnes grossas arbores in dicto manerio crescentes*, &c. it seems this is a good Exception of the *Trees*. *Shep. Touch. 78.*

If *A.* lets *all his Land* in *D.* other than *Whiteacre*, and *all his Land* in *S.* except *Blackacre*, for twenty-one Years, the Remainder to *B.* in Fee, *except before excepted*; I hold (says *Tyrrell*) *Whiteacre* passes; for the Grant shall be taken most strongly against the Grantor. *Carter 104.* So that the Exception is void for Incertainty.

A. lets the *Manor of Sale*, saving *Whiteacre*, to *B.* the Remainder to *C.* for twenty Years, saving *Greenacre*; the Remainder of all to *D.* except *Dry Close*; the Remainder to *John a Stile* of all, *except before excepted*. I think (says *Tyrrell*) in this Case all passes to *John a Stile*, except *Dry Close*. *Carter 104.*

Yet (says he) I grant that if *A.* lets to *B.* all his *Land* in *Sale*, saving or reserving, or other than *Whiteacre*, the Remainder to *C.* *except before excepted*; in this Case I grant *Whiteacre* is excepted, because there is no Exception before, and the Exception would be vain and idle if it should not be so taken. *Carter 104.*

A Man made a Feoffment to divers Uses, *excepting* two Closes, for the Life of the Feoffor only: It was adjudged that these two Closes were excepted, and did descend (to the Heir at Law) either because the Exception was good, tho' the latter Part of the Sentence, viz. *for the Life of the Feoffor only*, was void, and therefore to be rejected; or the whole Exception was void because one intire Sentence; yet the Court agreed, that there was no Use limited of these two Closes, which were intended to be excepted; for the Use was limited of the *Manor*, *Exceptis præexceptis*, which excluded the two Acres; for altho' there were not sufficient Words to except them, there was enough to declare the Intention of the Feoffor to be so. *1 Vent. 106, 107.*

If a Feoffment be made of a *Manor*, except *Blackacre*, to himself for Life only, *Habendum*, *except before excepted*, to the Use of *B.* in Tail, *Blackacre* shall not pass to *B.* in Tail. *1 Lev. 287.*

If a Man bargains and sells his *Land* in *D.* except what he shall afterwards Devise; this Exception is void for the Incertainty. *Hob. 72.*

If *Woods* whereof a *Præcipe* lies (by the Name of so many Acres of Wood) be Parcel of a *Manor*, and I lease the *Manor*, *excepting* the *Woods*; by this the Soil whereon they grow is excepted. *11 Co. 49. b. Popb. 146.*

By the Exception of *Woods* and *Underwoods*, the Soil itself whereon they grow is excepted. *5 Co. 11. a. Popb. 146.*

But if I except all my *Trees* growing in the *Manor*; in that Case the Soil itself is not excepted. *11 Co. 49. b. Popb. 146.*

In Exceptions of *Woods* and *Trees* observe these six Things:

First, That notwithstanding they are excepted, they are Parcel of the Inheritance; and by Demise for Years of the *Manor* they will pass, because the Freehold remains, and the Lessor remains Tenant to the *Præcipe*; but by a Demise for Life with such Exception *à contra*. *5 Co. 11. a. b. 11 Co. 50. a.*

Secondly, That where the Exception is of the Trees only, the Soil itself is not excepted, but only sufficient Nutriment for the Trees.

One lets a Tenement or Close whereof was Wood, and commonly known by the Name of a Wood, and in the Lease was an Exception of all saleable Woods now growing, or which shall grow hereafter, which have been sold by the Lord of the Premises, with free Entry, Egress and Regress, for felling, making and carrying off the same at all Times convenient; in this Case the Soil was not excepted, but passed to the Lessee. *Cro. Jac. 524.*

Thirdly, That the Lessee shall have the Pasture growing under the Trees, *vide* the Case above.

Fourthly, That the Lessor shall have all the Benefit of the Trees. *11 Co. 50. a.*

Fifthly, That he shall have the Fruits, and all other Profits of the Trees. *11 Co. 50.*

Sixthly, That where the Lessor excepts the Trees, and afterwards he intends to sell them, the Law gives to him, and to those who buy them, Power, as an Incident to the Exception, to enter and view the Trees, and so to cut them down and carry them away. *Lex est, cuicumque aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potuit*, is a Principle in Law. *11 Co. 52. a. 13 Co. 68.*

If a Lessee for Life makes a Lease for Years, excepting the Wood, Underwood and Trees growing upon the Land, it is a good Exception, altho' he has not any Interest in them but as Lessee, because he remains always Tenant, and is chargeable in Waste; wherefore to prevent it, he may make the Exception: But if Lessee for Years assigns over his Term with such an Exception, it is a void Exception. *Cro. Jac. 296.*

Rule 8.

The Exception out of the Thing granted may be in any Part of the Deed, but it most commonly and properly succeeds the setting down of the Things granted, and is made by one of these Words, *excepted or excepting, besides, saving, save only, excepted and always reserved, &c.* In what Part of the Deed.
By what Words.

The Form may be in this or the like Manner: *All that, &c.* (describing the Things granted, as before, and then go on with the Exception) *Saved and excepted to the said A. B. his Heirs and Assigns for ever, out of this Feoffment or Grant, (or Grant, Bargain and Sale, &c.) All that Messuage, &c. And all and singular the, &c. always foreprised, excepted and reserved unto the said A. B. his Heirs and Assigns.* See the Second Part, Title **Exceptions**.

If a Lease be made, *Provided that the Lessee shall not sell the Woods*; this Proviso is no Exception, but the Woods are demised. *1 Brownl. 241.*

Rule 9.

By the same Words whereby it may be well granted it may be well excepted.
See before (K).

Rule 10.

It may be made by other Words that carry the same Sense, but the Words before mentioned are the most proper.

The Words *other than*, will make an Exception; as in the Statute of Fines, 4 H. 7. which concludes thus — *All Persons, except Feme Coverts, other than those that be Parties to the said Fine* — Here *other than* makes an Exception out of an Exception. *Carter 99.*

S E C T. III.

Of the Habendum.

(A) Habendum, *what*.

THE *Habendum* is a Clause in a Deed, shewing what Estate the Grantee shall hold in the Thing granted.

It is so called from the Word *Habendum*, being the first Word in that Part of a Deed, when written in *Latin*.

An Estate may be made by a Deed without any *Habendum* at all; as if one gives or grants Land to another, and limits no Estate without any *Habendum* in the Deed, and seals

seals and delivers this Deed, and makes Livery accordingly, in both these Cases the Deed is good, and in the first Case an Estate in Fee-simple is made, and in the last Case an Estate for Life is made.

(B) *The Office of the Habendum.*

THE Office of the *Habendum* is to express the Certainty of the Estate which the Grantee, &c. is to have, for what Time, and to what Use.

It is to *limit* an Estate, and not to give any Thing.

It sometimes *qualifies* the Estate, so that the general *Implication* of the Estate, which by Construction of Law passes in the Premises, by the *Habendum* may be controll'd; but not if the Estate is *expressed* in the Premises; as if a Man by Deed gives Lands by the Premises to one and his Heirs, *Habendum* to him for Life; this *Habendum* is void because repugnant to what is expressed; not if the *Habendum* had been to the Heirs of his Body. *Wood, B. 2. c. 3.*

But if the Estate had only been *implied* in the Premises; as if *A.* grants a Rent to *B.* generally in the Premises, the same by *Implication* and Construction in Law, is an Estate for Life; yet an *Habendum* for Years is good, and shall *qualify* the Generality and Implication of Law in the Premises. *Ibid.*

An *Habendum* may sometimes *explain* the Premises, to prevent Wrong; *vide post.* and sometimes *enlarge* the Premises; as if a Man gives Lands in the Premises to one and the Heirs of his Body, *Habendum* to him and his Heirs, he has an Estate-tail and a Fee-simple expectant; for when the Deed at first contains special Words, and afterwards concludes in general Words, both Words, as well general as special, shall stand. *Ibid. Jones Rep. 4. 8 Co. 154. Dyer 160.*

An *Habendum* may abridge the Premises. *Jones Rep. 4. Vide Moor, Case 1236.* *J. W.* was seised in Fee of a House and Garden in *L.* and held it in Burgage, and by his Will devised it to *M.* his Wife for Life, and died; but before the making of his Will, he made a Deed of Feoffment to *G. W.* his Son, *Habendum* after the Death of the said *J. W.* the Feoffor to the said *G. W.* in Tail, and made Livery of Seisin *secundum formam Chartæ*; the Feoffment was void, and nothing passed, and then the Will made afterwards was good; for when no Estate is expressed in the Beginning of a Deed, but only an implied Estate for Life, as here, and by the *Habendum* an express Estate is limited, this doth control the implied Limitation; and if this be void and repugnant in Law, as it is here, being after the Death of the Feoffor, all is void; but if there be an express Limitation in the Beginning, if the *Habendum* be repugnant, it is void, and the first is good; and altho' Livery be made, yet it is tied *secundum formam Chartæ*, which is void, and so all is void, for it is but the Execution of a void Deed. *Cro. Eliz. 254. pl. 27.*

Sometimes the *Habendum* gives an Estate where nothing was given before. *Plow. 160. a.*

And sometimes it will alter the Estate given in the Premises. *Ibid.*

Sometimes it gives to a Person not named before. *Ibid.*

The *Habendum* shall never introduce one who is a Stranger to the Premises (3 Leon. Case 60.) to take as a Grantee, but he may take by Remainder. *T. Raym. 145.*

(C) *What the Habendum should contain, where placed in the Deed, and by what Words expressed.*

IT is necessary that the *Habendum* should comprize and include the Premises, and it must be consistent with that which is there expressed, for if it is not, the precedent Estate given by the Premises shall stand, and the Estate by the *Habendum* shall be void. *Wood, B. 2. c. 3.*

In it should be set down again the *Name of the Grantee*, the *Estate* that is to be made and limited, or the *Time* that the Grantee shall have in the Thing granted or demised, and to what Use, and therein sometimes, tho' needlessly, is set down again the Thing granted.

If the Name of the Grantee be not contained in the Premises, yet if it be in the *Habendum* it may be good enough; as if one gives or grants Land, *Habendum* to *B.* and his Heirs, and he is not named in the Premises, yet this is a good Deed to make

an Estate in Fee-simple. And yet if the Thing granted be only in the *Habendum* and not in the Premises of the Deed, the Deed will not pass it; and therefore if a Man grants *Blackacre* only in the Premises of a Deed, *Habendum Blackacre* and *Whiteacre*, *Whiteacre* will not pass by this Deed; but if the Thing newly added be implied in the Thing granted by the Premises of the Deed, as being an Incident thereunto, or otherwise, or it be the same Thing, and expressed in other Words only, in these Cases the Premises and the *Habendum* may stand together; as if one grant a Manor, *Habendum* the Manor with the Advowson appendant to the Manor; or if one grant a Reversion of Land by the Name of the Reversion in the Premises, *Habendum* the Land itself, in both these Cases the Deed is good, and the Advowson and Reversion will pass. So also if Livery of Seisin be made of the Thing newly added, in this Case perhaps it might pass by the Livery.

And if the Thing granted be left out in all, or in Part in the *Habendum*, yet the Grant is good; and therefore if one grants Land to *A. Habendum to A. his Heirs*, &c. or if one grants *Whiteacre* and *Blackacre* to *A. Habendum Whiteacre to A.* and omit *Blackacre*, yet the Deeds are good, and all that is contained in the Premises of the Deed doth pass in both Cases. *Shep. Touch. 75.*

The *Habendum* may be placed in any Part of the Deed, and be good in Law, but the proper Place is immediately after the Premises, thus:

To have and to hold the said Messuage or Tenement, Lands and Premises, before by these Presents granted, bargained, sold, remised, released, quit-claimed and confirmed, or meant, mentioned or intended to be herein and hereby granted, bargained, sold, remised, released, quit-claimed and confirmed, and the Reversion and Reversions, Remainder and Remainders, Rents, Issues and Profits thereof, and of every Part and Parcel thereof, with their and every of their Appurtenances (except before excepted) unto the said A. B. his Heirs and Assigns for ever, **To the only Use** and Beboof of the said J. B. his Heirs and Assigns for ever; (or it may be thus, viz.) **To the Releasee**, &c. his Heirs and Assigns for ever, to the Uses, Intents and Purposes herein after mentioned, and to no other Use, Intent or Purpose whatsoever, viz. **To the Use of**, &c. and so declare the Uses. See the Second Part, Tit. *Habendum*.

If any Thing be excepted in the Grant in the Premises, it is best to mention it here by these Words, (except before excepted) as in the above Precedent.

(D) *How the Habendum shall be construed; and how different Estates are limited according to Words of the Habendum.*

THE *Habendum*, as all other Parts of a Deed, for the most Part shall be taken most strongly against the Grantor, and most in Advantage of the Grantee, yet so as to be construed as near as possible to the Intent of the Parties.

If Land be granted to one and his Heirs until J. S. pays 100 l. and J. S. dies before A Fee-simple he pays it; in this Case the Estate is become a pure Fee-simple. *Plow. 557. Shep. Touch. 101.*

If Lands be given or granted to a Man, *To have and to hold to him and his Heirs*, this is a Fee-simple pure, absolute and perpetual, and is made by these Words, *his Heirs*; for it is a general Rule, that the Words, *his Heirs* only, make an Estate in Fee-simple in all Feoffments and Grants. *Co. Lit. 8, 9.*

But this Rule hath many Exceptions; for if a Feoffment of Land be made to J. S. & *hæredibus*, without the Word *suis*, this is a Fee-simple.

And yet if the Grant be to J. S. and J. D. & *hæredibus*, without this Word *suis*, *Life*.

contra; for this is only an Estate for their Lives.

And if Lands be given to a Bishop, Parson, or the like, *To have and to hold to him and his Successors*; this is a Fee-simple.

And if Lands be given to a Mayor and Commonalty, or other Corporation Aggregate generally, without the Word *Successors*, or any other Word; or if Lands be given to such a Corporation for their Lives; this is a Fee-simple.

But if Land be given to a Parson, or the like, *Habendum to him*, without saying *Life*.

how long; or *Habendum to him for Life*, by this he has no more than an Estate for *Life*. *Shep. Touch. 101. Vide Lit. §. 1. Co. Lit. 8, 9, 15. 27 H. 8. 5. Perk. §. 239, 240, 241. 39 H. 6. 38. Plow. 28. Bro. Estates 4. 11 H. 7. 12.*

And if Lands be given to the King generally, without any other Words, this is a Fee-simple.

Fee-simple. Co. Lit. 9. 6 Co. 27.

Y y y

So

So if one grants *Deo & Ecclesie de D.* it is said this is a Fee-simple in the Parson of *D.*

So also of a Grant *Ecclesie de D.*

So if a Grant had been to the Monks of such a House, it had been a Fee-simple in the House.

And in like Manner it is in other Cases; as if one recites that *B.* has enfeoffed him of *Whiteacre*, To have and to hold to him and his Heirs; and then he saith further, that as fully as *B.* hath given *Whiteacre* to him and his Heirs, he doth grant the same to *C.* by this *C.* the Grantee hath the Fee-simple of this Acre.

And if one grant two Acres to *A.* and *B.* To have and to hold, the one to *A.* and his Heirs, and the other to *B.* in forma prædicta; by this *B.* has a Fee-simple in this other Acre, for an Estate in Fee-simple, Fee-tail, or for Life, may he made by such Words of Reference. *Shep. Touch.* 101.

Also if a Rent be granted between *Parceners*, to make an Equality of Partition, and it be granted generally and without any Words of Heirs, yet this is a Fee-simple.

So where Lands are given in *Frankalmoigne.* *Shep. Touch.* 101.

And so also it is in the Cases of a Release of Right, a Fine and a Recovery. *Shep. Touch.* 102.

If one gives or grants Lands to another, To have and to hold to him and his Heirs Males, or to him and his Heirs Females; in both these Cases there is a Fee-simple made; but it is otherwise when these Words are in a Will, for then it is but an Estate in Tail only. *Lit. §. 31. 11 Co. 46.*

If one grants Land to one, To have and to hold to him and his right Heirs; by this he has a Fee-simple. *Shep. Touch.* 102.

And so it shall be taken if it be by Fine.

So if one grants Land to *J. S.* for Life, the Remainder to the Heirs, or to the right Heirs of *J. S.* this is a Fee-simple.

So if one makes a Feoffment in Fee to the Use of himself for Life, and after his Death to the Use of his Heirs; this is a Fee-simple.

If one grants Land to *J. S.* To have and to hold to him and the Heirs of *J. S.* this is a Fee-simple, and all one with a Grant to *J. S.* and his Heirs. *Shep. Touch.* 102.

If one grants Land to another, To have and to hold to him for twenty Years, and that after the twenty Years the Grantee shall have it to him and his Heirs by 10 l. Rent, and makes Livery of Seisin; by this the Grantee shall have the Fee-simple. *Shep. Touch.* 102.

If one grants Land to the Wife of *J. S.* To have and to hold to her for Life, and after to *J. S.* in Tail, and after to the right Heirs of *J. S.* by this *J. S.* has a Fee-simple. *Ibid.*

And if one grants Land to *A.* for Life, the Remainder to *B.* for Life, the Remainder to the right Heirs of *A.* by this *A.* has a Fee-simple.

If Land be granted to a Man and his Wife, To have and to hold to them and the Heirs issuing of them; this is a Fee-simple, and not a Fee-tail. *Bro. Estates* 86.

If Land be granted to one and his Heirs, by the Premises of a Deed, To have and to hold to him for Life; by this he has a Fee-simple. *Shep. Touch.* 102.

A Fee-simple qualified.

If Land be given or granted to one, *Habendum* to him and his Heirs, so long as he pays 20 l. yearly to *J. S.* and his Heirs, or so long as such a Tree doth stand, or the like; this is a Kind of Fee-simple, but it is limited and qualified, and determinable upon this Contingent. *Shep. Touch.* 101.

Fee-simple expectant.

If by the Premises of a Deed Land be granted to one and the Heirs of his Body, To have and to hold to him and his Heirs; by this he has an Estate-tail and a Fee-simple expectant, and so vice versa. *Shep. Touch.* 102.

If by the Premises of a Deed the Grant be to him and his Heirs, To have and to hold to him and the Heirs of his Body; by this also he has an Estate-tail and a Fee-simple expectant. *Ibid.*

No Limitation of the Party can make a Freehold commence in futuro. *5 Co. 55. a. b.*

Tenant in Fee cannot grant his Estate, *Habendum* after his Death; for then he would have a particular Estate in himself against the Rules in Law. *Cro. Jac.* 376. *pl. 2. Cro. Eliz.* 254, 255. *pl. 27.*

Fee simple.

If Lands be given to the Son, To have and to hold to him and his Heirs of the Body of his Father; by this the Son has a Fee-simple. *Shep. Touch.* 103.

If Lands be given or granted to a Man, To have and to hold to him and to the, Fee-tail. or to his, Heirs of his Body, or to the, or to his, Heirs Males of his Body, or to the, or to his, Heirs Females of his Body; by this the Grantee has an Estate-tail. *Shep. Touch. 102.*

If Lands be given to a Man, To have and to hold to him and the Heirs Males, or to him and the Heirs Females of his Body begotten; the Grantee has an Estate-tail. *Shep. Touch. 102.*

If Lands be given to a Man and his Wife, To have and to hold to them and the Heirs Males, or them and the Heirs Females of their two Bodies begotten; by this they both have an Estate-tail.

And if Lands be given to them and the Heirs Males, or Heirs Females of the Body of the Husband begotten on the Wife; by this he hath an Estate-tail, and his Wife an Estate for Life only.

And if Lands be given to A. To have and to hold to him and his Heirs on the Body of B. begotten; by this A. has an Estate-tail, and B. has nothing. *Shep. Touch. 103.*

So if Lands be given to a Man and his Wife, To have and to hold unto them and the Heirs be shall beget on her Body; by this they have an Estate-tail in them both.

If Lands be given to a Man and his Wife and the Heirs of the Body of the Husband; by this the Husband hath an Estate in general Tail, and the Wife but an Estate for Life.

If Lands be given to him, To have and to hold to him and his Heirs be shall beget on the Body of his Wife; by this he hath an Estate-tail, and she no Estate at all.

If one give his Land to his Daughter or Cousin in Frank-marriage, by this they have each of them an Estate-tail without any Word of Heirs or Heirs of the Body, &c. *Shep. Touch. 103.*

If one gives Lands to B. and his Heirs, To have and to hold to B. and his Heirs, if B. have Heirs of his Body; and if he dies without Heirs of his Body, that it shall revert to the Donor; by this B. has an Estate-tail. *Shep. Touch. 103.*

So if one gives Lands to B. and his Heirs, if he have Issue of his Body; by this he has an Estate-tail. *Ibid.*

So if Lands be given to B. To have and to hold to him and his Heirs, provided that if he dies without Heir of his Body, that the Land shall revert.

So if Lands be given to A. & B. uxori ejus & hered' eorum & aliis hered' ipsius A. si dict' hered' de dict' A. & B. exeunt' obierunt sine hered' de se, &c. by this they have an Estate-tail.

And so in all such like Cases where after a Limitation of a Fee-simple these or such like Words are added, viz. That if he dies without Heirs of his Body, the Land shall revert; for in all these Cases the Habendum is construed to be a Limitation or Declaration what Heirs are meant before.

If Lands be given to A. and B. (a Man and Woman unmarried) To have and to hold to them and the Heirs of their two Bodies; by this each of them has an Estate-tail, and if they marry, their Heirs may inherit it. *Shep. Touch. 103.*

But if the Words be, To have and to hold to him and the Heirs of the Body of the Father engendred; by this it is an Estate-tail in a Deed, as it is in a Will. *Shep. Touch. 103.*

And if the Father be dead, the Law is so also; but the Son shall have by this only an Estate for Life, except he be Issue in Tail to his Father *per formam doni.*

So if there be Grandfather, Father and Son, and the Father dies, and Lands be given to the Son, To have and to hold to him and the Heirs of the Body of the Grandfather; this is an Estate-tail in the Son, but neither the Father nor the Grandfather has any Estate in these Cases.

If Lands be given to J. S. and the Heirs of the Body of his Wife (being dead) begotten; by this J. S. has an Estate-tail. *Shep. Touch. 103.*

If one grants Lands to J. S. To have and to hold to him and the Heirs of his Body issuing, the Remainder to J. D. and his Heirs in forma prædicta; by this J. S. and J. D. after him have each of them an Estate-tail.

If one grants Lands to A. To have and to hold to him for Life, the Remainder to the first Son of A. and the Heirs Male of the Body of that first Son; by this the first Son has an Estate in Tail, and A. his Father but an Estate for Life only.

But if Lands be granted to A. for Life, the Remainder to the Heirs of the Body of A. by this A. has an Estate-tail in him. *Shep. Touch. 104.*

And

And if Lands be given to a Man and his Wife, To have and to hold to them and one Heir of their Bodies lawfully begotten, and to one Heir of the Body of that Heir; by this there is an Estate-tail made, yet so as it shall last only during the Lives of those two Heirs. *Shep. Touch. 104.*

If one grants Lands to another, To have and to hold to him and to his Heirs of the Body of such a Woman lawfully begotten; by this he shall have an Estate-tail, for begotten shall be intended by the Donee on that Woman. *Co. Lit. 26.*

If there be Husband and Wife, and they have Issue a Son and a Daughter, and Lands are given to the Wife, To have and to hold to her and the Heirs of her late Husband on her Body begotten; by this the Wife has an Estate for Life, and the Son an Estate in Tail, and if he dies without Issue, it shall go to his Daughter *per formam doni.* *Co. Lit. 26.*

If Lands be granted to the Husband of A. and Wife of B. To have and to hold to them and the Heirs of their two Bodies; by this they have each of them an Estate in Tail in them, for there is a Possibility that one Husband and Wife may die, and then the other Husband and Wife may intermarry. *Co. Lit. 20.*

If there be Father and Son, and Lands are given to the Father, To have and to hold to him and the Heirs of the Body of his Son; by this the Son has an Estate-tail, but the Father but an Estate for Life. *Shep. Touch. 104.*

If Lands be given to the Mother for Life, the Remainder to her Son and the Heirs of the Body of the Father on her begotten, (the Father being dead) the Son has an Estate-tail. *Lit. §. 352. Shep. Touch. 104.*

If Lands be granted to J. S. To have and to hold to him and the Heirs he shall happen to have of his Wife; by this he has but an Estate-tail, and no Fee-simple, and his Wife has no Estate at all. *12 H. 4.*

If Lands be granted to J. S. and the Heirs that the said J. S. shall lawfully beget of his first Wife, and he hath no Wife at the Time of the Grant; by this he has an Estate-tail. *Co. Lit. 20.*

If A. has Issue by B. his Wife C. a Son, and D. a Daughter, and A. dies, and Lands are granted to B. To have and to hold to her and to the Heirs of A. her late Husband on her Body begotten; in this Case and by this Deed C. has an Estate-tail, and the Woman hath only an Estate for Life, and if C. dies without Issue, D. his Sister shall have the Land *per formam doni.* *Co. Lit. 26.*

But if one grants Lands to A. late Wife of J. S. To have and to hold to the said A. and the Heirs of J. S. on the Body of the said A. begotten; in this Case the Son and Heir shall take no Estate by the Grant, and the same Construction shall be upon the same Words in a Will. *Ibid.*

If Lands be granted to the Husband and Wife, To have and to hold to them and the Heirs of the Body of the Survivor of them; by this the Survivor shall have an Estate-tail after the Death of the other. *Co. Lit. 26.*

If Lands be granted to J. S. To have and to hold to him & hæredibus de Carne sua, or hæredibus de se, or hæredibus quos sibi contigerit; in all these Cases J. S. has an Estate-tail, and no more. *Co. Lit. 20.*

If Lands be granted to Husband and Wife, To have and to hold to him and the Heirs of the Body of the Husband, the Remainder to the Husband and Wife and the Heirs of their two Bodies begotten, this Remainder is void; and therefore by this the Husband has an Estate in Tail, and the Wife a joint Estate for Life with her Husband, and no more. *Co. Lit. 28.*

If Lands be granted to J. S. and the Heirs of the Body of Jane a Noke begotten; by this J. S. has an Estate-tail, and no more. *1 Co. 140.*

If Lands be granted to J. S. & hæredibus de corpore procreatis; by this the Heirs that shall be begotten afterwards shall take. *Co. Lit. 20.*

And if Lands be granted to J. S. & hæredibus de corpore procreandis; by this the Heirs of his Body before begotten shall take *per formam doni*, as well as those that shall be begotten afterwards. *Co. Lit. 20.*

If one grant to J. S. that if he and the Heirs of his Body be not yearly paid 40 s. that he or they shall distrain in the Lands of the Grantor; by this the Grantee has an Estate in Tail in the Rent: As if he grants to J. S. that he and his Heirs be not paid, &c. that he or they shall, &c. he has a Fee-simple in the Rent. *Co. Lit. 146.*

Estate for Life. If one gives or grants Land to another, To have and to hold to him, or to him and his Assigns, and say not how long nor for what Time, and the Grantor makes Livery of Seisin according to the Deed, by this the Grantee has an Estate for his own Life; but

but if no Livery of Seisin be made, no Estate at all but an Estate at *Will* doth pass by this Deed; and if he that grants the Land be but a Lessee for Years of the Land, and he makes no Livery of Seisin upon the Grant, by this his Term of Years, and that Estate which he has is granted. *Shep. Touch. 105.*

But if he makes Livery of Seisin upon the Grant, then an Estate for the Life of the Grantee will pass; and it is a Forfeiture of the Estate of the Lessee for Years, of which he in Reversion may take present Advantage.

And if one grants to another Common in his Land, when he doth put in his own Beasts or Estovers in his Manor when he cometh there, and say no more; by this it seems the Grantee hath an Estate for Life. *Ibid.*

If one grants Land to *J. S.* To have and to hold to *him or his Heirs* in the Disjunctive; this is but an Estate for Life, and no more. *5 Co. 112. Co. Lit. 8.*

So if one grants Lands to *J. S.* To have and to hold to *him and his Heir* in the singular Number; by this *J. S.* has only an Estate for Life, and no Fee-simple. *Ibid.*

If one bargains and sells Land to another for Money, and limits no Time, and expresses no Estate; by this the Bargainee shall have only an Estate for Life: But it was otherwise before the Statute for Uses, for then it had been a Fee-simple. *1 Co. 87, 130. Plov. 539.*

If Lands be granted to *J. S. for Life, and after to the next Heir Male of J. S. and the Heirs Male of the Body of such next Heir Male*; by this *J. S.* has but an Estate for Life; but if it be to the next Heirs Male of *J. S.* it is an Intail. *1 Co. 66.*

If one grants Land to *J. S.* To have and to hold to *him in Fee-simple, or in Fee-tail, without saying to him and his Heirs, or to him and his Heirs Males, or the like*; this is but an Estate for Life, and no more. *20 H. 6. 33.*

So if one grants Land to *J. S.* To have and to hold to *him and his Seed, or to him and his Issues generally, without more Words*; by this is made only an Estate for Life: But in the Construction of a Will the Land is otherwise in most of these Cases. *Co. Lit. 8, 20.*

If Lands be granted to two & *heredibus*, without the Word *suis*; by this they have an Estate for their Lives, and no longer. *20 H. 8. 35.*

If one grants Lands to *J. S.* To have and to hold to *him and his Heirs for his own Life, or for the Life of J. D.* by this *J. S.* has an Estate for Life, and no more. *5 Co. 112. 1 Co. 140.*

If one grants Lands to *A. and B. Habendum sibi & suis*, omitting all other Words, or To have and to hold to *them and their Assigns*; by this they have an Estate for Life only.

So if Lands be granted to any natural Person, To have and to hold to *him and his Successors*; by this he has only an Estate for Life. *4 Co. 29. Co. Lit. 1, 8.*

If one grants his Lands to *J. S.* to pay his Debts, To have and to hold to *him generally, without limiting any Estate*; in this Case *J. S.* has an Estate for Life only. *8 Co. 96.*

If Lands be granted to *A. and B.* To have and to hold to *them for their Lives, to the Use of C. for his Life*; by this *C.* hath an Estate for his Life, if *A. and B.* live so long. *Dyer 186.*

If a Tenant in Tail grants *totum feutum suum*; by this the Grantee has an Estate for the Life of the Grantor, and no longer.

And if a Lessee for Life grants *all his Estate*, hereby his Estate for Life doth pass, for this is as much as he can lawfully grant. *Shep. Touch. 105.*

If a Man has a Son and a Daughter, and dies, and Lands be granted to the Daughter and the Heirs Females of the Body of the Father; by this she has only an Estate for Life. *Co. Lit. 24.*

If one grants Land to another, To have and to hold to *her whilst she shall live Sole, or during her Widowhood, or so long as she shall behave herself well, or so long as she shall dwell in such a House, or so long as she shall pay 10l. yearly, or so long as the Coverture between her and her Husband shall continue*; or one grants Lands to a Man, To have and to hold unto him until he shall be promoted to a Benefice, or the like; in all these Cases if Livery of Seisin be made according to the Deed, or if the Grant be of such a Thing whereof no Livery is requisite, the Grantee has an Estate for his Life, and no more, and that determinable also. *Co. Lit. 42, 234, 235.*

If one grants Lands to *J. S.* To have and to hold to *him for Life, and doth not say for whose Life*; this regularly shall be taken for the Life of *J. S.* the Lessee, and not for the Life of the Lessor.

But if the Lessor himself has but an Estate for Life in the Lands granted, then the Lease shall be construed to be and to enure during that Life only by which the Lessor did hold, to prevent a Forfeiture. And if he that makes the Lease be Tenant in Tail of the Land, this shall be taken to be a Lease for the Life of the Lessor.

And if a Tenant for Life of Land makes a Lease for Years of it, and then grants his Reversion by the Name of a Reversion to another, To have and to hold to him and his Heirs; by this he hath only an Estate for the Life of the Grantor, and no more.

So if Tenant in Tail of Land grants it to one for Years, and after grants his Reversion to another, To have and to hold to him and his Heirs; this shall be construed to be an Estate for the Life of the Tenant in Tail, and no longer; and the Attornment of the Tenants in these Cases will not alter the Cases.

And so it is in Case of a Release also; as if Tenant in Tail doth release to B. (being Lessee for Years of the Land) all his Right to the Land, this shall be taken to enure but for the Life of the Tenant in Tail, and no longer; as if a Man retains a Servant, and says not how long, this shall be taken for a Year, *Constructio Legis non facit injuriam*. Co. Lit. 42, 183. Plow. 161. F. N. B. 168.

And if a Man by his Deed grants a Rent of 10 l. issuing out of all his Land, Quarterly at the usual Feasts; this is an Estate for the Life of the Grantee. *Shep. Touch.* 107.

If one grants Land to J. S. and J. D. To have and to hold to them during their Lives, omitting these Words, and the longest Liver of them; yet they shall hold it during the Life of the longest Liver of them.

And if Lands be granted to A. To have and to hold to him during the Lives of B. C. and D. without any more Words; by this A. hath an Estate during all their Lives and during the Life of the longest Liver of them. 5 Co. 9. 11 Co. 3.

And if Lands be granted to A. To have and to hold to him during his Life, and during the Lives of B. and C. by this he has a Lease for his own Life and the Lives of B. and C. and the longest Liver of them. *Shep. Touch.* 106.

But if a Lease be made to J. S. of Land, To have and to hold to him during the Time that A. and B. shall be Justices of Peace, or during the Time that A. or B. shall be of the Inner Temple, or the like; in these Cases the Failure of one doth determine the Estate. 38 Eliz. B. R. Ros and Adwick.

And if a Lease be made to B. only, To have and to hold to him and C. for their Lives; by this B. hath an Estate for his own Life only, and no more, and C. hath nothing at all. 8 Eliz. B. R. Hobart and Wisemore.

Estate for
Years.

When no Time is set down for the Beginning of an Estate, then it shall begin presently, otherwise it shall begin at the Time expressed, if that be not against Law.

If a Lease for Years be made bearing Date the twenty-sixth Day of May, To have and to hold for twenty-one Years from the Date, or from the Day of the Date; in these Cases the Leases shall begin on the twenty-seventh Day of May.

But if the Words be, To have and to hold from henceforth, or from the making hereof; in these Cases the Lease shall begin on the Day in which it is delivered.

And if it be to begin a die consecutionis, then it shall begin the next Day after the Delivery.

And if it be, To have and to hold for twenty-one Years, without mentioning when it shall begin, it shall begin from the Delivery, if there be no former Lease in Being, and if there be, then it shall begin from the Time of the Ending of that Lease.

If the Deed has a Date which is void or impossible, as the 30th of February or 40th of March, and the Term be limited to begin from the Date, then it shall begin from the Delivery.

So if a Man by his Deed recites a Lease which is not existing, or which is void, or misrecite a Lease that is in esse in a Point material, and then say, To have and to hold from the End of the former Lease; this Lease shall begin in Course of Time at the Time of the Delivery of the Deed. Co. Lit. 46. 5 Co. 1, 2, 5. Dyer 286, 307.

If one makes a Lease of Land to A. for twenty Years, and then grants it to B. To have and to hold to him from the End of the first Term, &c. in this Case this second Lease shall begin as soon as the first Lease by what Means soever shall end.

But if the Words of the second Lease be, To have and to hold to him from the End of the twenty Years; in this Case the second Lease shall not begin until the twenty Years be expired.

And if one makes a Lease of *Whiteacre* to *A.* for ten Years, and of *Blackacre* to *B.* for twenty Years, and then reciting both the Leases makes a Lease to *C.* to begin after the former Leases; this shall be taken respective, and shall begin for *Whiteacre* after the End of the ten Years, and for *Blackacre* after the End of the twenty Years. 1 Co. 154. Plow. 198.

And if one makes a Lease to two for sixty Years, provided that if the Lessees shall die within the Term, that then presently after the Decease, or the last of them longest living, the Lessor shall re-enter; and one of them dies, and after the Lessor makes a Lease to another, *Habendum, &c. Cum post five per mortem sursum redd' vel forisfacturam* of the first surviving Lessees, *acciderit vacare* for forty Years; in this Case this second Lease shall begin after the Death of the Lessee surviving, Re-entry of the Lessor, or the Effluxion of Time of the first Lease, which of them shall first happen, and the Lessee at his Election cannot make it to begin at any other Time. 6 Co. 36.

If a Man makes a Lease for thirty Years, and four Years afterwards makes another Lease to another Man in these Words: *Noveritis, &c. me A. de B. predictis 30 Annis finitis dedisse & concessisse B. de C. &c. Habendum a die consecrationis presentium termino predicto finito usque finem 31 Annorum*; by this the second Term shall begin at the End of the thirty Years. Dyer 261.

And if one makes a Lease to *A.* for twenty Years, and after makes a Lease to *B.* To have and to hold to him from the End of the first Term for twenty Years, to be accounted from the Date of the last Deed; in this Case the second Lease shall begin at the End of the first Lease, and these Words, *to be accounted*, shall be rejected. Pas. 7 Jac. C. B. Craddock's Case.

If one makes a Lease of Land to *A.* for ten Years, and after by Indenture grants it to *B.* To have and to hold to him from Michaelmas next for ten Years; and afterwards the first Lessee purchases the Reversion, by which his Term is drowned; in this Case the second Lease shall begin presently when Michaelmas is come. Dy. 112.

If there be two Jointenants, and one of them grants the Land to *J. S.* To have and to hold to him for twenty Years, if the Lessor and his Companion so long live; by this the Lease shall continue no longer than they both live together, and when either of them is dead, the Lease is determined. Shep. Touch. 110.

And if one grants his Land to *J. S.* To have and to hold to him, his Executors, &c. for the Term of one hundred Years, if *A. B. and C.* live so long, and leave out these Words, or either of them; in this Case if either of them dies the Lease is determined. Ibid. 5 Co. 9.

But if the Words be, To have and to hold for one hundred Years, if *A. B. or C.* omitting or either of them, shall live so long, contra. Ibid.

If a Lease be made of Land to the Husband and Wife, To have and to hold to them for twenty-one Years, if the Husband and Wife, or any Child between them, shall so long live; this is a good Lease, and shall continue for all their Lives and for the Life of the longest Liver of them, altho' the first Words be in the Copulative. Shep. Touch. 110.

If one possessed of Land for a Term of Years grants the same to another, To have and to hold to him, his Executors and Administrators, or to him and his Assigns, or to him, without any more Words; or if a Man that is possessed of a Term grants his Lease to another, and does not say for what Time; in these Cases the whole Term is granted altho' no Livery of Seisin be made.

And in the first Case if Livery of Seisin be made, then it seems there passes an Estate for the Life of the Grantee; and therefore this is a Forfeiture of the Estate of the Lessee for Years, whereof he in the Reversion may take Advantage presently. Shep. Touch. 110.

And if a Lessee for Years of Land grants a Rent out of the Land generally, without any Limitation, this shall be construed to enure for a Grant of the Rent so long as the Estate of the Grantor continues.

But if he grants a Rent by express Words for the Life of the Grantee, by this the Grantee shall have it for all the Term, if he lives so long. Ibid.

If one grants Lands to *J. S.* To have and to hold to him for Life, reserving the first seven Years a Rose; and if he will hold the Land over, that he shall pay a Rent in Money, and no Livery of Seisin is made; by this it seems to be a Lease for seven Years until the Condition be performed, and then it is a Lease for no longer Time; and so perhaps it will be if Livery of Seisin be made. Co. Lit. 218.

If

If one grants a Rent of 5 l. per Ann. unto J. S. To have and to hold to him, &c. until he shall receive 20 l. in this Case he shall have a Lease for four Years of this Rent. Co. Lit. 42. Plow. 273.

If one makes a Lease for Life, and says, *That if the Lessee within one Year pays not 20 s. that he shall have but a Term for two Years*; by this if he does not pay the Money, he hath only a Lease for two Years altho' Livery of Seisin be made upon it. Co. Lit. 218.

If one makes a Lease to J. S. To have and to hold to him, his Executors, &c. for ten Years, if J. D. should live so long, and J. D. is dead at the Time when the Lease is made; in this Case J. S. hath an absolute Lease for ten Years. 9 Co. 60, 63.

If one grants Lands to J. S. To have and to hold to him, his Executors, &c. for three Years, and so from three Years to three Years during the Life of J. S. or from three Years to three Years during the Life of the Lessee; by this J. S. has a Lease for six Years, and no more.

And if one grants Lands to J. S. To hold for three Years, and after the End of those three Years, for three other Years during the Life of the Lessor; by this J. S. has a Lease for nine Years, and no more.

And yet if in these and such like Cases where a Lease is made from so many Years to so many for the Life of any Person, and Livery of Seisin is made upon this Deed secundum formam Chartæ, this perhaps may be an Estate for Life. Plow. 273. Co. Lit. 45. Dyer 24.

If Lands be granted, To have and to hold from our Lady-day, *pro termino unius anni, & sic de uno anno in unum annum quamdiu ambabus partibus placuerit*; by this the Grantee hath a Lease for three Years only in certain, and afterwards a Lease at Will.

And if Lands be granted, To have and to hold from the Nativity of Christ next, *pro termino unius anni, & si in fine diei unius anni ambæ partes placerent, quod eadem præsens demissio foret renovata, tunc habend' præmissa* to the Lessee, &c. *ab & post dictum festum Nativitatis Domini usque terminum trium annorum extunc prox' sequen'*; by this the Grantee has a Lease in certain but for one Year only, and if the Parties agree again, a Lease for three Years. 14 H. 8. 10. 6 Co. 35. 10 Co. 106.

If one makes a Lease to J. S. To have and to hold to him for Years, and say not how many Years; by this the Lessee hath a Lease for two Years, and no more. 6 Co. 35. 21 H. 7. 38.

If one grants his Land to J. S. To have and to hold to him until J. D. shall come to twenty-one Years of Age; in this Case if J. D. dies before that Time the Lease is ended. 3 Co. 19.

If a Man possessed of a Term of Years of Land grants the Land to another and his Heirs; this by Construction will amount to a good Grant of his Interest. 1 Co. 44. 7 H. 4. 42.

Tenant at Will.

If Lands be granted to J. S. To have and to hold, &c. until he shall receive 20 l. out of the Profits of it; in this Case if Livery or Seisin be made, the Grantee hath an Estate determinable upon the Levying of the Money, and if no Livery be made, he hath no Estate at all but at Will. Co. Lit. 42. Plow. 273.

Limitations of different Estates to different Persons.

If Lands be granted to Husband and Wife and to J. S. To have and to hold to them and to their Heirs of the Husband and J. S. by this the Wife has only an Estate for Life in a Moiety with her Husband, and the Husband and J. S. have the Fee-simple in Joint-tenancy to them and their Heirs. Dyer 263.

If Lands be granted to two Brothers, or two Sisters, or to a Brother or Sister, or to a Father and Son, or any others, To have and to hold to them and the Heirs of their Bodies begotten; by this they have joint Estates for their Lives, so that the Survivor of them will have the Whole for his Life, and several Inheritances, i. e. Estates in general Tail by Moieties in common one with another.

And if Lands be granted to two Men and their Wives and the Heirs of their Bodies begotten; in this Case they have joint Estates for Life, and afterwards the one Husband and Wife shall have the one Moiety, and the other the other Moiety in common.

And if Lands be granted to a Man and two Women, To have and to hold to them and the Heirs of their Bodies; by this they have each of them an Estate-tail common with the other. Shep. Touch. 111, 112.

If Lands be granted to Husband and Wife, To have and to hold to them and their Heirs of their Bodies issuing, or in such like Manner; by this the Wife has an Estate-tail as well as the Husband.

But

But if it be granted to them, To have and to hold to them and the Heirs of the Body of the Husband, or to the Husband and Wife, and the Heirs of the Husband which he shall have by his Wife, or in such like Manner; by this the Wife has only an Estate for Life, and the whole Estate-tail is in the Husband.

So *vice versa*, if Lands be granted to Husband and Wife and the Heirs of the Wife upon her Body begotten by the Husband; by this he has an Estate for his Life only, and his Wife the whole Estate-tail.

And if Lands be granted to the Husband, To have and to hold to him and the Heirs of his Body on the Body of his Wife begotten, or to have and to hold to him and the Heirs of his Body begotten on the Wife he shall first marry, or to have and to hold to him and his Wife he shall first marry, and the Heirs of their Bodies begotten; in these Cases the Husbands have the whole Estate, and the Wives nothing at all.

But it seems to be otherwise when the Estate is limited by way of Use to a Man and his Wife that he shall afterwards marry; for by this it seems the Wife shall take also.

If Lands be granted to A. a married Man, and to S. a married Woman, and to the Heirs of their Bodies engendred; by this they have each of them an Estate-tail presently executed, and whilst the Wife of the Husband and the Husband of the Wife live, they shall hold for their Lives; and if they happen to die, and these to intermarry and have Issues, their Issues shall have it according to the Intail. *Shep. Touch. 112.*

If Lands be granted to A. and B. To have and to hold to A. for Life, the Remainder to B. in Fee; by this A. shall have the Whole for his Life, and B. the Fee-simple afterwards. *Dyer 56, 126.*

(E) *Where the Habendum is repugnant and void; and where not, but shall control, divide or expound the Premises.*

AS touching this Matter these Differences are to be taken between Things that are granted, and between the Estates.

When the Things that are granted are such as lie in Grant and take Effect by the Delivery of the Deed only without any Ceremony, or take Effect by the same Ceremony, and when not, but another Ceremony is required to the Perfection of the Grant and Estate.

And when there is an *express Estate* made by the Deed in the Premises thereof, and when but an *implied Estate* only; as for Example,

If one grants Land, Rent, Common, or any such like Thing, to one and his Heirs, by the Premises of the Deed, *Habendum* to him for Life, or *Habendum* to him and to his Assigns, without more Words; in this Case the *Habendum* is repugnant and void, and by this the Grantee shall have an Estate in Fee-simple if Livery of Seisin and Attornment, as the Case requires, be duly made, for otherwise no Estate at all but at Will will pass.

So if a Man grants a Rent, or such like Thing that lies in Grant, to one and his Heirs, To have and to hold to him for Years; this is a void *Habendum*, and the Grantee shall have the Fee-simple.

But if a Man grants Land to another and his Heirs, To have and to hold to him for a certain Number of Years; in this Case whether he makes Livery of Seisin or not, it is a good *Habendum*; and by this the Grantee shall have an Estate for so many Years, and no more.

So if one grants Land, Rent, Common, or such like Thing, to one in the Premises of the Deed, without Limitation of Estate, (which in Judgment of Law is an implied Estate for Life), To have and to hold to him for a certain Number of Years, or at Will; this *Habendum* is good, and shall stand with the Premises, and qualify it as the *Habendum* is. *Shep. Touch. 112, 113.*

And if one grants Land by the Premises of a Deed to one and his Heirs of his Body, To have and to hold to him and his Heirs; this *Habendum* shall stand, and this shall be taken to be an Estate-tail and a Fee-simple expectant. *Co. Lit. 21. a.*

So *vice versa*, if Land be granted to one and his Heirs, To have and to hold to him and his Heirs of his Body; this shall be construed an Estate-tail and a Fee-simple expectant, and so both shall stand together. *Co. Lit. 21. a.*

If Lands be given to *B.* and his Heirs, To have and to hold to *B.* and his Heirs, and if he dies without Heirs of his Body, it shall revert to the Donor; it seems this is a Fee-tail only, and no Fee-simple expectant. *Voluntas donatoris in charta doni sui manifeste expressa observanda est.* Co. Lit. 21. a.

If a Lease for Years be made of Land, and then the Lessor by the Premises of the Deed grants the Land to another, To have and to hold the Reversion of the Land to him, &c. for Life; this *Habendum* shall stand.

So if by the Premises of the Deed the Reversion be granted, To have and to hold the Land itself; this is good, and both shall stand together; but nothing is granted in either Case but the Reversion. 10 Co. 107, 108.

If the next Advowson of a Church be granted to three, To have and to hold to them and either of them jointly and severally; this is joint, and the *Habendum* is void. Dyer 304. 5 Co. 19.

And yet if one grants Land to two by the Premises of the Deed, To have and to hold to one of them for Life, the Remainder to the other for Life; this is not repugnant, but shall stand together and make the Estates several and in Remainder one after another. 2 Co. 55.

So if a Lease be made to two, To have and to hold the one Moiety to one and the other Moiety to the other; by this they have several Estates. *Expressum facit semper cessare tacitum.* Co. Lit. 183. Dyer 106.

If a Man has a Lease for Years of Land, and he reciting this by the Premises of the Deed, grants all his Estate in the Land, To have and to hold the Land, or the Term after his Death, or for Part of the Time only; in this Case the *Habendum* is void, and the whole Estate passes immediately by the Premises. Dyer 272. Plow. 520.

If a Tenant for Life surrenders a Moiety of his Land, and the Lessor grants it all to a Stranger, To have and to hold the one Moiety for Life, and the other Moiety for forty Years after the Death of the Tenant for Life; this *Habendum* shall stand and enure according to the Grant. Dyer 256.

If a Man seised of Land in Fee makes a Lease for Life of it to one, and after grants the Reversion of it to another, To have and to hold the Reversion and the Tenements aforesaid, *cum post mortem, forisfacti, &c. vacare acciderit*; in this Case the *Habendum* and Premises may stand together. Pas. 7 Jac. C. B. Shep. Touch. 114.

Parol Agreements and Conveyances have the same Construction for the most part made upon them, as are made upon Deeds in Writing.

And therefore if a Man by Word of Mouth, without any Writing, grants all his Lands in the Dale to *J. S.* To have and to hold to him for Life, but doth not say for whose Life; this shall have the same Construction as such a Grant made in Writing has. Shep. Touch. 114.

As the Office of the *Habendum* is to limit the Estate, so the general Implication of the Estate which passes by Construction of Law, by the Premises, is always controlled and qualified by the *Habendum*. 2 Co. 55. a. b. Cro. Eliz. 254. Hob. 171. 2 Roll. Abr. 66.

And altho' the *Habendum* is void, and so in Effect no *Habendum*, yet no Estate of Freehold shall pass by Implication of Law against the express Limitation of the Party. 2 Co. 55. a. b. Hob. 171.

If in the Premises of a Feoffment to *B.* *A.* gives to him and his Heirs, *Habendum* to the Feoffee and his Heirs for twenty Years, or Life; this *Habendum* is void, and the Deed shall take Effect by the Premises. 2 Co. 24. a.

An *Habendum* contrary to the Premises is repugnant and void; as if a Man in the Premises gives Land to one and his Heirs, *Habendum* for Life, the *Habendum* is void. 2 Co. 23. b.

When no Estate is expressed in the Premises, but only an implied Estate for Life, and by the *Habendum* an express Estate is limited, this controls the implied Estate for Life; and if this is void and repugnant, all is void; but if there be an express Limitation in the Premises, and the *Habendum* is repugnant, the *Habendum* is void, and the Premises is good. Cro. Eliz. 254, 255. pl. 27. 2 Co. 55. a. 9 Co. 47.

But had it been where a Ceremony is requisite to the Perfection of the Estate limited in the Premises, and nothing is requisite to the Estate limited by the *Habendum* but only the Delivery of the Deed; in such Case tho' the *Habendum* be of less Estate than is mentioned in the Premises, the *Habendum* shall stand. 2 Rep. 24. a.

Where a Prebendary demises to T. S. and his Heirs, *Habendum* to him and his Heirs for three Lives; this is an Explanation of the Premises, that the Lessee and his Heirs shall have such an Estate as is mentioned in the Premises, which is but for three Lives, as in the *Habendum*. *Jones* 4. 2 *Keb.* 865.

If one Thing be granted in the Premises, *Habendum una cum* another, which is no Part of nor belonging to it; that mentioned in the *Habendum* will not pass. *Hob.* 161. *Vide Moor*, Case 1236.

And if the *Habendum* is not pursuant to the Premises, it is void; as a Grant of a Manor, *Habendum* a Rent, Parcel of the Manor. *Plow.* 151. b. 152. a.

Where a Man grants a Rent or Common, &c. by the Premises, to the Grantee and his Heirs, *Habendum* to the Grantee for Life or Years, the *Habendum* is repugnant and void.

S E C T. IV.

Of the Tenendum.

(A) Tenendum, *what*.

THE *Tenendum* is a Clause in a Deed wherein the Tenure of the Land is created and limited. *Vide* (C) *post*.

A Tenure is created, either by Act of the Party or Act of Law.

And Services are either of Profit and no Fidelity, or of Fidelity and no Profit.

Some of them are also for the private Profit of the Lord.

And some of them were for the publick Defence of the Realm.

A Tenure may be reserved upon a Gift in Tail, or Feoffment of corporate Things, into which an Entry may be made.

But upon incorporate Things, as Courts, Rents, Ways, Piscaries, and the like, no Tenure may be reserved; nor may it be of Things of no Profit to the Donor, Feoffor or Commonwealth; nor may it be done to a Stranger.

Nor may the Tenant hold by two Tenures.

There is no Land that is not held by some Service Spiritual or Temporal. *Shep. Common Aff.* 391.

But now by *Stat.* 12 *Car.* 2. c. 24. All Tenures are turned into free and common Socage, and all Tenures by Knight-service in *Capite*, and Socage in *Capite*, and the Fruits and Consequences thereof are taken away.

And all Tenures to be created by the King shall be in free Socage only, and not in *Capite*, saving Rents, Heriots and Suits of Court, and Services incident to common Socage, &c. and saving Tenures in *Frankalmoigne*, by Copy and Grand Serjeanty, other than incident to Knight-service.

No Man can hold one and the same Land immediately of two several Lords. *Co. Lit.* 152.

One Man cannot of the same be Lord and Tenant. *Ibid.*

If a Tenant in Fee conveys the Land to another, he shall hold the Land as the Feoffor held it from the Lord.

And if he makes a Feoffment of Part of his Land, he must hold that Part of the Lord as the other held, if it be to be divided.

But if they be not to be divided, as a Horse, and the like, the Lord shall have the Whole, as a Horse of every Tenant. *Shep. Com. Aff.* 392.

Where the Law makes a Tenure and Reservation, there the Heirs of the Feoffor, Donor or Lessor, shall have the Services as well as the Feoffor, Donor or Lessor himself, unless by the express Words of the Feoffor, &c. in the Deed it be otherwise limited. *Perk.* §. 697.

(B) The Office of the Tenendum.

THE Office of a *Tenendum* in a Deed, is to limit and appoint the Tenure of the Land by which it is held, and how, and of whom it is to be held.

Before the Statute called *Quia emptores terrarum*, (18 E. 1.) the *Tenendum* was usually from the Feoffor and his Heirs, and not of the chief Lord of the Fee, whereby Lords lost their Escheats, Forfeitures, &c.

But

But since the said Statute the *Tenendum*, where the Fee-simple passes, must be of the chief Lord of the Fee, by the Customs and Services, and the Feoffor held.

Yet this Statute does not extend to a Gift in Tail; for the Donee shall hold of the Donor. *Co. Lit. 6. a. 2 Inst. 66, 67, 500, 501, 502, 505.*

(C) *Where the Tenendum is placed, and by what Words it is expressed.*

THE *Tenendum* most commonly and properly succeeds the *Habendum*, and was usually in these Words, *Tenendum per servitium, &c.*

But since the Statute of *Quia emptores terrarum*, when the Fee-simple doth pass the Tenure is always of the chief Lord, and is thus set forth, *Tenendum de capitalibus dominis, &c.* But this Clause at this Day is for the most part left out of Deeds, and altogether omitted. *Shep. Com. Aff. 391.*

The *Tenendum* seems now to be incorporated with the *Habendum*, for we say, *To have and to hold*, in which Clause the Estate is limited, &c. *Vide the last Section.*

S E C T. V.

Of the Reddendum and Clauses of Distress, Nomine poenæ, and Re-entry.

(A) *Reddendum, what, and how it differs from an Exception.*

THE *Reddendum* is a Clause in a Deed whereby the Feoffor, Donor, Lessor, Grantor, &c. reserves some new Thing to himself out of that which he granted before; as Rent, Suit, Service, &c.

The *Reddendum* differs from an Exception, which is ever of Part of the Thing granted, and of a Thing *in esse* at the Time; but this is of a Thing newly created or reserved out of a Thing demised that was not *in esse* before, so that this always reserves that which was not before, or abridges the Tenure of that which was before.

(B) *Where the Reddendum is necessary or not.*

AN Estate in Fee, for Life or Years, may be good without any Reservation of Rent, except it be in Case of Leases made by Tenants in Tail of their intailed Land, Husbands of their Wives Land, and Churchmen of their Church Land. *Shep. Prec. 98, 99.*

(C) *Of what the Reddendum must be.*

THE *Reddendum* or Reservation must be of another Thing than what is granted, of a Rent or Profit issuing out of the Thing granted, and not any Part of the Thing itself granted; nor can it be out of any other Thing than the Thing granted, or some Part thereof at least. *Shep. Prec. 99.*

Antiently the Reservations were for the most part in Victuals, as Corn, Flesh, &c. but about the Reign of H. 1. the Reservation of Victuals was changed into Money. *Wood, B. 2. c. 3.*

If a Man grants Land, yielding and paying Money, or some such Thing yearly, this is a good Reservation; but if the Grantee covenants to pay such a Sum of Money, or to do such a Thing yearly, this is no good Reservation, but a Covenant to pay a Sum of Money in Gross, and not as a Rent. *Plow. 132.*

If two Tenants in Common make a Lease of their Land, rendring 20 s. Rent, this shall be but one 20 s. and not two 20 s.

So if the Lease be, rendring a Horse or a Hawk; by this they shall have but one Horse and one Hawk, and not two Horses or two Hawks, as it shall be in Cases where they do join in the Grant of such Things out of their Land. *Plow. 271, 289. 10 Co. 106.*

If one makes a Gift in Tail of two Acres of Land, the one at the Common Law and the other in *Borough English*, rendring an Ox to him and his Heirs; and the Donee

Donee having two Sons dies, and the Eldest Son inherits the one Acre, and the Youngest Son inherits the other; in this Case the Donor and his Heirs shall have but one Ox, &c. 10 Co. 106.

If one grants Land yielding for Rent Money, Corn, a Horse, Spurs, a Rose, or any such Thing; this is a good Reservation, but if the Reservation be of the Grass, or of the Vesture of the Land, or of a Common, or other Profit to be taken out of the Land, these Reservations are void. Co. Lit. 142.

If one grants a Manor, Messuage, Land, Meadow or Pasture, or the Vesture, or Herbage of Land, Meadow or Pasture, rendring a Rent, this is a good Reservation.

But if one grants Tithes, Rents, Commons, Advowsons, Offices, a Corody, Mulcture of a Mill, a Fair, Market, Privilege or Liberty, reserving a Rent, this Reservation is void.

And yet such a Reservation in the Case of the King also is good.

And in Case of a Subject also, if a Lease be made by Deed in Writing of any such Thing for a Term of Years, reserving a Rent, this may be good by way of Contract to produce an Action of Debt, tho' not as a Rent to be distrain'd for. Co. Lit. 47. 5 Co. 3. Perk. §. 626.

(D) *Out of what a Reddendum must be.*

THE Reddendum or Reservation must be out of Lands, Houses, or some such corporeal Thing, and cannot be made upon Fairs, Tithes, or any such incorporeal Thing, nor can one Rent be reserved out of another. Shep. Prec. 99.

A Rent cannot be reserved by a common Person out of any incorporeal Inheritance: But if a Lease be made by Deed reserving a Rent, it may be good by way of Contract to have an Action of Debt for it, as a Sum in Gross, tho' not as Rent: But such Rent shall not pass with the Grant of the Reversion, for that it is not incident to it. Co. Lit. 47. a. 142. a. Cro. Jac. 112. pl. 10. T. Raym. 194. Hard. 88.

(E) *To whom a Reddendum may be made.*

THE Reddendum must be made to him who makes the Deed; and if there be two or more Grantors, then to them all, or to one of them at least, for it cannot be made to one who is a Stranger to the Deed. Shep. Prec. 99.

If a Lease be made for Years, rendring a Rent to the Lessor or his Heirs in the Disjunctive, or rendring a Rent to the Lessor, without saying, *and his Heirs*, &c. or rendring a Rent during the said Term, and does not say to whom; or rendring 10*l.* to the Lessor and 5*l.* to his Heirs, all these Reservations are good.

But if a Lease be made, rendring Rent to the Heirs of the Lessor; this Reservation is void, because the Rent is not reserved to himself first. 5 Co. 111. 8 Co. 71. Co. Lit. 214.

And if the Reversion be, rendring so much Rent during the said Term, and doth not say to whom; in this Case it shall be construed to be to him that hath the Reversion, and accordingly it shall be paid, and shall continue during the Term.

But if *A.* be seised of Land in Fee, and makes a Lease for Years of it, rendring Rent to *A.* [without saying to his Heirs, &c.] during the said Term, this Rent shall continue only during the Life of *A.* and no longer.

And yet if *A.* be possessed of a Term only, and makes an Under-Lease or Assignment with such a Reservation, *Quere.* Shep. Touch. 115.

If two Jointenants by Deed Poll, or by Word, make a Lease for Life, reserving a Rent to one of them, this shall go to them both.

So if one of them be Tenant for Life, and the other in Fee, and they join in a Lease for Life or Gift in Tail, reserving a Rent, the Rent shall enure to them both.

But if Tenant for Life and he in Reversion join in a Lease for Life or Gift in Tail by Deed, reserving a Rent, the Rent shall enure to the Tenant for Life only during his Life, and after to him in Reversion. Co. Lit. 214.

If one be possessed of a Term of Years of Land, and grant it by Deed to *J. S.* for his Life, and after his Death to *J. D.* in this Case the whole Term is granted to *J. S.* and his Executors, Administrators and Assigns shall have it, and not *J. D.* But if a Term be so devised by Will, *contra.*

And if one gives or grants to another his Horse, or his Books, for Life, and that after his Death they shall remain to another, the Remainder is void, and the first shall have it for ever; for the Gift or Grant of such a Thing for an Hour, is a Gift of it for ever. 8 Co. 95. 10 Co. 47. Bro. Done 57. Fitz. Done 2.

(F) *How and by what Deed a Reddendum must be made.*

A Reservation may be by Fine as well as by Deed; or it may be in Case where the Lessor has a Reversion of the Land, or upon a Petition to make an Equality without any Deed at all.

But if it be upon an Exchange to make an Equality, it is not good except it be by Deed. Co. Lit. 225. 8 H. 7. 9. Bro. Fine 36. Reservation 4.

If two Jointenants join in the Grant of their Land by Deed indented, and the Rent is reserved to one of them, this is a good Reservation, and shall go to him alone.

But if the Lease be made by Word or by Deed Poll, the Rent shall go to them both. Co. Lit. 214, 143. Dyer 222.

And if a Man possessed of a Term join his Wife with him, and they both assign over their Term by Indenture, rendring a Rent to them two and the Survivor of them, and she does not seal the Deed; in this Case the Reservation as to the Wife is void.

And if the Reservation be of the Rent to a Stranger that is no Party to the Deed, and to him only, this Reservation is void.

And therefore if the Father and his Son and Heir Apparent by Indenture lease his Land for Years, to begin after the Father's Death, rendring Rent to the Son, it is void. Mic. 8 Car. Bland's Case. Hob. 274. 3 Co. Oats and Firth.

A Rent may be reserved upon an Indenture of Bargain and Sale inrolled, according to the Statute of Lands in Fee; for tho' an Use had only passed at the Common Law, yet now by the Statute of Uses, the Use and Possession pass together. Co. Lit. 144. Cro. Eliz. 595. pl. 39. 2 Roll. 448.

(G) *Where the Reddendum is placed in the Deed, and by what Words it is expressed.*

THE Reddendum most commonly and properly succeeds the Tenendum, or Limitation of Estates; but it is as good in Law if it be placed in any other Part of the Deed.

A Reddendum must be by apt Words, in this or the like Form:

Yielding and paying therefore yearly (if it be a Fee-simple, say) for ever hereafter, (if an Estate-tail, say) during the said Estate hereby granted and made, to the said C. D. (if he has the Fee-simple) and his Heirs and Assigns, (or if he has but a Lease for Years) his Executors, Administrators and Assigns, the yearly Rent of — of lawful British Money, at and upon the — Day of — and the — Day of — by even and equal Portions. For more Examples, see the Second Part.

The Reddendum may be made by other Words, as *reserving, rendring, paying,* or others of the like Signification; but the Words of the above Example are most commonly used.

By apt Words, an apt Rent out of Manors and such like memorable Things, or divers Rents may be reserved upon one Grant; as if one grants the Manors of A. B. and C. rendring for A. 20 s. B. 20 s. and C. 20 s. these are good Rents, and several.

So if one grants the Manors of A. B. and C. rendring 3 l. viz. for A. 20 s. for B. 20 s. and for C. 20 s. this is a good Reservation, but in this Case the Rent is intire.

Also one may reserve one Rent one Year and another Rent another Year, as 10 s. one Year, and 20 s. another Year; or one may reserve a Rent to be paid every second or third Year, and no Rent the other Years; or one may reserve one Kind of Rent one Year and another Kind of Rent another Year, and these Reservations are good. Dyer 308. 5 Co. 55. Co. Lit. 47, 164, 213.

If the Reservation be thus: *Yielding and paying* 20 s. during the said Term, omitting the Word [yearly], this shall be taken to be not once only but yearly during the Term, and accordingly it must be paid.

And if a Lease be made for Years, rendring in every Middle of the Year *quolibet medio anni* 20 l. this shall be paid during the Term. 27 H. 8. 19.

(H) *How*

(H) *How the Reservation shall be construed.*

THIS is always taken most in Advantage of the Feoffee, Grantee, Lessee, &c. and against the Feoffor, Grantor, Lessor, &c. and yet so as the Rent be paid during the Time.

If the Reservation be only to the Feoffor, Grantor, &c. and the Deed do not say also, *to his Heirs, Executors, &c.* this Reservation shall continue only for the Lifetime of the Grantor, and shall determine with his Death.

And so also it is where the Reservation is to the Feoffor or his Heirs in the Disjunctive; for in this Case the Rent shall continue only during the Life of the Grantor.

And yet if one makes a Lease for Years, rendring yearly during the said Term to the Lessor, or his Heirs or Executors; this is a good Reservation during all the Term, by Reason of these Words, *during the Term.*

So if the Feoffor or Lessor be seised in Fee, and makes a Feoffment in Fee, or Lease for Life or Years, rendring Rent to the Feoffor or Lessor, or his Executors or Assigns; in this Case the Rent shall continue only for the Life of the Lessor.

But if the Reservation be to the Feoffor or Lessor, or his Heirs and Assigns, in the Copulative or in the Disjunctive, to him or his Heirs, or to him and his Successors (if it be the Lease of a Corporation) during the Term, then all the Assignees of the Reversion shall enjoy it.

And if the Reservation be thus, *Yielding and paying so much Rent*, (without any more Words) this shall be taken for all the Time of the Estate, and shall go to him in Reversion accordingly. *Shep. Touch. 114, 115.*

If one by Deed indented grants Lands to A. To have and to hold to him for Life, the Remainder to B. and the Heirs of his Body, and for Default of such Issue, to remain to D. in Tail, or for Life, yielding therefore yearly, &c. in this Case the Reservation shall extend to all the Estates. *10 Co. 107.*

If a Lease be made the tenth Day of August, rendring Rent at our Lady-day and Michaelmas; in this Case altho' our Lady-day be first named, yet the first Payment shall be at Michaelmas next after the making of the Deed.

If the Reservation be at Michaelmas, or within twenty Days after; in this Case the twentieth Day shall be taken exclusive.

But if the Rent be to be paid at Michaelmas, or by the Space of twenty Days after; in this Case the twentieth Day shall be taken inclusive.

If a Lease be made in December from the Nativity of Christ next for one Year, with this Addition, *Et si in fine dicti anni ambæ partes agreeant quod eadem dimissio foret renovata, tunc habend' & tenend' præmissa dicto J. S. (the Lessee) ab & post dictum festum tunc proxim' sequent' usque finem trium annorum, Reddendo inde annuatim durante dicto termino dict' W. S. &c.* in this Case the Reservation shall relate to both the Terms, and the Rent shall be paid the first Year, altho' they do not agree to renew the Lease. *Shep. Touch. 115.*

If one makes a Lease of Land for Years, if the Lessee live so long, and after the Lessor by his Deed indented doth grant the Land to another, To have and to hold the Reversion to the Grantee for his Life, *cum post mortem, &c. aut aliter accidere vacare, Reddend' inde annuatim* to the Grantor and his Heirs, *cum reversione prædicta acciderit, 9 s. 4 d. per Ann.* in this Case this Reservation of Rent shall not begin before the Reversion happen in Possession. *10 Co. 107, 108.*

If Rent be reserved to be paid at two Terms, and it is not said by equal Portions, yet it shall be so taken, and it must be so paid. *13 H. 4. Avovery 240.*

(I) *Clause of Distress and Nonine poenæ.*

Sometimes a Clause of Distress is added in this Manner: *And it is agreed between the said Parties to these Presents, That if it happen the said yearly Rent of — or any Part thereof, shall be behind and unpaid by the Space of twenty-one Days next after either of the said Feasts or Days of Payment, in which it ought to be paid as afore-said, being lawfully demanded; that then and from thenceforth it shall and may be lawful to and for the said A. B. his Heirs and Assigns, into the said demised Premises, and every Part thereof, to enter, and there to distrain for the said Rent so being behind and unpaid.*

Nomine
pœnæ.

unpaid. (And sometimes is added a Penalty for every Day the Rent is in Arrear, in this Manner :) *As also for twelve Pence of lawful, &c. to be forfeited Nomine pœnæ for every Day wherein the said Rent so in Arrear shall be behind and unpaid after the said twenty-one Days ended, and the Distress and Distresses so then and there taken and found, to lead, drive and carry away, and the same to impound, detain and keep, until the said yearly Rent of — and the Arrears thereof, (and Sums to be forfeited Nomine pœnæ) shall be fully paid and satisfied.*

This Clause sometimes may be, that the Grantor may distrain and sell the Goods to pay the Rent, and the like ; of which see a Variety of Forms in the Second Part.

(K) Clause of Entry on Non-payment, &c.

AND sometimes there is a Clause of Entry on Non-payment of Rent, &c. in this or the like Form: *AND if it shall happen the said C. D. his Heirs and Assigns, shall at any Time hereafter make Default of Payment of the said yearly Rent of — on either of the said Days whereon the same ought to be paid as aforesaid, the same having been duly demanded, or the said C. D. his Executors, &c. shall break any Covenant or Grant contained in these Presents, which on the Part and Behalf of the said C. D. is to be performed, paid and kept, that then and so often it shall and may be lawful to and for the said A. B. his Heirs and Assigns, to enter into all and singular the said Manors, Messuages and Premises, and the same to occupy and enjoy, detain and keep, until the said C. D. his Executors, &c. the said yearly Rents, with the Arrearages thereof, and every Part thereof, shall and will well and truly pay and content to the said A. B. his Heirs and Assigns ; and also until the said C. D. his Heirs, &c. shall have made a reasonable Recompence and Amends to the said A. B. his Heirs and Assigns, of and for the Breach of any Covenant or Covenants so broken, and for any Damage by him or them sustained by reason of the same. See more Forms suitable to different Purposes in the Second Part.*

S E C T. VI.

Of the Condition.

(A) Condition what, and how it differs from a Limitation.

A Condition is a Restraint to an *Act* or *Thing*, rendring it uncertain. A Condition in a Deed or Will is a Clause restraining, staying or suspending some *Act* or *Thing*, whereby it is rendered incertain.

Some define it thus: It is *Modus* an Equality annexed by him that has the Estate, Interest or Right to the Land, &c. whereby an Estate, &c. may either be created, defeated or enlarged upon an incertain Event.

It differs from a Limitation, which is the Bounds or Compass of an Estate, or the Time how long an Estate shall continue.

(B) Kinds of Conditions.

Express.

THERE are divers Kinds of Conditions, some are in *Deed* or *Express*, i. e. when the Condition is expressed by the Party in legal Term, and by express Words in *Writing*, or *without Writing*, annexed to the Estate ; as if I enfeof a Man of Land, rendring Rent at a Day, on Condition that if it be not paid it shall be lawful for me to re-enter.

Implied.

And some are in *Law* or *implied*, i. e. when the Condition is *tacitè* created by the Law without any Words used by the Party.

The Conditions in Law or implied are either by Common Law or by Statute Law. The first Sort are some of them founded on *Skill*, as where an Office is granted there is a Condition *tacitè* implied, that if the Grantee doth not execute it faithfully according to the Trust, the Grantor may put him out.

And some are *without Skill*, as where an Estate is made for Life or Years of Land, there is this Condition implied, that if the Lessee commits Waste, he shall forfeit the

Place wasted; or if the Lessee makes a Feoffment of the Land, he shall forfeit his Estate, and the Lessor shall enter.

And where an Estate is made in Fee of Land, this Condition is implied that the Feoffee shall not alien it in Mortmain.

And these Conditions do sometimes give a Recovery and no Entry, as in the Case of Waste.

And sometimes they give an Entry and no Recovery, as in the Case of Alienation in Mortmain.

In the Case of Exchange also there is a Condition in Law.

Conditions are some of them *precedent* or *executed*, *i. e.* when the Condition must be fulfilled before the Estate can take Effect; as where an Agreement is made between me and J. S. that if he pays me 10 l. at Michaelmas, he shall have such a Piece of Ground of mine for ten Years; or I make a Lease of Land to J. S. for ten Years, provided that if he pays me 10 l. at Michaelmas he shall have the Land to him and his Heirs; in these Cases by the Performance of the Condition the Estate is acquired. Precedent.

And some Conditions are *subsequent* and *executory*, *i. e.* when the Estate is executed, but the Continuance thereof depends upon the Breach or Performance of the Condition; as where a Lease is made for Years, on Condition that the Lessee shall pay 10 l. to the Lessor at Michaelmas, or else his Lease shall be void; in this Case by the Performance of the Condition the Estate is held and kept. Subsequent.

These Conditions also are some of them in the *Affirmative*, *i. e.* do consist of doing; as providing that the Lessee shall pay the Rent, or pay 10 l. to the Lessor, &c. Affirmative.

And some are in the *Negative*, *i. e.* consist of not doing; as provided that the Lessee shall not alien, &c. Negative.

And some of them are in the *Affirmative*, which imply a *Negative*; as provided that if the Rent be unpaid, that the Lessor shall re-enter, which implieth a *Negative*, *viz.* not paid.

Conditions also are some of them *collateral*, *i. e.* when the Act to be done is a *Collateral* collateral Act, as that the Party shall pay 10 l. go to Rome, or the like.

And some are *inherent*, *i. e.* such as are annexed to the Rent reserved out of the Land whereof the Estate is made. Inherent.

And some of them also are *restrictive*, and contain a *Restraint*; as that the Lessee shall not alien or do Waste, or the like. Restrictive.

And some are *compulsory*; as that the Lessee shall pay to the Lessor 10 l. such a Day, or his Lease shall be void. Compulsory.

And some of them are *single*, *i. e.* to do one Thing only; and some *Copulative*, *i. e.* to do divers Things; and some *Disjunctive*, *i. e.* when one Thing of divers is required to be done. Single.
Copulative.
Disjunctive.

And some Conditions make the Estate whereunto they are annexed *voidable* only by Entry or Claim. Voidable.

And some of them make the Estate *void ipso facto* without Entry or Claim. Void.

And sometimes they tend to *destroy* Estates, sometimes to *make* or to *enlarge* Estates, and sometimes neither to make nor destroy, but only to *clog* Estates; as where a Lease is made, rendering Rent on a Day, on Condition if it be not paid, that the Lessor shall enter on the Land and keep it till the Rent be paid. To destroy,
enlarge and
clog Estates.

And by all these Ways Conditions may be lawfully made. *Lit. §. 327. Co. Lit. 201. 8 Co. 43.*

(C) The Nature of a Condition expressed, and of a Limitation.

THE Nature of an express Condition annexed to an Estate in general is this; that it cannot be made by nor reserved to a Stranger, but it must be made by and reserved to him that makes the Estate.

And it cannot be granted over to another except it be to and with the Land or Thing unto which it is annexed and incident. And so it is not grantable in all Cases, for the Estates of both the Parties are so suspended by the Condition, that neither of them alone can well make any Estate or Charge of or upon the Land; for the Party that parts with the Estate, and has nothing but a Possibility to have the Thing again upon the Performance or Breach of the Condition, cannot grant or charge the Thing at all.

And if he that has the Estate grants or charges it, it will be subject to the Condition still; for the Condition always attends and waits upon the Estate or Thing whereunto it is annexed; so that altho' the same passes through the Hands of an hundred Men, yet is it subject to the Condition still, and notwithstanding some of them be Persons privileged in divers Cases, as the King, Infants and Women Covert, yet they also are bound by the Condition.

And a Man that comes to the Thing by Wrong, as a Disseisor of Land whereof there is an Estate upon Condition in Being, shall hold the same subject to the Condition also.

And when the Condition is broken or perform'd, &c. the whole Estate shall be defeated.

So that if there be a Lease for Life made by Deed and not by Will, the Remainder over in Fee, on Condition that the Lessee for Life shall pay 10 l. to the Lessor; if the Lessee pays not this 10 l. the Estate in Remainder is avoided also. *Et sic e converso*, unless by special Limitation it be otherwise provided; as if A. grants by Indenture Land to B. for Life, the Remainder to C. in Fee, rendring Rent to A. and his Heirs; with Condition that if the Rent be behind, to re-enter and retain the Land during the Life of B. and no more; and A. enters in the Life-time of B. for Non-payment, this does not destroy the Remainder. *Shep. Touch. 120.*

And if Tenant for Life and he in Remainder join in a Feoffment, on Condition that if, &c. that then the Tenant for Life shall re-enter; this is good without defeating the entire Estate, for regularly a Condition cannot avoid a Part of an Estate only, and leave another Part entire; neither can the Estate be void as to one Person and good as to another, (except it be in the Case of a Condition annexed to an Estate limited by way of Use, as in *Frances's Case*, 8 Co. 90.) *Shep. Touch. 120, 121.*

And yet if A. makes a Gift in Tail to B. the Remainder to B. in Fee, upon Condition not to alien, and B. aliens; this doth defeat the Estate-tail only, and not the Remainder.

Also the whole Estate of the Whole and not of some Part only shall be avoided, except by Agreement the Condition be especially restrain'd to some Part, and the Re-entry given in that Part only; as where a Feoffment is made of two Acres of Land, on Condition that if such a Thing happens, the Feoffor shall enter into one of them.

And further, when he that has Right re-enters by Force of such Condition, he shall avoid all Charges and Incumbrances put upon the Land after the Condition made; for he that enters into Lands by Force of such a Condition, must have it again in the same Plight as it was when he parted with it.

And a Condition for the most part will not determine the Estate without Entry or Claim.

So that howsoever a Limitation hath much Affinity and Agreement with a Condition, and therefore sometimes it is called a Condition in Law, both of them do determine an Estate in Being before, and a Limitation cannot make an Estate to be void as to one Person and good as to another; as if a Gift be made in Tail to one and his Heirs Male until he does such a Thing, and then his Estate to cease and go to another; yet herein they differ.

First, A Stranger may take Advantage of an Estate determined by Limitation, but he cannot upon a Condition.

Secondly, A Limitation always determines the Estate without Entry or Claim, but a Condition does not. *Shep. Touch. 121.*

(D) *What shall be said a Condition in Law, and when an Estate shall be subject to such a Condition.*

TENANTS by the Curtesy, in Tail, after Possibility of Issue extinct, in Dower, for Life, for Years, by Statute or *Elegit*, *Gardian*, &c. do hold their Estates, subject to a Condition in Law; so that if any of them aliens his Land in Fee, or claims a greater Estate in a Court of Record than his own, he forfeits his Estate, and he in Remainder or Reversion may enter; and if such a Tenant does Waste, he in Reversion shall recover the Place wasted.

The Tenant in Fee-simple holds his Estate subject to a Condition in Law; so that if he aliens his Land in Mortmain he forfeits it, and the Lord may enter upon him. So

So also he that takes Land in Exchange holds it under a Condition in Law; so that if he aliens his Land in Mortmain he forfeits it, and the Lord may enter upon him.

So also he that takes Land in Exchange holds it under a Condition in Law, viz. that if the Land be given in Exchange for that Land he recover'd from him that has it, that he shall enter upon his own Land again.

Also every Officer that acts in the Administration of Justice, all Keepers of Parks, Stewards, Beadles, Bailiffs, and such like, hold their Offices under a Condition in Law; so that if they do not duly execute it, and do all that thereto appertains, they may forfeit them, and the Grantor may put them out. *In quo quis delinquit in eo est de jure puniendus.* Co. Lit. 233, 234. 8 Co. 44.

(E) Upon what Act a Condition may be created.

A Tenant cannot attorn to the Grant of a Seigniorship upon Condition subsequent, because it is but a Consent, no Interest passes from him; *secus* upon a Condition precedent. Co. Lit. 274, 300. b. Vide 15 Ed. 3. Aff. 95.

So Executors cannot agree upon Condition to a Legacy. 4 Co. 28. b.

But a Patron, in Respect of his Interest, may assent upon Condition to charge the Glebe of the Parson. Co. Lit. 300. b.

A Licence to alien cannot be upon a Condition subsequent; *secus* as to a Condition precedent, because in such Case it is no Licence till the Condition performed. Poph. 106.

A Disseisor may release his Right to the Disseisor upon Condition. Co. Lit. 274. b. Kelw. 88. a. 89. a.

But a Condition cannot be released upon Condition. Co. Lit. 274. b. 9 Co. 85. b.

An express Manumission of a Villein cannot be upon Condition, for once free and ever free. Co. Lit. 274. b.

Letters Patent of Denization of an Alien, may be upon Condition precedent or subsequent. Co. Lit. 274.

But a Naturalization by Parliament cannot be upon Condition, for it is against Absoluteness, Purity and Indebility, of natural Allegiance. Co. Lit. 129. a.

A Parson cannot resign upon Condition, because it is a judicial Act, to which no Condition can be annexed, any more than an Ordinary can admit, or a Judgment be confessed upon Condition. Ow. 12.

(F) Where the Cause or Consideration of the Grant will make a Condition.

If one grants an Annuity *pro Acra Terræ*, the Word *pro* shews the Cause of the Grant, and amounts to a Condition; for if the Acre be evicted by an elder Title, the Annuity shall cease. Co. Lit. 204. b.

So if an Annuity is granted *pro decimis*, &c. and the Grantee is unjustly disturbed of the Tithes, the Annuity ceases. Co. Lit. 204. a.

But if one makes a Feoffment, Lease for Life, &c. *pro Consilio impenso*, &c. or *pro una Acra Terræ*; tho' he denies Council, or the Acre be evicted, yet he shall not re-enter, for the Estate being executed, it shall not be avoided without legal Words of Condition. Co. Lit. 204. a.

(G) What may be made upon Condition, and to what Things Conditions may be annexed or not.

It is a general Rule, that when a Man hath a Thing he may Condition with it as he will.

Conditions in a Deed therefore may be annexed to Things inheritable to Freeholds, or to Chattles Real and Personal. Perk. §. 707.

As for Example; if a Feoffment in Fee, Gift in Tail, or Lease for Life, be made of Lands or Tenements, or a Grant be of a Rent, Common, or the like, in Fee-simple, Fee-tail, or for Life; these Things may be done upon Condition.

So a Lease for Years of Land, or a Grant of Rent, &c. for Years, may be made upon Condition.

And

And a Lease may be made for five Years, on Condition that if the Lessee pay to the Lessor within the first two Years ten Marks, that then he shall have the Fee, otherwise but for five Years.

Also a Guardian in Chivalry may grant the Wardship of the Body and Land, or either of them, on Condition.

A Tenant by Statute Merchant, Staple or *Elegit*, may grant their Estates upon Condition.

The Lord may grant his Seigniorship to his Tenant on Condition.

The Tenant for Life may grant his Estate to his Lessor, or to him in Reversion, upon Condition.

The King may make Letters Patent of Denization to an Alien, or a Charter of Pardon to a Man for his Life, upon Condition.

Also Releases and Confirmations may be made upon Condition.

And a Submission to an Award may be upon a Condition.

But an Institution to a Benefice, or an Induction, may not be on a Condition.

An Attornment, or an express Manumission of a Villain, cannot be upon a Condition subsequent, as it may be on a Condition precedent.

And some hold that a Condition cannot be released upon a Condition.

But the contrary is held by others clearly, and that there is no Difference between this and a Release of a Right. *Ideo Quære.*

An Award cannot be made on a Condition, as was held in *Shirer's Case*, 35 *Eliz.*

A Contract or Sale of a Chattel Personal, as an Ox, or the like, may be upon Condition; as if *A.* sells his Horse to *B.* that if *A.* do such an Act, then that *B.* shall pay 5 *l.* at the Day agreed upon, otherwise but 4 *l.*

So if I agree with a Physician, that if he cures such a Disease he shall have so much; and in this Case he cannot have the Money until he has done the Cure.

As where I promise a Man 10 *l.* when he has built such a House; in this Case he cannot have the Money until the House be built.

Also Retaining of Servants, Delivery of Charters or Deeds, and divers other Things, may be done upon Condition.

And if an Executor assent to a Legacy upon a Condition, the Assent is good, but the Condition is void. *Shep. Touch.* 119.

A Feoffment of two Acres upon Condition, and for Breach that he may re-enter but in one, is good. 1 *Roll. Abr.* 412.

A Tenth may be granted by the Clergy to the King upon Condition. *Ibid.*

If a Copyholder surrenders to the Lord to make his Will, upon Condition that he shall pay him 10 *l.* this is a good Condition. 1 *Roll. Abr.* 413.

A Contract may be upon Condition. *Ibid.*

(H) *How and by what Deed a Condition may be created and annexed.*

Conditions annexed to Estates are most frequently and safely made by Deed in Writing; yet it seems such Conditions may be made and annexed to any Estate of a Thing grantable without Deed without any Writing at all; however in some Cases it cannot be well pleaded nor used without a Deed, for it is a Rule, that if a Condition be pleaded in any Action to defeat a Freehold, the Deed wherein the Condition is contained must be shewed.

But of Chattels Real, as Leases for Years, and the like, or Grants of Chattels Personal, a Man may plead that such Leases and Grants were made upon Condition without shewing the Deed.

And in the first Case also of a Condition to avoid a Freehold, it may be given in Evidence to a Jury, and they may find the Matter at large as it is, and so the Party may have Advantage of the Condition without shewing any Deed of it.

Also the Pleading of a Feoffment in Fee, on Condition without Deed and Re-entry, is good if the Party confesses the Condition. *Shep. Touch.* 119, 120.

A Release of all one's Right may be upon Condition. 17 *E.* 3. 2. *b.* *Co. Lit.* 274. *b.* 30. *b.*

If a Copyholder surrenders to the Lord to make his Will, upon Condition to pay 15 *l.* this is a good Condition. *M. 2 Jac. C. B. Garden's Case.*

A Lessee may surrender upon Condition. 14 *Ed.* 4. 6. 4 *Co.* 82. *Br. Condition* 156.

A Confirmation may be upon Condition. 5 *Co.* 81.

A Devise of Lands devisable, was good at the Common Law upon Condition.

1 Roll. Abr. 412.

A Devise of an Use at Common Law was good upon Condition. *Ibid.*

A Devise within the Stat. 32 & 34 H. 8. may be upon Condition, because that Statute gives Liberty to Devise at Pleasure. *Ibid.*

A Man cannot release a Personal Thing as an Obligation upon a Condition subsequent; but the Condition will be void, because a Personal Thing being once suspended is perpetually extinguished. *Ibid.* Vide 1 Roll. Abr. 940.

But a Man may release a Personal Thing, as an Obligation, or such like, upon a Condition precedent; for there the Action is not suspended till the Condition performed. 1 Roll. Abr. 412.

A Condition written on the Back of a Lease before the Execution, is good. Cro. Jac. 456. See vide 2 Roll. Abr. 22. pl. 1.

A Condition to perform a Matter of Fact, without Writing, is good. 1 Roll. Abr. 413.

As in an Indenture, a Man may bind himself upon a Condition to perform all the Covenants between them made for the Permutation of a Benefice, of which there is no Writing. *Ibid.*

A Man may aver a Lease for Years to be upon Condition, and plead the Condition without shewing the Deed thereof, because it is but a Chattel. *Ibid.*

A Man may plead, that a Lease for Years of Land, or a Grant of a Ward, was made by Guardian in Chivalry upon Condition, &c. without shewing any Writing of the Condition, because it is but a Chattel Real. Lit. §. 365.

So it is of Chattels Personal and Personal Contracts. Lit. §. 365.

But a Man by Plea shall not defeat a Freehold by Force of a Condition without shewing a Deed. Lit. §. 365. Co. Lit. 225.

Otherwise if a Condition annexed to a Freehold be found by a Jury. Lit. §. 366. Co. Lit. 226. Kelw. 137. a.

If a Condition has false Latin in it, yet if any Sense may be intended in it by the Words within the Condition, it shall be good. 20 H. 6. 32.

If one grants a Rent for Life, a Condition cannot be annexed to it, unless it be by Deed. 33 Aff. 2. Br. Verdict 64. Fitz. Verdict 42.

If A. agrees with B. to make a Feoffment to him upon Condition, and after makes a Deed of Feoffment without any Condition, and afterwards makes Livery *secundum formam Chartæ* without any Condition; this is absolute without any Condition; for the Livery is not made according to the Agreement but according to the Deed. Fitz. Affise 311.

But if A. agrees to enfeoff B. in Surety of the Payment of certain Money, and afterwards makes Livery to him and his Heirs generally, the Estate is held by some to be upon Condition, inasmuch as the Intent of the Parties was not changed, but continued at the Time of the Livery. Co. Lit. 222. b.

If a Man makes a Deed of Feoffment to another, and in the Deed there is no Condition; but when the Feoffor would make Livery of Seisin to him by Force of the Deed, he expressing the Estate, makes Livery of Seisin unto him upon Condition, the Feoffment is of like Force as if no such Deed had been made. Lit. §. 359. Co. Lit. 222. b.

A Condition cannot be reserved without Deed indented. 1 Roll. Abr. 414.

If it be by Deed Poll, and the Feoffor, &c. gets it into his Custody, he may plead the Condition against the Feoffee, &c. Lit. §. 375. Co. Lit. 231.

A Corody granted for Life, *secundum quod prius per J. H. & alios usitat' fuit*; and avers the Use to have been, that every one who has it shall attend upon the Master four Times in the Year, otherwise shall forfeit it: This is a good Condition which refers to other Matters, though not shewed in certain that they were done. Bro. Condition 167.

If an Annuity be granted *pro consilio & auxilio habendis*, and does not mention in what Matter it shall be, yet it may be averred he was a Physician, or a Lawyer, and was granted for his Counsel and Aid therein. Bro. Annuity 7. Fitz. Annuity 19.

So if the Grantee be learned in two Sciences, yet he may aver the Grant was for one in certain. Fitz. Annuity 19.

(I) *To what Things a Condition shall extend.*

IF a Lease for Years be made, rendring for the two first Years 10*l.* and after 30*l.* yearly, provided that if the Rent of 30*l.* or any Part thereof be behind, the Lessor may enter; it was said, that if the 10*l.* is behind the Lessor may enter, for the 10*l.* is Part of the Rent, for it is but one Rent. 4 *Leon.* 8.

If a Man who has certain Walks in a Forest of Inheritance, gives one Walk called *B.* to *J. S.* in Tail, and dies, and his Heir recites the said Grant and confirms it, and by the same Deed grants another Walk called *S.* in the same Forest to him and his Heirs, *Proviso* that the said *J. S.* shall not cut any Trees *in aliqua parte premissorum in indentura predicti specificatorum*; the Condition shall extend to the Walk called *B.* so that if he cuts any of the Trees in his Walk, the Grantor may enter for the Condition broke, into the Walk called *S.* for the Word *Premisses* comprehends as well that which is confirmed, as that which is granted. 1 *Roll. Abr.* 422.

If *A.* be in Execution at the Suit of *B.* and *B.* upon good Consideration affirms to *J. S.* that he will not discharge *A.* without his Consent, and after *A.* and *B.* agree, that *B.* shall make a Release to him of the Execution, and deliver him; and that *A.* shall enter into an Obligation, with Condition to save *B.* harmless from all Suits, &c. that may arise upon the Release of the said *A.* being in Execution at the Enfealing thereof, at the Suit of the said *B.* in such a Sum, from all Persons which may any way Trouble the said *B.* touching or concerning the said Release, that then, &c. and after all this is done accordingly, and *J. S.* brings an Action on the Case against *B.* upon his Promise, and recovers; *A.* ought to save him harmless, otherwise the Condition is broke, for this arises by Reason of the said Release, and so within the Words, tho' the Promise made to *J. S.* was the Cause of the Action of *J. S.* *Ibid.*

If a Man makes a Gift in Tail to *A.* the Remainder to *A.* and his Heirs, upon Condition that he shall not alien: The Condition is good as to restrain any Discontinuance of the Estate-tail, but as to the Fee-simple it is void and repugnant; and therefore some are of Opinion that this is a good Condition, and shall defeat the Alienation for the Estate-tail only, and leaves the Fee-simple in the Alienee. *Co. Lit.* 224. *a.*

By special Words the Condition may extend to the particular Estate, or to the Remainder only. *Co. Lit.* 230. *b.*

There are several Incidents to an Estate-tail, not to be restrained by Condition, the Incidents are,

First, To be dispunishable of Waste.

Secondly, That the Donee's Wife shall be endowed.

Thirdly, That the Husband after Issue shall be Tenant by the Curtesy.

Fourthly, That the Tenant in Tail may suffer a Recovery.

And therefore a Gift in Tail, with Condition to restrain any of these Incidents, is void. *Co. Lit.* 224. *a.* 6 *Co.* 41. 1 *Co.* 14. *a.* 85. *a.* 86. 9 *Co.* 128. *b.* 10 *Co.* 38. *b.* 1 *Jones* 58. *Cro. Jac.* 697. 1 *Vent.* 322. 1 *Roll. Abr.* 418.

(K) *Incidents that a Condition to create an Estate ought to have.*

THERE are four Incidents that a Condition to create an Estate ought to have. *First*, It ought to have a particular Estate, as a Foundation whereupon the Increase of the greater Estate shall be built.

Secondly, That such particular Estate shall continue in the Lessee or Grantee until the Increase.

Thirdly, This must be at the Time when the Contingency happens, or else it shall never vest.

Fourthly, The particular Estate and the Increase must take Effect by the same Deed, or by several Deeds delivered at the same Time. 8 *Co.* 75. *a.*

(L) *To what Persons a Condition may be reserved.*

A Condition cannot be reserved but on the Part of the Feoffor, Donor or Lessor.
Dy. 6. a. b. pl. 2. Lit. §. 347. Co. Lit. 214.

If Tenant for Life and the Reversioner join in a Feoffment, the Condition may be reserved to the Lessee only, and by his Re-entry he shall devert but his Estate.
1 Roll. Abr. 407.

If *A.* enfeoffs *B.* upon Condition that if the Heir of *A.* pays to *B.* *£c.* 20 *s.* then he and his Heirs may re-enter; this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A.* himself never can. *Co. Lit. 214. b.*

If a Man gives Lands to his Eldest Son in Tail, the Remainder to his second Son in Tail, *£c.* upon Condition that if the Eldest Son, or any of his Issue aliens, the Land shall remain to the second, *£c.* the Consequence of the Condition, that the Land should remain to another, is void, tho' upon such Alienation the Donor himself might enter. *Co. Lit. 379. a.*

(M) *When a Person to whom a Condition is not certainly designed, the Law shall say who it shall be.*

IF a Man devises Land to *A.* upon Condition, the Remainder to *B.* in Tail, saving the Fee, and dies: The Condition here is, by Implication of the Law, reserved to the Heir; for by Intendment, he shall have the Condition who is prejudiced by the Devise, who is the Heir. *Dyer 3. 1 Roll. Abr. 407.*

A Condition to make the Obligee a Lease for Life by such a Day, or pay 100 *l.* the Obligee died before the Day, his Executor shall have the 100 *l.* *Salk. 170. p. 2.*

(N) *Of the Manner, Frame and Order of making a Condition.*

TO every good Condition is required an external Form, *i. e.* Words to declare an Intent in the Party to have the Estate conditional.

And an internal Form, *i. e.* such Matter as whereof a Condition may be made.

As to Things executed, the Condition must be made and annexed to the Estate at the Time of the making of it, but as to Things executory, it may be afterwards made.

And if the Condition be made in another Deed, and not the same Deed wherein the Estate is made; if it be deliver'd at the same Time, it is as good as if it were contained in the same Deed.

And therefore if a Man makes a Feoffment, Lease, or the like, by one Deed absolute, and at the same Time makes another Deed of Defeasance or Condition, and delivers both together, this is a good Condition, and will make the Estate conditional.

But if the Defeasance be sealed and delivered before or after the Deed, *contra.*

And therefore if one makes an absolute Feoffment in Fee, and before or after the Sealing or Delivery of that Deed the Feoffor declares himself by Deed, or the Feoffor and Feoffee agree by Deed that the Estate made before, or to be made after, shall be conditional, yet this is not conditional.

And yet if an Annuity be granted absolutely by one Deed, and after the Grantee grants to the Grantor, that if the Grantor do such a Thing, the Annuity shall cease; in this Case the Annuity is conditional. *Co. Lit. 146. Perk. §. 717. 1 Co. 113. 2 Co. 7. Plow. 113.*

A Condition may be annexed to an Estate by way of Use; as if a Feoffment be made to *A.* to the Use of *B.* and his Heirs, on Condition that *B.* shall pay to the Feoffor 20 *l.* such a Day; this is a good Condition.

So if one covenants to stand seised of Lands to the Use of *B.* and his Heirs, on Condition that if he pays him 10 *l.* the Use shall be void, or the like.

Also a Condition may be annexed to an Estate created by Will; as if one devises Land to *J. S.* for Life, provided that he pay 10 *l.* yearly to *J. D.* this is a good Condition. *1 Co. 112. Dyer 126, 348.*

A Rent or any such Thing may be granted on Condition that if such a Thing be or be not done, the Rent shall cease for a Time, and then revive again; and this Condition is good.

But

But in Case of Land it is otherwise, for that cannot be granted after this Manner. Also a Condition to make an Estate void for a Part of the Time, is not good.

And therefore if a Feoffment be on Condition, that upon such a Contingent the Feoffor shall enter and have the Land for a Time, or the Estate shall be void for Part of the Time; or makes a Lease for ten Years, provided that upon such a Contingent it shall be void for five Years; these Conditions are not good.

And yet if a Feoffment be made of two Acres, provided that upon such a Contingent the Estate shall be void as to an Acre only, this is a good Condition. 1 Co. 86. 8 Co. 17. 4 Co. 121. Dyer 6.

A Condition that a Stranger, or the Heir of the Feoffor, shall do an Act, is good as if a Feoffment be made to J. S. on Condition that J. D. shall pay to the Feoffor at Easter next 10 l. or if a Feoffment be made on Condition, that if the Heir of the Feoffor pays 20 s. to the Feoffee, that the Feoffor and his Heirs shall re-enter.

But a Condition to give a Stranger a Re-entry, is void.

And therefore if an Estate be made upon Condition, that upon such a Contingent a Stranger shall enter, or the Estate shall cease, and another shall have it; howsoever this may be so drawn as it may be a good Condition to give him, his Heirs, &c. who makes the Estate an Entry, yet it cannot be good to give the Estate or the Entry to the Stranger.

So if a Feoffment be made on Condition, that upon such a Contingent the Feoffor and a Stranger shall enter; this is not good to give an Entry to the Stranger, but it is good to give the Feoffor a Re-entry.

And yet by Will a Man may Devise a Term after this Manner. Co. Lit. 214, 379. Doct. & Stud. 94, 100, 159. 1 Co. 84. 8 Co. 95. Dyer 33.

If a Man enfeoffs another, upon Condition that he and his Heirs shall render to a Stranger and his Heirs a yearly Rent of 20 s. &c. and if he fails of Payment thereof, that the Feoffor shall re-enter; altho' this is a Reservation of Rent, it is merely void, and the Condition that calls it a Rent is merely mistaken; yet the Condition is good, & ut res valeat the Words shall be taken contrary to their proper Sense. Co. Lit. 213.

If I enfeoff J. S. of Land, on Condition that if J. D. gives to him 10 l. or go to Rome before such a Day, &c. that then the Feoffee shall pay to me 10 l. &c. this is a good Condition. Perk. §. 798.

If a Feoffment be made to one and his Heirs, on Condition that if the Feoffee pays to the Feoffor 10 l. he shall have the Fee of Land, this is not a good Condition; but if he say further, and if he fails to pay, that the Feoffor shall re-enter, this is good. Co. Lit. 207.

If a Gift in Tail be made to a Man and the Heirs of his Body, and if he dies without Heirs of his Body, that then the Donor and his Heirs shall re-enter; this is a void Condition, for when the Issues fail, the Estate is at an End. Co. Lit. 224.

Conditions that are so penned as they are insensible and altogether incertain, are void.

And if one makes a Lease, on Condition that if the Rent be behind to restrain, and if there be not sufficient, on the Ground to enter into the Premises; this Condition is void for Insensibility, and the Estate is absolute, & sic de similibus. 6 Co. 41.

(O) *At what Time a Condition may be created.*

IF a Disfeisee releases to the Disfeisor all his Right, and at a Day after the Disfeisor by Indenture grants, that if he pays so much at a Day certain, the Release shall be void; this is a void Condition as to revive the Right of the Disfeisee, for Inheritances executed cannot be defeated by a subsequent Defeasance. Br. Conditions 115. Co. Lit. 236.

But a Release, Feoffment, &c. where the Estate is executed, it is not to be defeated by Condition or Defeasance, unless contained in the same Deed, or in another made at the same Time. Co. Lit. 236. b. 2 Sand. 48.

And such a Condition as before mentioned may be created at the same Time that the Release was made, tho' it be by another Deed. Br. Conditions 115. 2 Co. 74. a.

Rents, Annuities, Warranties, &c. (being Inheritances executory) may be defeated by a Defeasance made at the same Time, or at any Time after. Co. Lit. 237. a.

(P) *Where placed in a Deed, and by what Words expressed and created.*

A Deed without any Condition in it, is as good as a Deed with a Condition. And when it is in a Deed it has no proper Place assigned it, but it may be in any Part of the Deed, yet for the most part it is placed next after the *Habendum*, or next after the *Reservation* of the Rent.

It is also sometimes annexed to and depending upon Estates, and sometimes annexed to and depending upon Recognizances, Statutes, Obligations, Contracts, and other Things; Conditions are also contained in Acts of Parliament and Records.

The most apt Words wherewith to make a Condition in a Deed are, *Provided always, So as, or Upon Condition*; and yet other Words of like Sense and Signification may make a Condition, as, *If it happen, &c.* but then this must follow, *That then this Estate, (Lease, Deed, or the like) shall be void, and it shall be lawful for the said A. B. &c. to re-enter, &c.*

Conditions annexed to Estates are sometimes so placed and confounded amongst Covenants, sometimes so ambiguously drawn, and at all Times have in their Drawing so much Affinity with Limitations, that it is hard to discern and distinguish them.

Therefore for the most part Conditions have conditional Words in their Frontispiece, and begin therewith; and amongst these Words there are three Words that are most proper, which in and of their own Nature and Efficacy, without any Addition of other Words of Re-entry in the Conclusion of the Condition, make the Estate conditional, as *Proviso, Ita quod & Sub conditione*.

And therefore if A. grants Land to B. To have and to hold to him and his Heirs, *Provided that, or So as, or Under this Condition, That B. pays to A. 10 l. at Easter next*; this is a good Condition, and the Estate is conditional without any more Words.

But there are other Words, as *Si, Si contingat*, and the like, as will make an Estate conditional also; but then they must have other Words joined to them, and added to them in the Close of the Condition; as *That then the Grantor shall re-enter, or That then the Estate shall be void, or the like.*

And therefore if A. grants Lands to B. To have and to hold to him and his Heirs, *and if, or but if it happen the said B. does not pay to A. 10 l. at Easter*, without more Words, this is no good Condition; but if these or such like Words be added, *that then it shall be lawful for A. to re-enter*, then it will be a good Condition. 2 Co. 10. Co. Lit. 204. 27 H. 8. 16. Lit. §. 328, 329, 330, 331.

But these Words, *Proviso, Ita quod, & Sub conditione*, altho' they be the most proper Words to make Conditions, yet they do not always make the Estate by the Deed to be conditional, but sometimes serve for other Purposes; for the Word *Proviso* has divers Operations besides, for sometimes it serves for and works a Qualification or Limitation, and sometimes it serves to work and make a Covenant only.

Therefore observe, that its being inserted amongst the Covenants of a Deed, it only makes the Estate conditional when there are these Things in the Case.

First, When the Clause wherein it is has no Dependance upon any other Sentence in the Deed, nor participates with it, but stands originally by and of itself.

Secondly, When it is compulsory to the Feoffee, Donee, &c.

Thirdly, When it comes on the Part and by the Words of the Feoffor, Donor, Lessor, &c.

Fourthly, When it is applied to the Estate, and not to some other Matter; as if one grants a Manor with an Advowson appendant, and after the *Habendum* and Reservation of Rent amongst the Covenants there is this Clause inserted, thus, [*Provided that the Grantee shall re-grant the Advowson for the Life of the Grantor*] this is a good Condition.

And it may be also a Condition and a Covenant; as if the Words run thus: *Provided always and the Feoffee, &c. doth covenant, &c. that neither he nor his Heirs shall do such an Act*; this is both a Condition and a Covenant.

But if the Clause have Dependance on another Clause of the Deed, or be the Words of the Feoffee, &c. to compel the Feoffor to do something, then it is not a Condition but a Covenant only; as if there be in the Deed a Covenant that the Lessee shall scour the Ditches, and then these Words follow, *Provided that the Lessor shall carry away the Earth*; or there is a Covenant that the Lessee shall repair the Houses, and then these Words follow, *Provided that the Lessor do provide Timber.*

So if this Clause be applied to some other Thing, and not to the Thing granted, then it is no Condition; as if a Lease of Land be made, rendring Rent at B. *Provided that if such a Thing happens it shall be paid at C.* this does not make the Estate conditional.

Or if a Lease is made for Years without Impeachment of Waste, *Proviso quod non prosterneat domus voluntarie*; in this Case this does make the Privilege, yet it does not make the Estate conditional; or if a Lease is made for Years, rendring Rent, *Provided that the Lessor shall not distrain for the Rent*; this is a good Condition, but not annexed to the Estate. *Co. Lit.* 146. 2 *Co.* 70. *Dyer* 6, 152, 311, 222. *Plow.* 136. 5 *H.* 7. 7. *Perk.* §. 732.

So if in a Deed of Bargain and Sale of Land after the *Habendum* there are these Words, *viz. Upon these Conditions following, viz. that if the Vendor pays the Vendee 20s. at Easter, and encloses him of a Meadow called S. before Whitsonide, that the Bargain shall be void; Provided nevertheless that the Bargainor shall hold the Land for twenty Years without the Let of the Bargainee*; this *Proviso* makes a Condition. *Dyer* 318.

So if a Lease be made of a House, and amongst the Covenants these Words are inserted, *Provided also that if the Lessor will dwell upon it, or keep it in his Hands, then the Lessee, his Executors and Assigns, doth covenant upon one Year's Warning to remove and give Place to the Lessor, this Lease notwithstanding*; this is no Condition, but a Covenant only. 27 *H.* 8. 15. *Bro. Condition* 7.

If a Lease be made, *Provided that if the Rent be behind, without any more Words*, this is no good Condition. *Muddy's Case*, *Pas.* 14 *Jac.* B. R.

Neither does the Word *Si* always make a Condition, for sometimes it makes a Limitation; as when a Lease is made for Years, *If J. S. shall live so long.*

There are other Words also that in the King's Grants, in last Wills and Testaments, and other special Cases, do make Conditions; as *Ea intentione, ad effectum propositum, intentionem*, paying, and the like.

So that if one devises his Land to J. S. *Ea intentione, &c. that he shall pay to W. S. 10l. or paying, or so as he pays to W. S. 10l. or to sell, &c.* these are good Conditions.

But these Words regularly do not make a Condition when they are used in Deeds; and therefore if one makes a Feoffment in Fee, *Ea intentione, ad effectum, &c. that the Feoffee shall do or not do such an Act*; these Words do not make the Estate conditional, but it is absolute notwithstanding.

And yet perhaps these Words being conjoined with some others may make a Condition; as if Lands be granted *Ea intentione quod si defecerit, &c. tunc quod reintret*, or the like. *Co. Lit.* 204, 236. *Doct. & Stud.* 34, 122. *Dyer* 318, 138. *Plow.* 142. 7 *H.* 4. 22. 10 *Co.* 42.

Also Conditions are sometimes made specially in Estates and Leases for Years without any of these formal Words, when the apparent Intent of the Lessor is to make the Estate conditional, altho' the Words be not used as the Words of the Lessor, but as the Words of the Lessee, or indefinitely of neither.

And therefore it has been said, that if an Indenture be made between A. and B. thus: *It is agreed and covenanted between the Parties aforesaid, that B. shall have the Land for ten Years, and that he shall not alien it*; that this Estate is conditional, but it seems this is not Law.

But if this Clause be inserted amongst other Covenants, *viz. If the Lessee binders the Lessor to sell, cut and carry away the Trees upon the Lands devised, that the Lessor may re-enter, and the Lease shall be void*; this is a good Condition, and so it hath been adjudged in the Case of *Haward and Fulchor*, *Hil.* 3 *Car.* B. R.

And if a Lessee for Years covenants in his Lease, that if he, his Executors or Assigns, shall alien, that it shall be lawful for the Lessor to re-enter; it seems this is a good Condition, and not a Covenant only.

And if a Lease for Years be made, and this Clause is inserted in the Deed, *It is agreed between the Parties, that if the Lessee does not pay 10l. to the Lessor at Easter, that from thenceforth the Lease shall be void*; this is a good Condition.

And if a Lease be made with this Clause inserted in the Deed, *It is agreed that whosoever shall have the Estate or Interest, that he or they shall find Sureties within the Year for the Rent, otherwise the Estate shall cease*; it seems this is a good Condition. *Doct. & Stud.* 94. *Dyer* 6, 91, 63, 92.

And if a Lease for Years be made with this Clause inserted, *And that it shall not be lawful for the Lessee to alien without Licence of the Lessor, under Pain of Forfeiture*; this is a good Condition. Dyer 65, 66.

And if a Lease for Years be made of a House with this Clause inserted in the Deed, *And the Lessee shall continually dwell upon the same House, upon Pain of Forfeiture of the said Term*; this is a good Condition. Dyer 79, 27. Co. Lit. 204.

And if in a Lease for Years the Lessee covenants to pay so much Rent, and then these Words are inserted, *And if it shall happen the said yearly Rent, &c. then the Lessee covenants and grants, &c. that the Lease shall be void*; this is a good Condition, and so has it been ever taken, as was said by Just. Dodridge, Hil. 3 Car. Plow. 132. And in all these Cases the Estate is conditional.

But in Cases of Feoffments in Fee, Gifts in Tail, and Leases for Life, it seems Words penned in this Manner will not make Conditions, but that in these Cases the precise and formal Words of a Condition are requisite.

And therefore if a Feoffment be made by Deed, and therein is inserted this Clause, *That it is agreed, or That the Feoffee doth covenant, that if the Feoffor do such an Act that the Feoffor shall re-enter*; this is no Condition, nor the Estate hereby made conditional. Co. Lit. 204. Doct. & Stud. 94. Dyer 65, 138. And yet see Perk. §. 744.

If one makes a Lease for Years, on Condition to pay Rent at four Feasts, and after there is a Clause in the Deed, *And if the Rent shall be behind, &c. that he shall disfrain*; this Clause does not take away the Condition, but the same continues, and the Estate is conditional still. Dyer 348.

In the making of Estates the Cause is regarded, and in Case of the Grants of Lands or Tenements *Causa* sometimes makes a Condition; as,

If a Woman gives Lands to a Man and his Heirs, *Causa matrimonii prælocuti*; in this Case if she either marries the Man, or the Man refuses to marry her, she shall have the Land again to her and her Heirs.

But on the other Side, if a Man gives Land to a Woman and to her Heirs, *Causa matrimonii prælocuti*; tho' he marry her, or the Woman refuses, he shall not have the Land again to him and his Heirs.

And in the Case of a Grant Executory, the Word *pro* may make a Condition; and therefore if a Man grants me an Annuity, *pro una Acre Terræ*, or *pro Decimis*, &c. or if he grants me an Annuity for a Way or a Gutter thro' my Ground, this is conditional; and if he be disturbed in the Way, Acre of Land, Tithes or Gutter, he may refuse to pay the Annuity.

So if an Annuity be granted to an Officer for the executing of his Office, or *pro consilio impendendo*; if the Grantee do not execute the Office, or give Counsel, &c. the Annuity shall cease.

But if one grants me Tithes or an Annuity, and I grant an Annuity for these Tithes, or grant to give Counsel for the Annuity; it seems the Grants that are in this Manner are not conditional, but absolute.

So if I *pro consilio*, &c. or *pro una Acre Terræ*, &c. make a Feoffment in Fee, or Lease for Life of another Acre; these Estates are not conditional. Co. Lit. 204. 10 Co. 42. 9 Ed. 4. 19. 15 Ed. 4. 2. Dyer 6.

And if one devises Land to be sold by his Executors, and to be distributed for his Soul; by this the Estate or Power of the Executors is conditional.

So if one devises his Lands to find a Preacher or a Chaplain.

But otherwise it seems it is of Land so conveyed by Deed in a Man's Life-time.

And if a Feoffment be made of Land, *Ad erudiendum filium*; some have said this Estate is conditional. Dyer 7, 127. Plow. 141, 142.

The most apt and proper Words to make a Limitation of an Estate are, *Quamdiu, Dummodo, Dum, Quousque, Si*, and such like.

And therefore if A. grants Lands to B. To have and to hold to him and his Heirs until B. goes to Rome, or until he be promoted to a Benefice, or until B. pays to A. or A. pays to B. 20 l. or so long as J. S. shall live; or if A. grants Lands to B. To have and to hold to him, his Executors, &c. if J. S. and J. D. shall live so long; or if A. grants Lands to B. To have and to hold to him for the Life of B. so that B. pays to A. 20 l. at Easter following; these are not conditional, but limited to Estates.

So if A. grants Lands to B. To have and to hold to him for so long as he shall keep himself a Widower, or *dum sola fuit*, or *durante viduitate*, if the Grantee be a Widow; these are good limited Estates, but these Words do not make the Estates to be conditional. Co. Lit. 234, 235. 10 Co. 42. Plow. 413. Lit. §. 90. Dyer 290.

If

If the Words in the Close or Conclusion of a Condition be thus, *That the Land shall return to the Feoffor, &c. or that he shall take it again and turn it to his own Profit, or that the Land shall revert, or that the Feoffor shall recipere the Land*; these are either of them good Words in a Condition to give a Re-entry, as good as the Word *re-enter*, and by these Words the Estate will be made conditional. *Dyer 125. Plow. 159. Perk. §. 740.*

Proviso is as proper a Word as any, but then it must not be dependant on another Sentence: It must be the Words of the Grantor, &c. and compulsory to enforce the Grantee to do some Act. *2 Co. 70. b.*

Ad effectum, in Grants of the King, makes a Condition. *1 Roll. Abr. 407.*

If the King grants an Advowson in Fee, and further *concessit*, that the Grantee may amortize this for the Soul of the Progenitors of the King; this is but a Licence, and not a Condition. *Ibid.*

The Words *Ad solvendum* in the King's Grant makes a Condition. *Ibid.*

The Words *Ea intentione* in the King's Grant makes a Condition. *10 Co. 42. a.*

But they do not make a Condition, but a Confidence and Trust, unless an express Re-entry be limited. *Dyer 3, 4. Doct. & Stud. 122. Co. Lit. 204.*

A Man made a Feoffment *Ea intentione*, that his Wife should have an Estate for Life, the Remainder to his Youngest Son in Fee, and the Feoffee died without making such Estate; the Heir of the Feoffor could not enter because there was no Condition, but an Estate executed presently according to the Intent. *4 Leon. 4.*

Ut inveniat, ad inveniendum seu perimplendum, &c. make not a Condition. *1 Roll. Abr. 407.*

Words in
Covenants.

If a Man leases Land by Indenture, wherein is this Clause: *And it is covenanted between the Parties, or it is agreed between the Parties, that the Lessee shall not do such a Thing, upon Pain of Forfeiture of his Estate*; this is a good Condition, for here the Words stand indifferently to be the Words of the Lessee or Lessor, and so shall be taken to be the Words of the Lessor. *Cro. Eliz. 202. 1 Leon. 245. 1 Roll. Abr. 407, 408.* Being by Indenture they are the Words of both Parties. *Cro. Eliz. 202. 1 Leon. 245, 246.*

But if one leases for Years, and the Lessor covenants, That the Lessee shall have House-boot, Hay-boot and Plough-boot, without committing Waste, upon Pain of Forfeiture of the Lease; this is a Covenant on the Part of the Lessor, and therefore no Condition. *Cro. Eliz. 604.*

If one leases to a Woman for forty Years, upon Condition that *Si illa tam diu viveret & custodiret seipsam* a Sole Widow, and should inhabit upon the Premises; this is no Condition, for the Word *Si* makes the Intention uncertain, whether or no another Thing was intended, besides the Cesser of the Term or the Re-entry. *1 Roll. Abr. 410.*

None can imagine what the Conclusion should be, but it was agreed, That if the Lease had been for forty Years, *Si tam diu sola viveret & inhabitaret* upon the Premises, the Lease had determined by her Marriage or Death. *Cro. El. 414.* adjudged by three Judges against one; for every *Si* ought to be answered with a *Tunc*. *Owen 107, 108. Goulf. 179. Moor 400. pl. 525.*

But if the Word *Si* had been omitted in the first Case, it would have been a Condition; or if *Sub conditione quod* had been omitted, it would have been a Limitation. *Goulf. 179.*

If a Man leases Lands to another, *Proviso si* the Rent be in Arrear; this is not any Condition, because the Word *si* makes the Intention uncertain; for where the Proviso is hypothetical, it ought to be shewed what he would have. *1 Roll. Abr. 410. 1 Roll. Rep. 367. Moor 848. Cro. Jac. 390. 3 Bulst. 153.*

If a Man leases Land to another, *Proviso if the Rent be behind it shall be lawful for him to restrain; and not being sufficient the Ground to re-enter into the Premises, and the same to have again in his former Estate*; this is not a good Condition, for the Words are not that he shall restrain the Goods upon the Tenement; nor is it known what is intended by the Word *sufficient*, *scilicet*, *sufficient Reparation, Rent, &c.* and the Words, *the Ground to re-enter into the Premises*, are without Sense. *1 Roll. Abr. 410. 1 Roll. Rep. 330, 367. 1 Bulst. 153, 154.*

In this Case Lord Coke held the Word *restrain* to be the same as *distrain*. *Cro. Jac. 300.* This was adjudged to be not a good Condition, because not said what shall be restrained, nor who shall re-enter. *Moor 848. pl. 1151.*

If a Man leases Lands for Years by Indenture, and after a Covenant on the Part of the Lessor, this Clause is contained, viz. *Provided always nevertheless, and it is covenanted and agreed by and between the said Parties, that the said Lessee, his Executors nor Administrators, shall alien the Premises, but to, &c.* this is a Condition and Covenant at the Election of the Lessor. 1 Roll. Abr. 410. 2 Co. 69. b.

If a Man leases Lands for Years rendring Rent, and the Lessee covenants to pay the Rent, and not to do Waste; and the Lessor binds himself in an Obligation, that the Lessee shall enjoy the Lands for the said Rent, and doing according to the Covenants of the said Indenture; these Words, *for the Rent*, make not a Condition, because he has other Remedy for the Rent, *scilicet*, upon the Indenture of Covenants. 1 Roll. Abr. 410. 1 Roll. Rep. 367.

The Lessor covenanted that the Lessee paying his Rent, should enjoy the Land; per two Judges against one, the Covenant is conditional. 4 Leon. 50. But in 1 Sid. 280. is held the contrary, *per Cur.*, and in 2 Mod. 34, 35. it is adjudged *contra*.

So if a Man leases for Years, excepting the Trees, and Liberty to fell and carry them away, *reparando sepes & implendo foveas*, the Repairing the Ditches, &c. is no Condition, but a Covenant upon which the Lessee has Remedy by Action. 2 Jones 206.

If A. enfeoffs B. upon Condition that he shall render to C. and his Heirs a yearly Rent of 20s. and that if B. and his Heirs fail of Payment thereof, that then A. and his Heirs may enter; this is a good Condition, for tho' a Rent cannot be reserved to a Stranger, yet yearly Rent in this Case shall be intended of a yearly Sum of 20s. in Grofs. Lit. §. 345. Co. Lit. 213. a.

If a Man grants a Walk in a Forest, provided the Grantee shall not cut down any Trees *super præmissa*; tho' the Soil is not granted *præmissa*, and has properly a Relation to the Thing itself, yet since in this Case it cannot have such Construction, it shall be intended of Trees growing within the Walks. Cro. Eliz. 781.

A. being seised in Fee of the Manor of B. and of divers Lands in C. then in the Possession of D. for several Years to come, makes a Feoffment thereof to E. to the Use of himself in Tail Male, Remainder to F. in Tail Male, &c. provided that F. or the Heirs Male of his Body in whomsoever of them the Inheritance in Tail of all the Premises shall happen to be, shall pay to the Daughter of A. 200 l. according to the last Will of A. and A. makes a Letter of Attorney to J. S. to enter into the Manor of B. and the Lands in C. and in his Name to take Possession, and deliver it to E. whereupon Possession is given to E. of all but what was in the Possession of D. and D. never attorns, so that the Lands in C. passed not; and after A. by Will bequeaths 200 l. to his Daughter, and dies without Issue; yet F. is not bound by this Condition, because he has not all the Land according to the Purport of the Condition, which was that he that had all should pay, &c. and a Condition ought to be taken strictly. Poph. 102, 103.

If a Man makes a Feoffment of Lands in several Counties, upon Condition that the Feoffee shall re-enfeoff him of all the Land within twenty Days after the Date; if Livery is made but of Part within the twenty Days, the Condition is not broke tho' all be not re-conveyed within twenty Days, according to the Letter of the Condition, which is intire. Hob. 24.

If a Man leases for Life, or makes a Feoffment upon Condition, that if the Lessee does such an Act the Estate shall be void; tho' the Estate cannot be void before Entry, yet this is a good Condition, and shall give an Entry to the Lessor by Implication. 1 Roll. Abr. 408. 3 Co. 65. Lit. §. 723.

Improper Words.

So it is if the Condition be, that the Estate shall cease. 1 Roll. Abr. 408.

If a Man makes a Feoffment by Deed, upon Condition that if the Feoffee does not such an Act, then the Feoffment, Charter and Livery, shall be void; this is a good Condition, tho' no Re-entry be reserved. 1 Roll. Abr. 408.

So if the Condition be, that the Feoffment shall be void; this is a good Condition, and shall give a Re-entry without an express Reservation. 11 H. 7. 22. 1 Roll. Abr. 408.

So if the Condition be, that the Deed of Feoffment, & *seisina inde habita erit vacua & nullius vigoris*; this is a good Condition, for this is all one as if he had said, That the Feoffment shall be void, for the Livery takes Effect by the Deed. *Dubitatur*, M. 37 & 38 Eliz. B. R. Goodall and Wiat, two against two Justices. 1 Roll. Abr. 408. In 5 Co. 95. b. the same Case and same Point appears. Cro. Eliz. 384. S. C. and S. P. adjudged

adjudged in Error. *Goulf.* 176, 177. S. C. *Popb.* 100. S. C. and S. P. doubted by *Fenner* and *Popbam*.

If a Man leases for Life, or makes a Feoffment in Fee, upon Condition that if the Feoffee or Lessee does such an Act, that then his Estate shall be void and cease, and the Land shall remain over to a Stranger; tho' it was intended that the Stranger should take Advantage of the Condition, and he cannot by Law, yet the Lessor or Feoffor may enter by Force of this Condition. *Lit.* §. 723.

If a Man makes a Feoffment by Deed, and the Feoffee grants by another Deed, made upon Condition, *That if the Feoffor does such an Act, the first Deed shall be of no Force*; this is a good Condition, and shall give a Re-entry, tho' none be reserved. 30 *Aff.* 11. 45 *Aff.* 10. 1 *Roll. Abr.* 408. In *Br. Condition* 113. the S. C. and S. P. is admitted where Livery is made upon both Deeds.

If a Man makes a Lease for Years, and therein is this Clause, *Et non licebit* to the Lessee *dare, vendere, vel concedere statum & terminum suum licui personæ sine licentia* of the Lessor, *sub pana forisfacturæ termini præd'*; this is a good Condition. 1 *Roll. Abr.* 408.

So if there be such a Clause, *And the Lessees shall continually dwell upon the House, upon Pain of Forfeiture of the said Term and Interest.* *Ibid.*

If a Man makes a Feoffment rendring Rent, and if the Rent be behind, that it shall be lawful for him and his Heirs to retake the Land, and to make his Profit thereof; this is a good Condition, and shall give a Re-entry tho' it be not expressly limited. *Ibid.*

(Q) *What shall be said a Condition precedent, and what subsequent.*

IF I grant, that if you will go to such a Place about my Business, you shall have 10 *l.* this is a Condition precedent. 3 *H. 6.* 7. *b.* 1 *Roll. Abr.* 414.

If I retain a Man for 40 *s.* to go with me to Rome; this is a Condition precedent, for the Duty commences by going to Rome. 3 *H. 6.* 33. *b.* *Br. Count* 5. 1 *Roll. Abr.* 414.

So if a Man retains another to be his Counsel for two Years next ensuing, taking every Year 20 *l.* this is a Condition precedent. 3 *H. 6.* 33. *b.* *Br. Count* 5. 1 *Bull.* 168. *Popb.* 161.

If by Charter-party G. and three others, covenant with P. and C. to let to Freight a certain Ship of which they are Owners, to the said P. *pro usu & ex parte* of one B. for a Voyage, *modo & forma sequente*, G. and the other three covenant and grant with B. that the Ship shall go from L. and take such Freight, and thence to T. and thence to Z. and thence to return to the T. and C. covenants with G. and the other three, that P. shall cause Lading to be put in the Ship at T. Z. &c. within so many Days, and covenants that the said P. shall pay to the said G. and the other three, *pro tota transfectione*, 147 *l.* at such a Day; G. and the other three may have an Action of Covenant against C. for Non-payment of the said 147 *l.* without Averment of the Performance of the Covenants of their Parts; for this is not a Condition precedent, but Covenants distinct of the other Part. 1 *Roll. Abr.* 414. 1 *Bull.* 168. S. C. *contra* by three Judges upon a Writ of Error in B. R. but the Court not being full, the Reversal of the Judgment was not pronounced, but *adjournatur*.

If Articles of Agreement be made between A. on the Behalf of B. and C. by which A. covenants, that B. for the Consideration after in the Deed expressed, shall convey certain Lands to C. in Fee, and after C. covenants on his Part, *pro considerationibus prædictis*, to pay to B. 160 *l.* &c. in this Case, tho' B. does not assure the Land to C. yet C. is bound to pay the Money, for the Assurance of the Land is not a Condition precedent; but these are distinct and mutual Covenants. 1 *Roll. Abr.* 415. 2 *Sand.* 155, 166. 1 *Mod.* 64. 1 *Sid.* 464. 2 *Keb.* 674. 2 *Mod.* 33, 34.

If A. makes a Release to B. of an Obligation, in which B. is bound to him with a Proviso, that A. might have and enjoy 120 *l.* due from J. S. to B. at Lady-day next ensuing; this is a Condition precedent, and not subsequent, because the 120 *l.* was not due at the Time of the Release, but at a Day to come; and if it should be subsequent, the Condition would then be void, the Release being of a Personal Thing. 1 *Roll. Abr.* 415.

If *A.* Tenant for Life, and *R.* in Reversion in Fee, covenant to levy a Fine, and that it shall be to the Use of *A.* and his Heirs, *Si R.* does not pay 10 s. to *A.* the 10th of September after, to the Use of *R.* in Fee: In this Case the Word *Si, &c.* is a Condition subsequent, and not precedent; so that *A.* has an Estate in Fee till *R.* pays the 10 s. because there is a Day limited for Payment of the 10 s. and the subsequent Words explain the Intent to be a subsequent Condition, *viz.* And if he pays it then, it shall be to *A.* for Life, and after to the Use of *R.* in Fee; which shews the Intent to be, that *A.* shall have an Estate in Fee till the 10 s. paid. 1 Roll. Abr. 415.

A Copyholder in *Borough English* surrenders to the Use of himself for Life, and after to the Use of his Eldest Son and his Heirs, if he lives to the Age of twenty-one, provided and upon Condition, that if he dies before twenty-one, that it shall remain to the Surrenderor and his Heirs; tho' by the first Words it seems to be a Condition precedent, yet upon all the Words taken together it is not, but a Surrender to the Use of the Eldest Son, to be defeated upon a Condition subsequent. 3 Lev. 132.

A. made a Lease by Indenture of a Messuage to *B.* in December 22 Car. for twelve Years, and covenanted with *B.* to repair it with all necessary Reparations before Midsummer following; and *B.* covenanted on his Part, *Quod ab & post tale tempus quale A. repararet & emendaret præd Messuagium, quod tunc prædictus B. sufficienter repararet prædictum Messuagium ad omnia tempora durante dicto termino*, in an Action of Covenant by *A.* against *B.* for not repairing of the Messuage after Midsummer, according to the Covenant of *B.* and declares, that altho' he has performed all the Covenants on his Part to be performed, (without any particular Averment that he has repaired before Midsummer, according to the Covenant, with all necessary Reparations) yet the Defendant has not repaired it after the said Feast, &c. This is a good Declaration; for the Covenant of *A.* to repair it before Midsummer, is not a Condition precedent, but only the Time divided and mutual between *A.* and *B.* *viz.* That *A.* shall repair it before Midsummer, and *B.* after during the Term; for which each of them may have their Remedy by an Action against the other, for the ultimate Time limited for *A.* to Repair is at Midsummer, and the Covenant of *B.* refers to the said extreme Time limited to *A.* and not to the Fact, *viz.* the Reparation, for the Words are *post tale tempus, &c.* 1 Roll. Abr. 416, 417. Vide Stile 140, 141.

Conditions precedent must be literally performed; and Equity will seldom give Relief in Cases of such Conditions, but it often does in Cases of Conditions subsequent, which not being favoured, because they go in Defeasance of Estates, this Court may relieve, if performed in the substantial Part, tho' some of the Circumstances are not pursued. 3 Chan. Ca. 130.

It is sufficient in Case of a Condition subsequent that the Intent and Substance be performed. 1 Vern. 83.

A Man by his Will gave an Annuity to his Granddaughter for Life, and afterwards by a Codicil to his Will declared, *That if his Granddaughter should marry with the good Liking of his Trustees, then she shall have a Portion.* But without their Consent she married a Man worth nothing, the Husband is not intitled to the Money, the Condition, *viz.* *That if she shall marry without the good Liking, &c.* being a Condition precedent to the Gift of the Portion. 1 Will. 285.

A Man bequeaths to his Niece, an Infant, the Surplus of his Personal Estate, payable at twenty-one; and if she shall die before twenty-one, the Surplus to go over. The Bequest is a Condition precedent, and the Niece shall have the Interest paid her in the mean Time. 2 Will. 419.

A Man bequeaths the Residue of his Personal Estate to a Woman, provided she marries with the Consent of his two Executors; on the Death of one, the Condition being a subsequent one is become impossible, and she may marry without the Consent of the Survivor. 2 Will. 626.

In executory Contracts, if the Agreement be that one shall do an Act, and that for doing thereof the other shall pay, &c. the doing of the Act is a Condition precedent to the Payment, and the Party who is to pay shall not be compelled to part with his Money till the Thing be performed for which he is to pay. This is laid for a Rule by Holt C. J. Salk. 171. pl. 3. 1 Vent. 177, 214.

If a Day be appointed for the Payment of Money, and the Day is to happen before the Thing can be performed, an Action may be brought for the Money before the Thing is done; for the Party relied upon his Remedy, and intended not to make the Performance a Condition precedent. Salk. 171. pl. 3. 1 Vent. 177. 1 Saund. 319.

Where

Where a certain Day of Payment is appointed, and that Day is to happen subsequent to the Performance of the Thing to be done by the Contract, in such Case Performance is a Condition precedent, and must be averred in an Action for the Money. *Salk. 171. pl. 3.* So is *1 Jon. 218.* to be understood. *Salk. 112. p. 1.*

(R) *Of Conditions Copulative and Disjunctive.*

IF the Condition be in the Copulative, and it is not possible to be so performed, it shall be taken in the Disjunctive. *1 Roll. Abr. 444. Owen 52. 1 Leon. 74. Goulf. 71. Popb. 204, 205.*

As if the Condition be, that he and his Executors shall do such a Thing: This is in the Disjunctive, because he cannot have an Executor in his Life-time. *21 Ed. 4. 44. b.*

So if the Condition be, that he and his Assigns shall sell certain Goods: This is in the Disjunctive, because both cannot do it. *21 Ed. 4. 44. 1 Roll. Abr. 444.*

If a Lease be made to Husband and Wife for twenty-one Years, if the Husband and Wife, or any Child between them, so long lives, and the Wife dies without Issue, yet the Lease shall continue during the Life of the Husband; for the Disjunctive refers to the Whole, and disjoins not only the latter Part, as to the Child, but also to the Baron and Feme; so that the Sense is, if the Baron, Feme, or any Child, shall so long live. *Co. Lit. 225. a. Moor 239. pl. 375. Owen 52, 53. 1 Leon. 74. Goulf. 71. 1 And. 161, 162.*

So if an Use be limited till *A.* shall come from beyond Sea, and attains to his full Age, or dies; if he comes from beyond Sea, or attains his full Age, the Use ceases. *Co. Lit. 225. a.*

(S) *Of Conditions to enlarge Estates.*

A Condition to enlarge or increase an Estate may be good; as if a Gift be made in Tail, or a Lease be made for Life or Years, on Condition that if such an Act be done or not done, the Lessee shall have the Land to him and his Heirs; as if one makes a Lease for Life to one, and if the Lessor dies without Heir of his Body, then he grants the Land to the Lessee and his Heirs for ever.

Or if Land be granted to a Man for five Years, on Condition that if the Grantee pays to the Grantor within the two first Years *10 l.* then that he shall have the Fee-simple, otherwise that he shall have the Land but for five Years, and Livery of Seisin be made according to the Deed; this is a good Condition, and by this upon the Performance of the Condition the Fee-simple will pass.

So if one grants Land for five Years, rendring Rent, and that if the Lessee will hold it over to him and his Heirs, that he shall pay *20 l.* Rent; this is a good Condition, and if he pays the Rent he shall have the Fee-simple.

So if a Man makes a Lease for Years, and at the same Time for the Surety of the Term to the Lessee makes a Feoffment to him, upon Condition that if he be disturbed in his Term he shall have the Fee-simple of the Land, and delivers both these Deeds at one Time, and gives Livery of Seisin accordingly; this is a good Condition.

So if a Lease for Life be made, upon Condition that if the Lessor or his Heirs pays to *B.* or his Heirs *10 l.* at a certain Day, that then the Lessor may re-enter; and if he does not pay it at that Time, and the Lessee pays to the Lessor or his Heirs *10 l.* at a certain Day, after the former Day, that then the Lessee shall have the Lands to him and his Heirs for ever; this is a good Condition.

But in all Cases where these Kind of Conditions are good, to make the increased Estate good there must be these Things in the Case:

First, There must be a precedent particular Estate, as an Estate in Tail for Life or Years for a Foundation to erect the subsequent Estate upon, and that first Estate also must be certain and irrevocable, not upon Contingency or with Power of Revocation.

Secondly, The Privy must remain until the Time of the Performance of the Condition; for if the Donee or Lessee grants away the first Estate, the Condition cannot afterwards be performed to effect and produce the increasing Estate.

Thirdly, The subsequent Estate must vest *Eo instante*, when the Contingency upon which the Condition depends shall happen, or never.

Fourthly,

Fourthly, The first and second Estate must take Effect by one and the same Deed, or else by two Deeds delivered at the same Time, for *quæ incontinenti fiunt in esse videntur*.

Fifthly, The Condition upon which the Increase is, must be possible and lawful; for upon an impossible Condition it cannot, and upon an unlawful Condition it shall not increase. *Shep. Touch. 128, 129.*

If one makes a Lease for Life, provided that if the Lessee dies within sixty Years, that his Executors shall have the Land for so many of the sixty Years as shall be to come at the Time of his Death; this is no good Condition to make the Estate to increase, but it may be a Covenant. *1 Co. 155. Dyer 150.*

And if a Lease for Years be made, on Condition that if the Lessor sells the Reversion of the same Land, the Lessee shall have the Fee of it; this is no good Condition to increase the Estate. *1 Co. 84.*

And a Possibility cannot decrease upon a Possibility; as a Lease for Years to a Lease for Life by one Contingent, and the Lease for Life to a Fee-simple by another. *8 Co. 75.*

And if a Lease be made to a Man and a Woman for their Lives, on Condition that which of them two shall first marry, that one shall have the Fee, and they intermarry; in this Case neither of them shall have the Fee for Incertainty. *Co. Lit. 218.*

(T) *Of Conditions to abridge an Estate.*

IF a Man makes a Lease for Life, and adds this Condition, That if the Lessee within one Year does not pay 20 s. that he shall have but a Term of two Years, and if he does not pay the 20 s. by this his Lease for Life is gone, and he has now but a Lease for two Years. *Co. Lit. 318. 5 Ed. 3. 27.*

(U) *Of the Matter and Substance of a Condition.*

IF a Lease be made, on Condition that if a Stranger dislike it, or be discontent with it, that the Lease shall be void; this is a good Condition. *1 H. 8. 13.*

If a Lease be made, on Condition that if the Lessee be outlawed, the Lease shall be void; it seems this is a good Condition. *Shep. Touch. 129.*

If a Feoffment be made, on Condition that if the Feoffee commits Treason, that the Feoffor shall re-enter; in this Case the Condition is vain; for if the Feoffor enters, the Entry is not lawful, for the King is intitled, and his Title shall be preferred. *Ibid.*

No Condition or Limitation, be it by Act executed, Limitation of a Use, or by Devise or last Will, that contains in it Matter repugnant, and tending to the utter Subversion of the Estate, or Matter that is against Law, or Matter that is impossible to be done, is good.

And therefore in all such Cases if the Condition be subsequent the Estate is absolute, and the Condition void; and if the Condition be to go before the Estate, the Estate and Condition both are void. *1 Co. 85. 6 Co. 43. 9 Co. 128.*

If a Feoffment or other Conveyance be made of Land, or a Grant of Rent, &c. in Fee-simple by Deed or Will, upon Condition that the Feoffee or Grantee shall not alien to certain Persons, as to *J. S.* or to *J. S.* and *W. S.* this is a good Condition. Repugnant Conditions to restrain Alienation.

So if one makes a Feoffment in Fee of Land, on Condition that the Feoffee shall not alien it in Mortmain; this is a good Condition.

So if *A.* be seised in Fee of *Blackacre*, and *B.* enfeoffs *A.* of *Whiteacre* in Fee, on Condition that he shall not alien *Blackacre*; this is a good Condition.

But if the Condition be, that the Feoffee or Grantee shall not alien the Thing granted to any Person whatsoever, or that if he does alien to any Person, that he shall pay a Fine to the Feoffor; these Conditions are void in the Case of a common Person, as repugnant to the Estate; but in Case of the King, such Conditions are good.

And in the Cases of a common Person also the Alienation is good until it be avoided by the Feoffor.

And in *Pas. 19 Jac. B. R.* it was held by Just. *Dodridge* and *Chamberlain*, that if a Feoffment be on Condition, that if the Feoffee aliens he shall pay 10 l. to the Feoffor,

Feoffor; that this is a good Condition: But Ch. Just. and Just. *Haughton* held the contrary, for then this shall be a Circumvention of the Law. *Co. Lit. 223.*

If a Gift had been made to an Abbot and his Successors, on Condition not to alien, this had been a good Condition. *Dr. & Stud. 124.*

If one makes a Feoffment of Land to an Infant, on Condition that he shall not alien to any Person; this is a good Condition during the Minority of the Infant, but not afterwards.

In like Manner as if one makes a Feoffment to a Husband and Wife, on Condition that they shall not alien; this Condition to some Intent is good, that is, to restrain Alienation by Deed of Feoffment, and to some Intent repugnant and void; that is, to restrain Alienation by Fine, for that is lawful.

So if a Gift be made in Tail, on Condition that the Tenant in Tail may alien for the Profit of his Issues; this is a good Condition.

And so if Land be given in Tail, upon Condition that the Tenant in Tail or his Heirs shall not alien in Fee-simple, Fee-tail, nor for the Term of any other's Life, but for their own Lives, this Condition is good.

But if Lands be given in Tail, on Condition that the Tenant in Tail or his Heirs in Tail shall not suffer a common Recovery, levy a Fine with Proclamations according to the Statutes of 4 H. 7. and 32 H. 8. to bar the Issues, or on Condition that he shall not make Copyhold Estates of Copyhold Lands, according to the Custom of the Place, or make Leases according to the Statute of 32 H. 8. c. 28. these Conditions are repugnant, and therefore void.

And yet as to the last of these Cases, see the Opinion in *Co. Lit. 223.* to the contrary; and that a Condition to restrain the making of such Leases is good, for this Power is not incident to the Estate, but given to him collaterally by the Statute, and *Quilibet potest renunciare juri pro se introducto.* But *tota Curia* in *Mary Portington's* Case is against him.

If a Man makes a Gift in Tail to A. the Remainder to him and his Heirs, on Condition that he shall not alien; this Condition as to the Estate-tail is good, and void as to the other; and therefore if there be an Alienation he shall defeat it only as to the Estate-tail. *Shep. Touch. 130. Co. Lit. 224. 10 H. 7. 11. 13 H. 7. 23. 10 Co. 30. Perk. §. 739.*

And if a Man makes a Gift in Tail, on Condition that the Donee or his Heirs shall not alien; this is a good Condition to some Intents, and void to other; and therefore if he makes a Feoffment in Fee, or any other Estate by which the Reservation is discontinued tortiously, the Donor shall enter, otherwise if he suffers a common Recovery.

And if a Gift in Tail be made, on Condition that the Tenant in Tail shall not make a Lease for his own Life; this is not a good Condition. *6 Co. 43. against Co. Lit. 223.*

If one seised in Fee of Land makes a Lease of it for Years or Life, on Condition that the Lessee shall not alien the Land leased, or any Part thereof, during the Term, or on Condition that he shall not alien it, or any Part of it, during the Term, without Licence of the Lessor; these are good Conditions.

So if one be seised in Fee of a Manor, and he makes a Lease of Years of it to J. S. on Condition that he shall not make voluntary Estates by Copy; this is a good Condition, but in a Feoffment in Fee such a Condition is repugnant and void.

And if one be possessed of a Lease for Years, or of a House, or of any other Chattel Real or Personal, and he gives or sells all his Interest therein, upon Condition that the Donee or Vendee shall not alien the same; this Condition is void for Repugnancy, and the Gift or Sale is absolute. *6 Co. 43. Co. Lit. 223.*

If one makes a Feoffment of Land in Fee, on Condition that the Feoffor shall retain the Land for twenty Years without Interruption; this is a good Condition, and not repugnant. *2 Co. 72. Dyer 318.*

If I grant Land to another for Life, if it shall please me so long to suffer him; this Condition is repugnant and void. *Dyer 94.*

If a Feoffment be made of Land in Fee, on Condition that the Feoffee shall not enjoy the Land, or shall not take the Profits of the Land, or on Condition that the Heir of the Feoffee shall not inherit the Land, or on Condition that the Feoffee shall not do Waste, or on Condition that his Wife shall not be endowed; in all these and the like Cases the Condition is void as repugnant to the Estate. *10 Co. 39. Co. Lit. 206. Plow. 77, 133. 21 H. 7. 8. 8 H. 7. 10. Perk. §. 731.*

If a Gift in Tail be made, on Condition that the Donee or his Issues shall not take the Profits of the Land, or on Condition that if the Donee dies, his Estate shall go to another, or on Condition that their Wives shall not be endowed, or on Condition that they shall not do Waste, or on Condition that Warranty and Assets, or a collateral Warranty, shall not bar the Issues in Tail; all these Conditions are repugnant and void. 6 Co. 41. 1 Co. 84. Co. Lit. 224.

If Lands be given or granted to two and their Heirs, on Condition that the Survivor shall have the Whole notwithstanding Partition, or on Condition that the Survivor shall not have the Whole altho' there be no Severance; these Conditions are repugnant and void. 1 Co. 8.

If one makes a Lease for Life, on Condition that the Lessee shall not do Fealty; this Condition is not good.

If Lands be given to one and the Heirs Males of his Body, provided that if he dies without Heirs Females of his Body, that the Donor shall re-enter; this Condition is repugnant and void. Co. Lit. 204.

If one has Land in Possession or Reversion, and he grants Rent out of it, on Condition that the Grant shall not charge the Person of the Grantor; this is a good Condition, and not repugnant.

But if a Man grants a bare Annuity, or grants a Rent-charge out of another Man's Land with such Condition, or if one grants a Rent-charge on Condition that the Grantee shall not distrain nor charge the Person of the Grantor, or if one grants a Rent out of Land, on Condition that the Land shall not be charged with it; all these Conditions are repugnant and void.

So if two grant a Rent-charge out of Land, provided that it shall not extend to one of them; this Condition is repugnant and void. Shep. Touch. 131, 132. Co. Lit. 146. 10 H. 7. 8. 6 Co. 41. 5 H. 7. 7. 7 H. 6. 44. Perk. §. 732.

If a Man seised in Fee of Land makes a Lease for Years, rendering Rent, and after the Lessee makes a Lease to the Lessor of other Land, on Condition that he shall not distrain for his Rent in the former Lease made to this Lessee; this is a good Condition, and not repugnant.

If one makes a Feoffment in Fee, or Lease for Life, with Warranty, on Condition that the Feoffee or Lessee shall not vouch to Warranty, nor recover in Value; or if the Lease be made without Impeachment of Waste, on Condition that if the Lessee commits Waste the Lessor shall re-enter; these are good Conditions, and not repugnant. Perk. §. 734. Dyer 47.

All Conditions annexed to Estates being compulsory, to compel a Man to do any Thing that is in its Nature good or indifferent, or being restrictive, to restrain or forbid the doing of any Thing which in its Nature is *Malum in se*, as to kill a Man, or the like, or *Malum prohibitum*, being a Thing forbidden by any Statute, or the like; all such Conditions are good, and may stand with the Estates. Conditions against Law.

But if the Matter of the Condition tends to provoke, or furthers the doing of some unlawful Act, or to restrain or forbid a Man the doing of his Duty; the Condition for the most part is void.

And therefore if Lands be given or granted to a Man, upon Condition that he shall kill a Man, or upon Condition that he shall burn his Neighbour's House, or upon Condition that he shall forswear himself, or upon Condition that he shall save and keep harmless the Grantor whatsoever he shall do, or that if he do these Things the Grant shall be void; these Conditions are void.

Or if Lands be given or granted to an Officer, upon Condition that he shall not duly execute his Office; this Condition is against Law, and void: *Et sic de similibus*. Co. Lit. 223, 224, 207. Perk. §. 722, 723.

So if a Gift be made in Tail, upon Condition that the Donee shall discontinue, or if one gives or grants Land, on Condition that the Grantee shall be a Forestaller against the Statutes; these and such like Conditions are void. Perk. §. 727.

And hereupon it is, that Conditions annexed to Land, that the Profits thereof shall be employed to superstitious Uses, are void. 1 Co. 24. 6 Co. 43.

And hence also it is that such Conditions which are against the Liberty of Law, as that a Man shall not marry, or the like, are void. Dyer 343. Co. Lit. 206.

And hence also such as are against the publick Good; and therefore if one grants his Land to J. S. on Condition that he (being a Husbandman) shall not sow his Arable Land; this Condition is void.

And

And in all these Cases if the Condition be subsequent to the Estate, the Condition only is void, and the Estate good and absolute; if the Condition be precedent, the Condition and Estate both are void; for an Estate can neither commence nor increase upon an unlawful Condition. 11 Co. 53. 7 Ed. 3. 65. Perk. §. 722, 725.

Conditions
impossible.

All Conditions annexed to Estates that contain in them Matter at the Time of making of them impossible to be done, are void; and therefore,

If one gives or grants Land, on Condition that a Man shall go to Rome in three Days; or on Condition that a Man shall enfeoff such a Corporation, when there is no such; or if one gives Lands in Tail, on Condition that the Estate shall cease, as if the Tenant in Tail be dead; or if one grants Lands, on Condition that a Man shall enfeoff his Wife; all these and such like Conditions are void.

And in these Cases also if the Condition be subsequent, the Condition is void only, and the Estate is absolute; and if the Condition be precedent, the Condition and the Estate both are void; for an Estate can neither commence nor increase upon an impossible Condition.

And if the Thing to be done by the Condition be possible at the Time of making of the Condition, and do afterwards by the Act of God become impossible, the Condition is become void, and the Estate absolute; as if a Feoffment be made, on Condition that if the Feoffee dies before the Day, or on Condition that if the Feoffee shall appear in such a Court before or at Easter, and he dies before the Time; in these Cases the Condition is gone, and the Estate is absolute. 6 Co. 41. Co. Lit. 207, 219, 206. Dyer 252. Perk. §. 935, 729. Plow. 272, 286. 1 Co. 84.

Limitations.

And the same Law is for the most part of Limitations, if they be repugnant, impossible, or against Law, as is before shewed to be done of Conditions. 6 Co. 41. 1 Co. 84.

(V) Of Conditions relating to Assignees by Nomination.

IF a Condition be to lease certain Lands for three Lives to the Obligee, or his Assigns, and after the Obligee demands a Lease to be made to three Strangers for their Lives; he ought to make it to them accordingly, or otherwise the Condition is broke; for here by the Word *Assigns*, is intended *Assigns by Nomination*; for he cannot have other Assigns, inasmuch as the Estate is not assignable before he has it. 1 Roll. Abr. 421. 1 Roll. Rep. 373. 3 Bulf. 168. Bridgm. Rep. 39, 40.

If a Man be bound in 20 l. upon Condition to pay 10 l. to such Person as the Obligee shall name by his last Will, and after the Obligee names no Person by his Will; the Obligor is not bound to pay it to his Executors, because the Condition has Reference to his Nomination. 1 Roll. Abr. 421. Hob. 9. Godb. 192. And per Coke, there is a Diversity where the Condition is to pay 10 l. to the Assignee of the Obligee, and where to the Obligee or his Assigns; for in the last Case it vests as a Duty in the Obligee, and shall go to his Executors.

If a Man makes a Feoffment in Fee, upon Condition that the Feoffee shall pay 20 l. to the Feoffor, his Heirs or Assigns, at such a Day, and before the Day the Feoffor dies; the Feoffor may pay it either to the Heir, or to the Executors of the Feoffor, for they are his Assigns in Law to this Intent; for the Feoffor having a bare Condition in the Land, and no Estate, could have no Assigns in Deed. Co. Lit. 210. a.

But if a Man makes a Feoffment in Fee, upon Condition that if the Feoffor pays 20 l. to the Feoffee, his Heirs or Assigns, before such a Day, &c. and before the Day the Feoffee dies; the Money cannot be paid to his Executors, because the Assignees of the Estate only were intended by the Condition; and where there may be Assignees in Deed, the Law will never seek out or appoint Assignees in Law. Co. Lit. 210. a. 5 Co. 96, 97.

If A. seised in Fee by Indenture inrolled, covenants with B. that if B. pays to A. his Heirs or Assigns, 400 l. at a Day, that then A. and his Heirs will stand seised to the Use of B. and his Heirs; and A. devises to his Wife, during the Minority of his Son, and dies; the Money shall not be paid to his Wife, for she is not Assignee, the Reversion being in the Heirs of A. 5 Co. 97. 1 Leon. 252.

But if A. had made a Lease for Life, the Remainder to another in Fee, the Lessee for Life had been an Assignee. 5 Co. 97.

And it was said, that if A. had conveyed over his whole Estate in part, yet so long as A. had any Part remaining, the Tender ought to be made to him. 5 Co. 97. a.

(W) H

(W) *What Persons shall be bound by a Condition.*

IF an Estate be made to a Feme Covert she shall be bound by the Condition, because this does not charge her Person, but the Land. 1 *Roll. Abr.* 421. 45 *E.* 3. 28 *H.* 8. 13. 6. 5. *Moor* 92. *pl.* 229.

If an Estate be made to an Infant upon an exprefs Condition, the Infant shall be bound to perform it. 1 *Roll. Abr.* 421. 8 *Co.* 44. *b.*

So where an Estate is devised to an Infant, upon Condition he is bound to take Notice thereof, and perform the Condition. 2 *Lev.* 21, 22. 1 *Mod.* 86, 87. 1 *Vent.* 200, 201, &c.

So if an Estate be made to another in Fee, upon Condition his Heir after his Death, tho' he be within Age, shall be bound by the Condition. 1 *Roll. Abr.* 421. 1 *Jones* 390. *Cro. Jac.* 374. 1 *Roll. Rep.* 136, 198. 3 *Bulf.* 58, 59.

If a Man devises Lands to H. his Son, and to the Heirs of his Body, the Remainder to T. and the Heirs Males of his Body, upon Condition that he or they, or any of them, shall not alien, discontinue, &c. this Condition shall extend only to restrain T. and the Heirs Males of his Body, and not H. and his Heirs. 5 *Co.* 68. *Moor* 727. *pl.* 1014.

If a Man leases Lands for Years, upon Condition that the Lessee, nor his Assigns, shall not alien the Term to any but to one of his Brothers, and after the Lessee aliens to one of his Brothers; this Assignee is not within the Condition, but he may alien to whom he pleases. 1 *Roll. Abr.* 422. *Dyer* 152. *a.*

If a Man devises Part of his Lands to his Eldest Son in Tail, and the Rest of his Land to his Younger Son in Fee, provided that neither of his Sons should sell or lease before he comes to the Age of thirty Years; and that if either of the Sons should, &c. the other Son should have his Lands, &c. The Eldest before his Age of thirty leases, and the Younger enters upon him: He shall hold these Lands discharged of the Proviso, for that extends only to the immediate Estate expressly devised, and not to the new Estate arising upon the Limitation. 2 *Leon.* 38. *Owen* 8, 55. *Moor* 271. *pl.* 324. *Godol.* 366.

If a Man devises his Land to his Wife during the Minority of his Son, upon Condition that she shall do no Waste, and dies, and the Wife marries again, and dies, and after the Husband commits Waste; the Condition is not broke; adjudged, because a Condition to avoid an Estate shall be taken strictly. 2 *Leon.* 35, 48. *Lat.* 20.

And a Proviso that the Lessee shall not alien, extends not to his Executors. *Moor* 11. *pl.* 40. *Dyer* 65. 66. *a.*

If A. being seised in Fee of the Manor of B. and of divers Lands in C. then in Possession of D. for several Years to come, makes a Feoffment thereof to E. to the Use of himself in Tail Male, Remainder to F. in Tail Male, &c. provided that F. or the Heir Male of his Body, in whomsoever of them the Inheritance in Tail of all the Premises shall happen to be, shall pay to the Daughter of A. 200 *l.* according to the last Will of A. and A. makes a Letter of Attorney to J. S. to enter into the Manor of B. and the Lands in C. and in his Name to take Possession, and deliver it to E. whereupon Possession is given to E. of all but what was in Possession of D. and D. never attorns, so that the Lands in C. passed not; and after A. by Will bequeaths 200 *l.* to his Daughter, and dies without Issue; F. is not bound by this Condition, because he hath not all the Land according to the Purport of the Condition, which was, that he that had all should pay, &c. *Popb.* 102, 103.

A Person gives Money to an Infant, upon a Condition to be performed; the Infant is bound by it as well as one at full Age, and may be a Trustee. 2 *Vern.* 561.

An Infant shall be bound by Conditions in Fact, and such Conditions as he can perform in Equity as well as in Law. 1 *Mod.* 300. 2 *Vern.* 343. *Co. Lit.* 233. *b.*

If A. leases to B. for Years, upon Condition that B. his Executors or Assigns, shall not alien; and B. makes his Wife Executrix, and dies, and the Wife takes a Husband, and he aliens; this is a Breach. *Pasch.* 28 *H.* 8. *Dyer* 6, 7. by *Brown* and *Shelly*, contra *Baldwin*; for the Land is tied with the Condition into whose Hands soever it comes. 1 *Leon.* 3.

If a Lease for Years be made, upon Condition that the Lessee, his Executors or Assigns, shall not alien without the Assent of the Lessor, and the Lessee dies Intestate, his Administrator cannot assign without Licence, for he is an Assignee in Law. *Cro. Eliz.* 26. 1 *Leon.* 3. *Vide* 1 *And.* 123, 124. *Cro. Eliz.* 657.

Who shall be bound by a Condition as Assignees.

If a Man leases an House for eighty Years, upon Condition that the Lessee, his Executors and Assigns, shall maintain it in Repairs; and if, upon lawful Warning given by the Lessor, that the House is in Decay, it is not repaired, &c. within six Months, the Lessor, &c. may re-enter; and the Lessee leases it to *A.* for thirty Years, and *A.* leases it to *B.* for fifteen Years: If the House is out of Repair, Warning must be given to the first Lessee, and not to *B.* for he is no Assignee of the Term, but has only a petit Interest under the great Lease, and the Warning needs not be given at the House, but to the Person of the Lessee who has the grand Interest. *Telo. 36. Owen 114.* The Notice to *B.* (being a Person not concerned) tho' upon the Land, is not sufficient. *Cro. Jac. 9. Moor 680. pl. 932. Owen 114.*

(X) Of a Condition to perform Covenants.

IF a Man leases a Manor by Indenture, except a certain Parcel of Land, and in the Indenture there are several Covenants to be performed on the Part of the Lessee; and after the Lessee for further Security binds himself in an Obligation to perform all the Covenants, Articles and Agreements contained in a Pair of Indentures, and names the said Indentures, and after the Lessee enters into the Land excepted: Yet this is not any Breach of the Condition, for this Land excepted is not leased, and is so as if it had not been named, and therefore it cannot be intended an Agreement to be performed on the Part of the Lessee within the Intent of the Indenture. *1 Roll. Abr. 431. Cro. Eliz. 657. Moor 553. pl. 747. 11 Co. 50.*

But if the Exception was of a Thing *dehors*, as a Way, Common, or other Profit appender, it is otherwise. *Cro. Eliz. 637. Moor 553. pl. 747.*

Note; Where a Lease is void, the Bond to perform the Covenants is also void. *1 Sid. 309. 1 Lev. 45. T. Raym. 27.*

If a Man makes a Lease for Years rendring Rent, payable at *Michaelmas* and at the *Annunciation*, upon Condition that if he does not pay it upon the said Feasts, or within fourteen Days after, that it shall be lawful for him to re-enter; and the Lessee binds himself upon Condition to perform the Covenants and Agreements of this Lease; and after the Lessee does not pay the Rent at the Feasts, but after, and within the fourteen Days; yet the Condition is forfeited, for the Condition in the Lease is not Part of the Reservation. *1 Roll. Abr. 431.*

If *A.* by Deed Poll reciting, that he was possessed of certain Lands for Years, by good and lawful Conveyance assigns the same to *B.* and in the Deed there are several Articles and Agreements on the Part of *A.* and *A.* enters into a Bond to *B.* with a Condition for the Performance of the Articles and Agreements in the Deed: If *A.* had not such Interest by a good and lawful Conveyance, the Obligation is forfeited. *1 Leon. 122.*

If *A.* by Indenture leases Lands to *B.* for Years, and covenants that *B.* shall enjoy the same without Interruption; but there is a Proviso in the Indenture, that if *A.* pays 10 *l.* to *B.* on the 31st of *March* next, the Indenture and all therein contained shall be void; and *A.* enters into an Obligation with a Condition for the Performance of the Covenants in the Indenture; and the 20th of *March* next *A.* disturbs *B.* and after upon the said 31st of *March* pays the 10 *l.* Yet an Action lies upon the Obligation, for by the Breach of the Covenants before the Condition was performed, the Obligation was forfeited, and it is not material that the Covenants became void before the Action brought. *Cro. Eliz. 244. Vide 2 Brownl. 167. And tho' the Oblige releases the Covenants after the Breach, it is not material. 3 Leon. 69. Hob. 168.*

But if the Proviso had been, that upon Payment of the 10 *l.* as well the Obligation as the Indenture should be void, perhaps it had been otherwise, for then the Bond would have been void before the Action brought. *Cro. Eliz. 244.*

If a Man leases for Years, by the Words *Demise, Grant, &c.* and in the Deed there are several Covenants on the Part of the Lessor, and he enters into a Bond conditioned for the Performance of all the Covenants, &c. in the said Deed: This extends as well to the Covenants in Law, as express Covenants. *4 Co. 80. b.*

If *A.* by Deed enfeoffs *B.* provided that if *A.* pays Money to *B.* on or before a certain Day, the Feoffment shall be void; and covenants to save harmless from Incumbrances and Arrear of Rent, and to make further Assurance, and after *A.* enters into an Obligation conditioned for the Performance of all Covenants, Payments, Articles and Agreements comprised in the Deed: If *A.* pays not the Money, yet the

Bond is not forfeited, for there being no Covenant to pay the Money, it is a Proviso in Advantage of the Feoffor, that if he paid the Money he should have the Land again; so that it is at his Election to pay the Money or lose the Land, which is a sufficient Loss to him; and the Word *Payment* in the Bond has Reference to the Covenant to save harmless from Arrears of Rent. *Cro. Jac.* 281. *2 Mod.* 36, 37.

But it is otherwise if the Condition of the Bond had been for the Performance of all the Covenants and Conditions in the Deed. *2 Lev.* 116. adjudged. The like in *Telv.* 206. the Proviso being, *that if A. paid for B. 40 l. to C. &c.* for the Word *Payment* in the Obligation shall have Reference to such Payments only as by the Deed are compulsory, not such as are voluntary, for otherwise the Obligation and Condition would be repugnant and contrary to the Deed. *1 Brownl.* 113. *1 Bulst.* 156.

(Y) *Of Condition to save harmless, &c.*

IN an Action of Debt brought by *A.* against *B.* in which *C.* and *D.* are Bail for *B.* if the Plaintiff has Judgment against *B.* and the Bail, and after *C.* one of the Bail, gives Security to *A.* for all the Money due to him; and in Consideration thereof *A.* promises *C.* that he may take Execution against *D.* the other Bail, and that he will not release him without the Assent of *C.* upon which *C.* procures *D.* to be taken in Execution, and after *A.* releases him out of Execution, and thereupon *D.* is bound to *A.* in an Obligation, of which the Condition is to save *A.* harmless of all Actions and Damages which may arise upon the Release of *D.* out of Execution, then being in Execution at the Suit of *A.* from all Persons that may trouble him concerning the said Release, and after *C.* brings an Action against *A.* for the Breach of his Promise, and recovers his Damages: This is a Breach of the Condition, for the Condition is not to be intended by the Words of the Damages only which directly arise upon the Release, but to any Collateral Act *dehors* as to the said Promise. *Hob.* 269, 270. Case 353.

Where the Condition is, that the Defendant shall discharge, acquit or free the Plaintiff of or from such a Bond, or Rent or Action, or from any other Thing in particular ascertained in the Condition, there the Negative Plea, *Non damnificatus*, is not good, because the Defendant hath undertaken to do an Act in Discharge of the Plaintiff. *Cartb.* 375.

But where the Condition is only to free, or discharge or indemnify the Plaintiff from any Damage, or Cost or Trouble which shall or may happen by Reason of such Bond, Rent or Action, or other particular Thing therein mentioned; in such Case the Negative Plea is sufficient, because it does not appear that any Damage happened to the Plaintiff; and if no Damage happened, then it is impossible that the Defendant should shew in the Affirmative the Manner how he had freed or discharged the Plaintiff; therefore it lies on the Part of the Plaintiff, by way of Reply, to shew wherein he was damnified. *Cartb.* 374. *5 Mod.* 244.

(Z) *What Persons may perform a Condition.*

IF *A.* and *B.* levy a Fine to the Use of *A.* in Fee, if *B.* does not pay 10 s. at Michaelmas after; and that if he then pays the said 10 s. that then it shall be to the Use of *A.* for Life, and after to *B.* in Fee, and after *B.* dies before Michaelmas; it seems the Heir of *B.* may pay the 10 s. for this is not more Personal, being the Payment of Money, than in the Case of *Lit.* (*Co. Lit.* 205. b. 206. a.) upon a Mortgage. The Court was divided as to this Point, *viz.* *Croke* and *Jones* thought it was not Personal, but the Heir might perform it; but *Brampton* and *Berkley* *contra.* *1 Roll.* Abr. 420. *1 Jon.* 390.

If a Man makes a Feoffment in Fee, upon Condition to be void if the Feoffor pays a certain Sum of Money to the Feoffee, and the Feoffor dies before Payment, his Heir cannot pay it, because the Time of Payment is past; for the Condition being general, if the Feoffor pays, &c. it is as much as to say, if the Feoffor during his Life pays, &c. *Lit.* §. 337. *Co. Lit.* 208. a.

But when a Day of Payment is limited, and the Feoffor dies before the Day, his Heir may tender the Money, because the Time of Payment was not past by the Death of the Feoffor. *Lit.* §. 337. *Co. Lit.* 208. b. *Poph.* 10.

So

So may his Executors or Administrators, because they represent the Person of their Testator. *Lit. §. 337. Co. Lit. 208. b. 209. a.*

If *A.* mortgages his Lands to *B.* upon Condition that if *A.* and *C.* pays 20 s. at a Day to *B.* that then he shall re-enter: *A.* dies before the Day, *C.* may pay the Money, &c. and yet the Letter of the Condition is not performed. *Co. Lit. 219. b.* So if *C.* dies before the Day, *A.* may pay it. *Ibid.*

But if *A.* had been living at the Day, and would not have paid the Money, but had refused to pay it, and *C.* had tendered it, *B.* might have refused it. *Co. Lit. 219. b.*

If a Man devises his Land to his Daughter at her Age of eighteen Years, and that his Wife shall take the Profits to her own Use until his Daughter comes to eighteen, provided she shall keep and bring up his Daughter at School, &c. and dies; and the Wife marries again, and dies, the Interest in the Lands accrues to the Husband; for the Keeping and Education of the Child is not of such particular Privy, but it may be effectually performed by another. *Hob. 285. Hut. 36. 1 Brownl. 79. Godd. 350, 388.*

If two are enfeoffed to reinfeoff, if one refuses to reinfeoff, the other cannot perform the Condition by a Feoffment of the Whole. *Contra 49 Ed. 3. 16. b. 1 Roll. Abr. 421.*

If the Condition of an Obligation be to pay a less Sum, if my Servant, by my Command, tenders it to the Obligee, this is sufficient. *2 H. 6. 3. b. 1 Roll. Abr. 421.*

So if a Stranger tenders for and by the Assent of an Infant above fourteen. *Moor 222. pl. 137.*

If a Man makes a Feoffment in Fee by way of Mortgage, upon Condition to be void upon Payment of Money by the Feoffor at a Day; if a Stranger of his own Head tenders the Money, the Feoffee is not bound to receive it. *Co. Lit. 206. a. b. 1 Leon. 34. Owen 137.*

But if the Feoffee accepts it, this is a good Satisfaction, and the Mortgagor or his Heirs agreeing thereto afterwards, may re-enter; but the Mortgagor may disagree thereto if he will. *Co. Lit. 206. b. 207. a.*

If *A.* enfeoffs *B.* upon Condition that *B.* shall pay Money at a Day, and *B.* before the Day enfeoffs *C.* now *C.* has an Interest in the Condition, and may tender the Money at the Day for the Safeguard of his Estate. *Lit. §. 336. Co. Lit. 207. b. 5 Co. 96.*

And so also may *B.* being a Party and Privy to the Condition. *Lit. §. 336. Co. Lit. 207. b.*

If a Man mortgages Land, upon Condition that if he or his Heirs repay 100 l. at such a Day, he shall re-enter; and dies leaving a Daughter, and his Wife enfeoffs with a Son; if the Daughter pays the Money, and after the Son is born, yet she shall retain the Land for ever. *Cro. Car. 61.*

(AA) *Of Conditions where something is to be done before the Performance or Breach of them.*

By Demand,
&c.

IF a Man leases Land for Life or Years, or, &c. reserving a Rent, and for Default of Payment a Re-entry; the Lessor ought to demand the Rent at the Day, otherwise the Condition shall not be broke by the Non-payment of the Rent. *1 Roll. Abr. 459.*

So if a Man leases Land, reserving a Rent, to be paid at a Place out of the Land, upon Condition of Non-payment to re-enter: Tho' the Rent be to be paid out of the Land, yet this is a Rent, and not an Annuity; and therefore the Lessor ought to demand it at the Day, otherwise he shall not enter for the Non-payment. *4 Co. 73. Cro. Eliz. 415, 535, 536.*

If a Man reserves a Rent, and that if the Rent be in Arrear he shall forfeit so much by way of *Nomine pænæ*; the *Nomine pænæ* shall not be forfeited without Demand made. *Hob. 82, 180, 113, 133. 1 Brownl. 179.*

If a Man grants a Rent-charge to another, and for Default of Payment to forfeit a *Nomine pænæ*; no Forfeiture shall be of the *Nomine pænæ* without a Demand at the Day. *7 Co. 28. b. Cro. Eliz. 383. Goulds. 129, 186. Moor 357. pl. 486.*

If a Man leases Land for Life or Years, reserving a Rent, upon Condition that if the Lessee does not pay the Rent at the Day without any Demand made by the Lessor,

Lessor, that then it shall be lawful to the Lessor to re-enter: In this Case, by this special Agreement of the Parties, the Lessor may enter for Default of Payment of the Rent without any Demand. 5 Co. 40. b.

If a Man leases Land for Years, reserving a Rent, with Condition for Non-payment to be void: In this Case the Lessor ought to demand the Rent at the Day of Payment by the Condition, or otherwise the Lease is not void tho' it be not paid by the Lessee. 1 Roll. Abr. 459. 1 Sid. 7.

Where a Man leases to another, reserving a Rent, and the Lessee covenants to pay the Rent at the Days limited, he ought to pay it without any Demand, at his Peril, inasmuch as he hath bound himself to pay it. 1 Roll. Abr. 459.

If a Man leases Land by Indenture for Years, reserving a Rent, payable at certain Days at London, and the Lessee in the same Indenture covenants to pay the said Rent at the Days and Place aforesaid; he ought to pay it, by Force of this Covenant, without any Demand of the Lessor, otherwise he has broke his Covenant. 1 Roll. Abr. 459.

If a Man leases for Years, reserving a Rent, with a Clause of Re-entry; and upon the making the Lease the Lessor lends him 200 l. Stock, and the Lessee covenants to pay the Rent at the Days and Place; and after, by another Covenant, covenants that if Default of Payment of the said Rent be made at any of the Days in which it ought to be paid, according to the Effect, Limitation and true Intent of these Presents, then the Lessee covenants to repay the said 200 l. Tho' there needs no Demand of the Rent to make the first Covenant to be broke by Non-payment, yet there ought to be a Demand to intitle him to the 200 l. for this last Covenant does not refer to the Covenant before, but to the Reservation: The Words are (*according to the Limitation of the Indenture*) which is the Reservation; and by these Presents is intended the Indenture, or the most notable Part thereof, which is the Reservation. 1 Roll. Abr. 460.

If a Man leases Land by Indenture, reserving a Rent, and the Lessee binds himself by Obligation, upon Condition to perform all Covenants, Articles and Payments in the Indenture mentioned: In this Case there ought to be a Demand by the Lessor, to make the Obligation to be forfeited. 1 Roll. Abr. 460.

If a Man leases by Indenture certain Coal-Mines, reserving a Rent, and the Lessee binds himself in an Obligation, with Condition to observe, perform, pay and keep all Payments, Rents, Covenants, Grants and Agreements in the said Indenture mentioned: In this Case it is a good Assignment of a Breach of the Condition in an Action of Debt, upon the Obligation that the Lessee did not pay him the Rent at the Time of Payment thereof by the Reservation, without alledging that he demanded the Rent at the Day of Payment; for he is not bound to demand it, but the other ought to pay it without Demand. 1 Roll. Abr. 460. Cro. Car. 76, 77. Hut. 90, 91.

If a Man makes a Lease, rendring Rent, and covenants by the Indenture of Lease to pay the Rent, being lawfully demanded, and enters into an Obligation to perform the Covenants; the Lessee is not bound to pay the Rent without a Demand. 1 Roll. Abr. 460.

If A. leases Land to B. by Indenture for Years, reserving 20 l. Rent per Annum, payable at four Feasts by equal Portions; and after B. is bound in an Obligation to A. upon Condition that if he pays to A. for the Rent of the said Premises the yearly Rent of 20 l. for such Term, (*scilicet* the Term demised) at four Quarter-Days, according to the Tenor and Effect of one Lease thereof made, bearing Date with this Obligation, and made between the said Parties, according to the Tenor and Effect of the said Lease, by equal and even Portions, then the Obligation shall be void: The Lessee is not bound to pay the Rent by this Condition without any Demand of the Lessor, because it refers to the Indenture of Lease, and that it shall be paid as a Rent according to the Indenture. 1 Roll. Abr. 460, 461. Cro. Car. 421.

If a Man makes a Grant of a Rent out of Land, and after devises, that the Grantee shall have the said Rent according to the Intent of the said Writing; and that if his Heir pays the said Rent according to his Will, then he shall have the Disposition of the said Land so long as he shall perform the Will; and if his Heir does not perform his Will, then that his Executors shall have the Disposition of the Land, to the Intent that his Will be performed; and if there be Default in the Heir that his Will be not performed, and Default in his Executor that his Will is not performed, then the Land shall be to J. S. In this Case the Grantee of the Rent ought

to demand the Rent at the Days of Payment from the Heir, and from the Executor, when it comes to him, otherwise *J. S.* shall have nothing; for the Will refers to the Writing; and the Clause of the Executor is not that he shall pay the Rent, but if there be Default in him, &c. so that this is not to be paid as a Rent, and then it ought to be demanded. 1 Roll. Abr. 461. Cro. Jac. 144, 145.

If a Man devises Land to another, upon Condition that if he pays 4*l.* yearly out of the Land to the Wife of the Devisor for her Life, adding over and above, that his full Intent and Will was, that she should be yearly paid the said Rent accordingly: The Devisee ought to pay this Rent to his Wife, at his Peril, without any Demand of the Wife, otherwise the Condition is broke. 1 Roll. Abr. 461. Lane 78.

But if a Man devises Lands to his Wife for Life, so long as she shall be effectually ready to demise it to his Heir at 50*l.* paid yearly, when she shall not dwell on it herself; yet if she goes and lives at another Place, the Condition is not broke without a Tender and Refusal to lease. Moor 626. pl. 860.

If a Man leases Lands for Years, upon Condition that if the Lessee does not pay yearly 40*s.* at the Feast of *P.* during the Term to *D.* it shall be lawful to the Lessor to re-enter: In this Case the Lessee ought to pay it, at his Peril, without any Demand, because this is not issuing out of any Land. 1 Roll. Abr. 461. He must seek *D.* if in *England.* Lit. §. 345. Co. Lit. 213. b. Dal. 54, 55.

If *A.* conveys Lands to *B.* in Tail, upon Condition that *B.* and the Heirs of his Body shall pay to the Daughter of *A.* 200*l.* or so much thereof as shall be unpaid at the Death of *A.* according to the Intent of the Will of *A.* and after *A.* by Will devises to his Daughter 200*l.* viz. 100*l.* to be paid that Day twelve Months next after his Death, and the other 100*l.* that Day twelve Months next after, &c. and dies; *B.* is not bound to pay the 200*l.* without Demand; for the Payment by the Indenture is referred to be according to the Will, and the 200*l.* was devised as a Legacy, which ought to be paid upon Demand, and not at the Peril of the Executor, and therefore the Nature of the Payment is altered by the Will. Popb. 102.

By Notice.

If a Man, in Consideration that *J. S.* will deliver a Horse to a Stranger, promises to pay *J. S.* 5*l.* when he shall be thereto requested: *J. S.* needs not give Notice to him of the Delivery of the Horse, but he ought to take Notice thereof at his Peril; for he ought to pay it upon Request. 1 Roll. Abr. 461.

If the Condition of an Obligation be to pay 10*l.* to the Obligee at the Day of the Marriage of the Obligee; the Obligee is not bound to give Notice to the Obligor before his Marriage at what Day he will be married, but the Obligor ought to take Notice thereof at his Peril, inasmuch as he has taken upon him to pay it at the Day. Ibid. 1 Roll. Rep. 433, 434. Cro. Car. 34 adjudged. Hutt. 80. 3 Bulst. 237. Dubitatur Cro. Jac. 404.

If a Man promises *J. S.* in Consideration that he will marry *A. W.* his Cousin, he will pay 10*l.* to him at the Day of his Marriage: *J. S.* needs not give Notice to him who made the Promise, before he marries with *A. W.* at what Day he will marry her, but he ought to take Notice thereof at his Peril, inasmuch as he has taken upon himself to pay it at the Day, tho' the Marriage is to be had by *J. S.* himself. 1 Roll. Abr. 462, 468. Telv. 168. Cro. Jac. 229, 405. 3 Bulst. 326. Lat. 97. 1 Roll. Rep. 433, 434 adjudged. 3 Bulst. 236, 237. adjudged, and therein it is said, that there is a Difference where Money is to be paid, and where a Collateral Thing is to be done upon the Marriage Day; but yet vide Cro. Jac. 102. Cro. Car. 35. Hutt. 80. Telv. 122, 168.

So a fortiori, if a Man promises to pay 10*l.* to *J. S.* at the Day of the Marriage of *W. N.* for there the Marriage is not to be had by him to whom the Promise is made. 1 Roll. Abr. 462, 468. 1 Roll. Rep. 433, 434. 3 Bulst. 236, 237.

If *J. S.* sues an Action against *J. D.* and *J. N.* comes to *J. S.* and promises him, that if he will surcease his Suit against *J. D.* that he himself will pay him all the Charges, &c. of the said Suit, when he, scilicet *J. S.* comes into *Somersetshire*: If *J. S.* surceases his Suit, and after comes into *Somersetshire*, *J. N.* is bound to perform his Promise, without any Notice given of the coming of *J. S.* into *Somersetshire*, because this was a Duty by his coming there. 1 Roll. Abr. 462, 469. 1 Roll. Rep. 314 Hob. 68. 1 Brownl. 10. Sed vide Hob. 93. where the Opinion is contra.

If *A.* says to *B.* that if he will sell certain Cattle to *C.* for such Sum as shall be agreed between them, if *C.* does not pay him the Sum according to the Agreement, he himself will pay it; and *B.* sells the Cattle to *C.* for 20*l.* to be paid at a Day to come, and *C.* does not pay the 20*l.* at the Day, *A.* is bound to pay it at his Peril without

without any Notice given to him by *B.* for how much he sells them, or at what Time, because he has taken upon himself to pay it at his Peril. 1 *Roll. Abr.* 462.

If *A.* sells Lands to *B.* by the Name of twenty Acres, according to the Rate of 200 *l.* for every Acre; and it is agreed between the Parties, that the Land shall be measured by *J. S.* before the first of *January* next ensuing; and *A.* covenants to repay according to that Rate for every Acre before the first of *May* after: If there be not twenty Acres upon the Measure, if *J. S.* measures it, and it is found there is not twenty Acres, *A.* ought to repay it before *May* at his Peril, without any Notice given how many Acres it wants of twenty, for he has taken upon himself to perform it at his Peril. 1 *Roll. Abr.* 462, 469. 1 *Roll. Rep.* 314.

So in this Case, if by the Agreement no certain Person had been appointed to measure it, but that it should be measured by one elected by one of the Parties, and by another elected by the other: If the Vendee elects *J. S.* and gives Notice thereof to the other, and of a certain Time to measure it, and *J. S.* does it at the Day, and none comes for the other to join with him, yet he ought to take Notice, at his Peril, how many Acres it wants of twenty, otherwise an Action of Covenant lies; for now, by the Matter subsequent, and the Default of the Vendor, it is as much as if *J. S.* had been appointed at the Beginning to have measured it. 1 *Roll. Abr.* 462, 469. 1 *Roll. Rep.* 314. In Point of Covenant, Notice is not so strictly to be given as it is upon an Obligation which is in Point of Forfeiture. *Cro. Jac.* 390, 391. & vide 472. 1 *Bulst.* 12. *Hut.* 80.

If the Condition of an Obligation be to account before such Auditors as the Obligee will assign, and the Obligee assigns Auditors, he ought to give Notice thereof to the Obligor, otherwise he is not bound to account. 1 *Roll. Abr.* 462. 8 *Ed.* 4. 1. *b.* *Fitz. Arbitrament* 15. Vide 8 *Co.* 92. *b.*

If I am bound to enfeoff such Persons as the Obligee shall name, he ought to give Notice of those which he names, otherwise I am not bound to enfeoff them. 1 *Roll. Abr.* 463. 8 *Ed.* 4. 15.

If the Condition be to seal such Obligation as an Escrow as the Obligee shall write, he is not bound to seal it without Notice of the Escrow written. 1 *Roll. Abr.* 463.

If the Condition of an Obligation be, that if the Obligee returns from beyond the Seas before the 22d of *April* next, then if the Obligor pays unto him at *Easter* following 100 *l.* the Obligation shall be void: If the Obligee returns within the Time, he is not bound to give Notice thereof to the Obligor; but he ought to take Notice thereof at his Peril, for he has bound himself to this Inconvenience. 1 *Roll. Abr.* 463. Like Point adjudged *contra per tot' Cur'* 1 *Bulst.* 44. in *Gable v. Moss.*

If the Condition of an Obligation be to pay 20 *l.* within ten Days after: *J. S.* has rode five Times in six Days from *London* to *Tork*, and from *Tork* to *London*; he ought to take Notice of the doing thereof at his Peril, because it is to be done by a Stranger. 1 *Roll. Abr.* 463, 469. *Hut.* 80. *Hard.* 42. *Popb.* 164. *Cro. Jac.* 137, 150. *dubitatur.*

If the Condition of an Obligation be to pay 20 *l.* to *B.* the Obligee within one Year after *B.* shall marry *C.* In this Case he is bound to pay it to *B.* within one Year after the Marriage, without any Notice given of the Marriage by *B.* for he has taken upon himself to pay it within one Year; and he may take Notice of the Marriage of *C.* who is a Stranger to the Condition. 1 *Roll. Abr.* 463. *Telv.* 168. *Cro. Jac.* 229. Vide 2 *Sid.* 36, 116. *Lat.* 15. 1 *Roll. Rep.* 286. 3 *Bulst.* 86, 327. *Cro. Jac.* 229. *Stil.* 53, 57. *All.* 24. *Popb.* 165. 1 *Roll. Abr.* 470. *pl.* 5.

If *A.* sells to *B.* certain Weyes of Barley, or other Things, and *B.* assumes to pay for every Wey as much as he sells a Wey for to any other Man; if he after sells to others certain Weyes for a certain Sum, he shall not have an Action upon the Case against *B.* upon his Promise, till he has given him Notice for how much he sold the Wey to others; for *B.* is not bound to pay it till Notice, because it is uncertain, and not known to him; and here he assumes in general, and not in particular, to pay so much as *J. S.* shall pay for a Wey, and so he does not assume to take Notice at his Peril. 1 *Roll. Abr.* 463. 1 *Roll. Rep.* 285. *Cro. Jac.* 432. 3 *Bulst.* 85, 86.

Yet where it lies as much in the Conscience of one as the other, he must take Notice at his Peril. 1 *Bulst.* 12. 2 *Bulst.* 143, 144. *Cro. Jac.* 493. *Telv.* 121. *All.* 2. 2 *Sid.* 116. *Hard.* 42.

But if he had undertaken to pay as much for every Wey as he sold a Wey for to *J. S.* if *J. S.* after bought a Wey for a certain Sum, he ought to take Notice thereof at his Peril, without any Notice given, otherwise he has broke his Promise. 1 *Roll. Abr.* 463. 1 *Jon.* 287. *Cro. Jac.* 684. *Stil.* 184.

If

If *A.* is indebted to *B.* by Obligation in 60 *l.* for the Payment of 30 *l.* and thereupon, in Consideration that *B.* will *mutuo dare* to *C.* a Stranger, upon Request, so much as will make it 100 *l.* and will accept *C.* and *D.* to be bound to *B.* for the Payment of the 100 *l.* and will deliver up the said Obligation of 60 *l.* *A.* undertakes to *B.* that the said 100 *l.* with Interest, shall be paid as certainly as any Money in England: In an Action upon the Case by *B.* he is not bound to alledge more, but that he lent the 70 *l.* to make the 20 *l.* 100 *l.* to *C.* without averring that he gave Notice thereof to *A.* for the Reason aforesaid. 1 Roll. Abr. 463.

If *A.* covenants with *B.* to make such Assurance to him of the Manor of *D.* as the Counsel of *B.* shall devise before such a Day; and after the Counsel devises an Assurance, *B.* ought to give Notice thereof to *A.* otherwise he is not bound to perform it. *Ibid.*

But if *A.* covenants to make such Assurance as the Counsel of *A.* himself shall devise; then if his Counsel devises, he ought to perform it without Notice given by *B.* 1 Roll. Abr. 464. 1 Leon. 105.

If in an Action upon the Case upon a Promise the Plaintiff declares, that the Defendant promised to pay so much for his Passage over certain Locks in a River made by the Plaintiff in his own Soil, as the Lord of *M.* thereafter should appoint to be paid for the Passage of every Boat; and alledges, that the Lord of *M.* after appointed so much in certain to be paid, &c. and that he requested the Defendant such a Day to pay it: This is a good Declaration, without alledging that he gave any Notice to the Defendant of the Appointment of the Sum made by the Lord of *M.* because the Plaintiff is as great a Stranger thereto as the Defendant, and it does not lie more in his Conscience than in the Conscience of the Defendant, this being to be appointed by a Stranger. 1 Roll. Abr. 464. Cro. Car. 132.

If *A.* bargains with *B.* for certain Land for 100 *l.* in this Manner, *viz.* he gives him 20 *l.* presently, and says further, if he likes the Land and Assurance, that then this 20 *l.* shall be in Part of Payment of the 100 *l.* but if he does not like it, that then he shall have back his Money again; and after he dislikes the Bargain, he may have an Action of Debt for the 20 *l.* before any Notice given to *B.* of his Dislike, for he ought to take Notice thereof at his Peril. 1 Roll. Abr. 464. Cro. El. 834.

If a Man undertakes to deliver to *J. S.* at *B.* on Shipboard twenty Quarters of Barley; altho' *J. S.* ought to bring a Ship there to receive the Barley, yet he needs not give Notice to him that he has brought it there, for he ought to take Notice thereof himself. 1 Roll. Abr. 464. 1 Roll. Rep. 312. 3 Bulst. 152, 153.

If *A.* assumes to *B.* in Consideration that *B.* will deliver to *D.* certain Wood to the Use of *A.* that he will pay so much, &c. for every Load to *B.* upon Request. In an Action upon the Case, if he alledges that he delivered so much, &c. to *D.* to the Use of *A.* and that he after required *A.* to pay so much for every Load, &c. this is good, without alledging any Notice given to *A.* when he delivered the Wood to his Use to *D.* for he ought to take Notice thereof at his Peril, tho' the Time of the Delivery is uncertain. 1 Roll. Abr. 464.

If a Lessee for Years covenants to find necessary Provisions for the Lessor, his Steward and Servant, at all Times when he shall keep a Court there; the Lessee must take Notice of the general Summons, and do it without Personal Notice given him. Palm. 532.

If a Condition of an Obligation be to perform an Award, and the Arbitrator awards, that one shall make a general Release of all Things till the Date of the Obligation: It is not an Excuse to him to say that he was at all Times ready to make such general Release, but the other never requested him to do it. 1 Roll. Abr. 464. Owen 7. 1 Leon. 71.

After a Marriage by *C.* with *D.* the Daughter of *A.* *B.* the Father of *C.* in Consideration that *A.* will give 50 *l.* to *C.* for the better Maintenance of *C.* and *D.* and at the Request of *B.* *B.* promises *A.* to pay 100 *l.* to *D.* the Daughter of *A.* if she survives *C.* her Husband: In an Action upon the Case by the Administrator of *A.* against *B.* after the Death of *C.* it is a good Declaration to aver, that *A.* paid the 50 *l.* to *C.* in his Life, and yet the Defendant *B.* did not pay the 100 *l.* to *D.* who survived *C.* without averring any Notice given of the Payment of the 50 *l.* by *A.* to *C.* for he has taken upon himself to pay it at his Peril. 1 Roll. Ab. 464. All. 1. Godol. 160.

If a Man promises another, that upon Request he will make him a good and sufficient Assurance of certain Lands for seven Years: He ought upon Request to make

a Lease for the Years, without any Tender of a Lease by him to whom the Promise is made; for he ought to make a good Lease at his Peril, for here the Request does not refer to the Manner of the Conveyance to be made, but only to the Time when the Lease shall be made. 1 Roll. Abr. 465.

If the Condition of an Obligation be, that *whereas the Obligor is Lessee for Years from the Obligee of certain Lands; if he renders up the Possession of the Land at the End of the Term of the Lessor, his Heirs or Assigns, upon Request, then the Obligation shall be void, &c.* and after the Lessor assigns over his Reversion, and the Assignee at the End of the Term requests him to render up the Possession to him; he is bound to do it without any Notice given him that he is Assignee; for he ought to take Notice thereof at his Peril, inasmuch as he has bound himself to render it up to the Assignee. 1 Roll. Abr. 465. Bridg. 128, 129.

If a Man leases a Mill for Years, and the Lessee covenants to repair the Mill, and the Lessor covenants to find him great Timber for it; the Lessee ought to give Notice to the Lessor how much will suffice for the Reparation, and not to demand in general Timber for Reparations, or otherwise the Lessor is not bound to deliver any. 1 Roll. Abr. 465.

If the Condition of an Obligation be, that if the Obligor, with two others, make, and, upon Request, seal to the Obligee an Obligation of 40 l. then, &c. it is sufficient for the Obligee to make Request only, without tending any Writing to them, for he ought to do it at his Peril. 1 Roll. Abr. 465. Cro. Jac. 652.

If the Plaintiff in an Action upon the Case declares, that in Consideration that he would become bound to the Defendant by Obligation for the Payment of 11 l. at a Day, the Defendant assumed to deliver an Horse to the Plaintiff; and the Plaintiff avers, that he offered to be bound to the Defendant, &c. and did not say the Obligation was sealed, and that he offered to deliver it so sealed, as he ought: This is not good, for he ought to do it of his Part. Hob. 24, 105, 69, 70.

If A. being a Bailiff of the Borough Court of *Westminster*, in Consideration of 10 l. given to him by B. promises B. to arrest J. S. at the Suit of B. by Process out of the said Borough Court: In an Action upon the Case upon this Promise, it is a good Plea for A. to say, that he was always ready after the said Promise to arrest J. S. at the Suit of B. if he had brought to him any sufficient Warrant to do it; but says, B. never brought him any Process out of the said Court to arrest him: This is a good Plea, because it belonged to B. to sue out the Process, for it will be Maintenance in A. to do it; and the Law (where the Words are general) will so marshal them, that he ought to do it for whom it is most proper. 1 Roll. Abr. 465.

If the Condition of the Obligation be, that the great Bell of *Mildenhall* shall be carried to the House of the Obligor in W. at the Costs of the Men of *Mildenhall*, and there shall be weighed, and put in the Fire *in praesentia hominum de Mildenhall*, and then the Obligor shall thereof make a Tenor to agree *in Tono & Sono* to the other Bells of *Mildenhall*. In this Case the Obligor ought to weigh and put it in the Fire, for he ought to do it to whose Occupation it properly belongs to do it, which is the Defendant, who ought to make the Bell. 1 Roll. Abr. 465. 9 Ed. 4. 3. b. Bro. Condition 72. Fitz. Barr. 87.

If A. binds himself to B. to deliver to B. a certain Quantity of Hops, well picked and conditioned, and that B. shall have the Choice of these Hops out of 204 Bags of Hops of A. of his own Growth: In this Case B. ought to do the first Act, *scilicet*, he ought to require A. to shew him his 204 Bags, out of which B. shall have his Election, for otherwise B. cannot make any Election without View of the 204 Bags, which are in the Custody of A. himself, and A. cannot deliver them before Election. 1 Roll. Abr. 466. All. 25, 26. Stil. 49, 74. March 74, 75.

If a Man covenants to make further Assurance at all Time and Times at the Charge of the Covenantor, and the Covenantor demands a Fine after for further Assurance, the Covenantor is not bound to levy it, if he does not appoint a certain Day when he will have it levied. 1 Roll. Abr. 466.

If a Man promises to make such Assurance of such Lands as he has by Copy to another, before such a Day as his Counsel learned shall advise: If he tenders an Assurance to him without any Advice of his Counsel, yet he who made the Promise is bound to seal it, otherwise he has forfeited the *Assumpsit*. 1 Roll. Abr. 466. For to have Advice of his Counsel, is only for the strengthening his Assurance; and, at his own Peril, he may require it without if he will. Cro. Eliz. 466. If the Party himself might

might advise, it would be no Plea to say, *Quod consilium non dedit advisamentum*. Cro. Eliz. 297, 298.

In an Action upon an *Assumpsit*, if the Plaintiff declares, that whereas he, at the Request of the Defendant, had delivered to the Defendant so much old Lay Metal, to be artificially made by the Defendant into Pewter Vessels, *capiendo inde* of the Plaintiff *tantum quantum* for his Labour he shall reasonably deserve: *In consideration inde* the Defendant after, *scilicet*, the same Day, assumed to deliver to the said Plaintiff Lay Metal artificially made into Pewter, when he should be requested; and avers, that altho' the Defendant was requested to deliver the said old Lay Metal made into Pewter Vessels, yet he had not delivered it, &c. and the Defendant pleads *Non assumpsit*, and it is found for the Plaintiff. Tho' it is not averred, that he tendered to the Defendant so much as he deserved for the making thereof into Pewter Vessels, yet the Declaration is good, for this is not a precedent Condition, but the Words *capiendo proinde*, &c. is but to shew the Contract between them, upon which he may have an Action of Debt. Tho' the Defendant may retain the Goods till he be paid as much as he deserves, yet this shall come of his Part to shew how much he deserves, and that he was ready to deliver it upon Payment thereof; for this ought to come properly of his Part, inasmuch as it does not lie in the Conusance of the Plaintiff how much he deserves, without shewing thereof by the Defendant; and also it is at the Election of the Defendant, either to bring his Action for what he deserves, or retain the Goods till Payment, and therefore it ought to come of his Part; and here the Defendant does not rely upon it, but pleads *Non assumpsit*. 1 Roll. Abr. 466.

If *A.* covenants with *B.* to surrender a Copyhold, which he has for Life, to the Use of *B.* who has the Reversion thereof upon Request made by *B.* to *A.* and after *B.* tenders to *A.* a Letter of Attorney in Writing, by which he gives Power to two Attornies to surrender for him, at the next Court of the Manor, to the Use of *B.* and this Course is warrantable by the Custom of the Manor: In this Case, upon this Tender and Request to seal, *A.* is not bound to seal the Letter of Attorney, nor to surrender in Court, or otherwise, for *A.* has taken upon him to surrender upon Request; so that it is at the Election of *A.* whether he will surrender in Court or by Letter of Attorney, or any other ways that he may; and this Election cannot be taken away by *B.* (*All.* 68, 69. *Stil.* 107.) and therefore when *B.* does not require him to surrender, but only to seal a Letter of Attorney; this is a void Request, and as no Request, (for it ought to be an express Request to make a Surrender, and not an implied one. Cro. Jac. 300.) and therefore *A.* is not bound to seal the Letter of Attorney, nor to surrender in Court, or otherwise, upon this Request. 1 Roll. Abr. 466, 467. Cro. Car. 299, 300. 1 Jon. 314, 315. God. 445.

If *A.* and *B.* undertake one to the other to perform the Award of *J.* who awards, that *A.* shall pay to *B.* 8*l.* 8*s.* or 3*l.* and all Costs that *B.* *expofuisset* in *et circa* prosecutionem cujusdam placiti transgressionis inter ipsos *A.* & *B.* *pendenti*, prout per *notam* attornati prædicti *B.* *appareret*, *ad libitum* ipsius *A.* in this Case *B.* is not bound to tender a Note of his Attorney to *A.* of the Cost that he has expended in it, without Request made by *A.* to do it, because *A.* has Election to pay one or the other, *scilicet*, the 8*l.* which is certain, or the 3*l.* and Costs of Suit, which are uncertain; and *B.* does not know whether he will pay the one or the other, and therefore *A.* ought to do the first Act, *scilicet*, to pay the 8*l.* or request *B.* to give him a Note from his Attorney of the Cost, and if *B.* refuses to deliver it, *A.* is excused. And another Reason was given in this Case, *viz.* because *B.*'s Attorney ought by this Award to give the Note; and he is a Stranger, and therefore it needs not be shewn before Request made. 1 Roll. Abr. 467. March 108.

If *A.* be bound in an Obligation to *B.* of which the Condition is, that *A.* shall pay to *B.* all such Money as by a true and justifiable Bill under the Hand of the Attorney of *B.* shall appear to be before disbursed by *B.* or his Attorney, or any of them, or by any of their Means or Appointment, upon such a Day, in such a certain Sum, between, &c. In an Action upon this Obligation, if *B.* assigns for a Breach, that 24*s.* by a true and justifiable Bill under the Hand of *J.* S. the Attorney of *B.* appeared before to be disbursed, which *A.* did not pay: This is a good Breach, without alledging that *A.* had Notice thereof, or that the Bill of the Attorney was shewn to him; and tho' it was expressly alledged by *A.* that no such Bill was tendered to him, by which it appeared what Sum was disbursed, because the Attorney was a Stranger, of which *A.* ought to take Notice at his Peril. 1 Roll. Abr. 467. Vide March 108, 109.

If *A.* undertakes to *B.* that if *B.* will borrow 100*l.* of *C.* that he will pay it to *C.* at such a Day, and upon such Conditions as shall be agreed between them; and *B.* borrows the Money, and agrees that it shall be repaid at a Day certain, and the Money is not paid, upon which *C.* sues *B.* and recovers it: Now tho' *B.* did not give Notice of the Agreement to *A.* before the Day, yet *B.* shall recover his Principal against *A.* but not his Damages, for the want of Notice shall not discharge *C.* of his Promise. 1 *Bulst.* 12.

If *A.* upon a good Consideration promises *B.* to join with him in the Surrender of certain Copyhold Lands, *B.* must give Notice to *A.* when he is ready to join in a Surrender. *All.* 68.

If *A.* devises Lands to *B.* (who is not his Heir at Law) in Tail, provided *B.* shall not marry without the Assent of *C.* and if she marries without such Assent, then devises the Land to *D.* *B.* at her Peril must take Notice of this Condition, for she may as well take Notice of that as of her Estate, and no Body is bound to give her Notice. 2 *Lev.* 21, 22.

Otherwise where the Devise is to the Heir at Law upon such a Condition, for the Heir upon his general Title may enter without Notice of such Will or Condition. 2 *Lev.* 22.

So where a Man makes a Feoffment to the Use of himself for Life, Remainder to his Heir in Tail, &c. upon Condition, and dies. 3 *Mod.* 28, 29, &c.

If a Man covenants to pay for the better Support and Maintenance of his Wife 200*l.* within two Years after he shall be required, to such Persons as she shall by Deed assign and appoint: She appoints the Payment thereof to *A.* and *B.* and dies before Notice to the Covenantor, and adjudged Notice needs not be given in her Life-time. *Skin.* 34.

If a Man, in Consideration that I will enter into an Obligation to *J. S.* for his Debt, promises to save me harmless from all such Obligations in which I shall enter to *J. S.* for his Debt not exceeding 500*l.* If I enter into an Obligation to *J. S.* under 500*l.* he ought to save me harmless at his Peril, without any Notice given to him that I have entered into an Obligation, because he has bound himself to it. 1 *Roll. Abr.* 467, 468. Before Notice.

If the Condition be, that he shall pay so much as he shall be found in Arrear before such Auditor as the Obligee shall assign; when the Auditor is assigned, he ought to take Notice at his Peril how much he is found in Arrearages, and perform it. 1 *Roll. Abr.* 468. 1 *Roll. Rep.* 286.

So if the Condition be to stand to the Award of *J. S.* he ought to take Notice of the Award at his Peril, and perform it. *Ibid.*

An Award was made between *A.* and *B.* that *A.* within two Months should make a Lease, and upon the making thereof, *B.* should pay him 50*l.* *A.* is not bound to give *B.* Notice when he would make the Lease, tho' it may be objected that *B.* must always have 50*l.* about him. 1 *Vent.* 93.

If the Condition of the Obligation be to pay the Damages that shall be recovered by *J. S.* against him, he ought to take Notice of the Sum recovered at his Peril, and pay it. 1 *Roll. Abr.* 468. 18 *Ed.* 4. 18.

If a Man promises another to pay him so much at the Marriage of a Stranger, he ought to take Notice of the Marriage at his Peril, without Notice given. 1 *Roll. Abr.* 462. pl. 4. 468. 1 *Roll. Rep.* 434.

If *A.* be indicted in a Leet for an Incroachment upon the Highway, and after *A.* dies, and *B.* his Heir continues the Incroachment, and thereupon an Order is made in the Leet, that *B.* shall reform the Incroachment by a Day, upon the Pain of 40*s.* and for not reforming thereof, the Lord of the Leet brings an Action of Debt for the 40*s.* and declares thereupon as before: This is a good Declaration, without alleging that *B.* had Notice of the Order made, inasmuch as he is within the Jurisdiction of the Leet, he ought to take Notice thereof at his Peril. 1 *Roll. Abr.* 468. *Vide* 2 *Roll. Abr.* 136. pl. 1.

(BB) *Who are disabled to perform Conditions.*

IF a Man promises to perform an Award, which is, that he shall deliver up a certain Obligation to the other, in which the other is bound to him, without limiting any Time when it shall be performed: If he brings an Action of Debt upon the Obliga-

Obligation, and recovers, and after delivers up the Obligation, yet it is not any Performance of the Condition, but it is broke, because he ought to deliver it up as it was at the Time of the Award made, for the Recovery in the mean Time is a Deceit, and a Disability of itself by his own Act to perform it. *1 Roll. Abr. 447. 1 Sid. 48. T. Raym. 25. 1 Keb. 103, 118.*

If the Feoffee, upon Condition to reinfest the Feoffor, enfeoffs a Stranger, upon Condition to perform the Condition, yet the Condition is broke, because the Feoffee has disabled himself to do it. *1 Roll. Abr. 447. 38 Aff. 7.*

If there be Feoffee upon Condition to reinfest, or to enfeoff a Stranger, and after another recovers the Land against him by Default, yet till Execution sued the Condition is not broke, for before Execution he is not disabled; for perhaps he will never sue Execution, and if he sues Execution after he has made the Feoffment according to the Condition, the Feoffor may re-enter, for the Condition is broke. *1 Roll. Abr. 447, 848. pl. 1. 2. 44 Aff. 26. 44 Ed. 3. 9. b.*

Where a Feoffment is made, on Condition that the Feoffee shall give the Lands to the Feoffor and his Wife, and the Heirs of their Bodies, Remainder to the right Heirs of the Feoffor; if the Feoffor dies before the Gift made, he must make a Lease to the Wife for her Life, without Impeachment of Waste, Remainder to the right Heirs of the Feoffor, which is as near as can be to the Intent of the Condition. *Lit. §. 352. Co. Lit. 219.*

But where a Feoffment is made upon such Condition, and the Feoffee enfeoffs another, and doth not perform the Condition, the Feoffor may enter, because the Feoffee has disabled himself to perform the Condition. *Lit. §. 355.*

If the Feoffee, upon Condition to reinfest, &c. grants a Rent-charge out of the Land: This is a Forfeiture of the Condition, because he is disabled to make a Feoffment of the Land as it was at the first Feoffment; and if the Feoffor should accept the Re-feoffment, he should be subject to the Charge. *1 Roll. Abr. 447.*

If the Feoffee, upon Condition to reinfest, &c. takes a Wife; by this he has disabled himself to perform the Condition, because the Land is subject to the Dower of his Wife, and remains not in the same Plight. *Lit. §. 357. Co. Lit. 221.*

So if he had made a Lease for Years, to commence *in futuro*. *Co. Lit. 221. b.*

But if Feoffee, upon Condition to reinfest, is disseised, and after takes a Wife, binds himself in a Statute, &c. This is no Disability, for that during the Disseisin the Land is not charged with it, so that if the Wife dies, or the Conusee releases, &c. and after the Disseisee enters, he may perform the Condition. *Co. Lit. 222. a. 2 Co. 59. b.*

If a Stranger recovers by real Action against a Feoffee, upon Condition to reinfest; this is no Disability of the Feoffee before Execution sued, for perhaps he will not sue to Execution. *1 Roll. Abr. 448. 44 Ed. 3. 9. b. Secus* where by Default upon a feigned Title. *Co. Lit. 222. b.*

But if he that recovers sues Execution, or enters upon the Feoffee, the Condition is broke, for he is disabled. *1 Roll. Abr. 448. 44 Ed. 3. 9. b.*

So if after such Recovery the Feoffee makes a Re-feoffment, and after he that recovers enters upon him, or sues Execution; now the Condition is broke, and the Feoffor may re-enter. *1 Roll. Abr. 448.*

If an Annuity be granted till he is promoted to a Benefice, if the Grantee takes a Wife, the Annuity is determined, because by the Marriage he is disabled, & *Lex non cogit inutile, scilicet*, to proffer it to him. *Ibid.*

(CC) *To whom a Condition may be performed.*

IF a Man makes a Feoffment in Fee, upon Condition that if he pays 100 l. to the Heirs, Executors or Administrators of the Feoffee within a Year after his Death, that then it shall be lawful for him to re-enter; and after the Feoffee makes a Feoffment to J. S. and dies, and the Feoffor pays the Money to the Heir of the Feoffee: This is a good Performance of the Condition, for the Heir is within the express Words of the Condition. *1 Roll. Abr. 421. Cro. Eliz. 384. Moor 708. pl. 989. Goulf. 177, 178. Poph. 100.*

So if the Condition be to pay to the Feoffee, his Executors or Assignees, and the Feoffee makes his Sons Executors, and dies, and Administration is committed during their Minority, it is the safest way to pay the Money to the Executors, or one of them; for the Administrator is but as a Bailiff to them. *3 Leon. 103.*

And in this Case, if the Money had been paid to the Assignee, it had been no Performance of the Condition, because the Assignee is not named. 5 Co. 97. Cro. Eliz. 384.

But if the Condition had been to pay it to the Feoffee, his Heirs or Assigns, it might have been paid to either. Co. Lit. 210. a.

If a Man makes a Feoffment in Fee, by way of Mortgage, upon Condition to be void upon Payment of the Money by the Feoffor at a Day: If the Feoffee dies before the Day, the Money shall be paid to the Executors, and not to the Heirs of the Feoffee, because it shall be intended the Estate was made by Reason of the Loan of the Money, or for some other Duty. Lit. §. 339. Co. Lit. 209. b.

But if the Condition be, that if the Feoffor pays, &c. to the Feoffee, or his Heirs; if he dies before the Day, the Payment ought to be made to his Heir, and not to his Executors, for *Designatio unius est exclusio alterius*. Lit. §. 339. Co. Lit. 210. a. 1 Brownl. 66.

If the Condition of an Obligation be, to pay 10 l. per Ann. after the Death of the Oblige, to the Executors of the Oblige, for the Use of his Children, and he dies without making any Executors, the Money shall be paid to his Administrators. Hetl. 115, 116.

If A. pawns a Jewel to B. for 25 l. but no certain Time is appointed for the Redemption thereof; and after, B. being sick, his Wife, in his Presence, and with his Assent, delivers it to C. and B. dies; the Money must be paid to the Executors of B. and not to C. because by the Delivery of the Feme, with the Assent of the Baron, there passed no Interest, but a Custody only. Cro. Jac. 244, 245.

It would be so, tho' it be delivered over upon a Condition. It is not like a Mortgage, for there he who has the Interest ought to have the Money. Telw. 178.

If the Condition of an Obligation be to pay 10 l. &c. it is a good Performance if he pays it to his Deputy. 1 Roll. Abr. 421. 42 Ed. 3. 13. b.

A Bond conditioned for the Delivery of forty Pairs of Shoes at H. within a Month to J. S. a common Carrier, for the Use of the Oblige, and J. S. did not come to H. within the Month, but the Obligor delivered them to his Porter: This is a good Performance, for the Delivery to the Man is a Delivery to the Master, within the Intent of the Condition. 2 Mod. 309.

If the Condition of an Obligation is to pay 20 l. to the Oblige, and other the Parishioners of D. it may be paid to any two of them. Moor 68. pl. 183.

(DD) *At what Time a Condition shall be performed where Time is limited.*

IF A. covenants with B. to make a Surrender of Land, or to convey Land to B. Upon Request, (or upon reasonable Request): If a Writing purporting a Surrender or Conveyance be tendered to him, with Request to seal it, A. ought to seal it presently, and shall not have any Time to advise by his Counsel, whether it be according to the Covenant. 1 Roll. Abr. 441. Cro. Car. 299, 300. 1 Jon. 314. Godb. 445.

If a Man covenants to make further Assurance at all Time and Times at the Charges of the Covenant, and as Counsel advises that he shall levy a Fine; yet he is not bound to do it presently, but he shall have convenient Time to do it, tho' the Words be, that he shall do it at all Times, for the Words ought to have a reasonable Construction. 1 Roll. Abr. 441.

If A. being a Copyholder for Life, covenants with B. to surrender to B. in Reversion the said Copyhold Tenement, *super rationabilem requisitionem ei fiendam* by B. and after B. tenders to A. a Writing purporting a Letter of Attorney of Surrender of the said Tenement to B. and A. requests, that before she seals it, she, by her Counsel, *circa scriptum illud infra rationabile tempus tunc proximo sequens advisaretur*, which B. refuses, and thereupon A. refuses to seal it. Admitting that A. was bound to seal the Letter of Attorney, and to surrender by such Letter of Attorney, then she has broke her Covenant, for she ought to take Consuance of the Law at her Peril, whether the Letter of Attorney was according to the Covenant, and she shall have no Time to be advised thereupon: But the reasonable Time mentioned in the Covenant, is intended reasonable Time in the making thereof, *scilicet*, she shall have Time to read it before she seals it, and therefore it ought to be sealed presently, without Time to advise upon Request, according to the Words of the Covenant. 1 Roll. Abr. 441, 442. Cro. Car. 299, 300. 1 Jon. 314. Godb. 445

If a *Latitat* to arrest *J. S.* be returnable *Monday* next after the *Morrow* of the Holy Trinity, which this Year was the 10th of *July*, and the Sheriff arrests him the 10th of *July*, and takes an Obligation from him the same Day, with a Condition to appear before the Lord the King on *Monday* next after the *Morrow* of the Holy Trinity, to answer, &c. It seems he ought to appear the same Day, and not this Day twelve Months. 1 *Roll. Abr.* 444.

If a Man in *Lent* enters into Bond, conditioned to pay a lesser Sum *in quarta septimana quadragesimæ prox'*: This is not payable till *Lent* come twelve Months. *Goulf.* 137.

So if a Bond is entred into upon *Michaelmas* Day, conditioned to pay a lesser Sum upon the Feast of St. *Michael prox' futur'*: It is not payable the same Day, but that Day twelve Months. *Goulf.* 137.

If the Condition of an Obligation be to pay 8 *l.* *Anno Domini* 1599. *in and upon the 13th Day of October next after the Date hereof*, at D. &c. Where the 13th of *October* next after the Date is a long Time before 1599. yet it shall be paid in 1599. and not before, for it appears the Intention was, that it should be paid in 1599. and this is first expressed; and therefore if the subsequent Words, *upon the 13th of October next after the Date hereof*, are contrary, they shall be void: But it seems they may be interpreted, that it shall be paid the 13th of *October*, which shall be *Anno Domini* 1599. next after the Date thereof, and so all may stand together, otherwise not. 1 *Roll. Abr.* 444.

If *A.* be obliged to *B.* the first of *May*, upon Condition to pay him 10 *l.* at the Feast of St. *Michael*, without saying more; it shall be intended the Feast of St. *Michael* next ensuing. *Ibid.*

The Words of a Condition may be performed and not the Intent; and the Intent may be performed and not the Words; and then for the most part a Condition is performed when the Intent and Meaning of it is observed.

When the Act is to be done between the Parties themselves.

1. To make an Estate.

And therefore if a Feoffment be made, on Condition that the Feoffee or his Heirs shall make an Estate to the Feoffor and his Wife in Tail before such a Day, and before the Day the Husband dies, and then he makes an Estate as near it as he may, viz. to the Wife for Life without Impeachment of Waste, and after to the Heirs of the Body of the Husband; this is a good Performance of the Condition. *Shep. Touch.* 139. *Lit.* §. 352. 3 *Co.* 64. 8 *Co.* 90. 2 *H.* 4. 11.

And if the Condition be that the Grantee shall make a Feoffment of Land, and he makes a Lease of the Land first, and then a Release to the Lessee and his Heirs; this is tantamount, and a good Performance of the Condition. *Co. Lit.* 207.

2. To pay Money.

If a Feoffment be made, on Condition that the Feoffor or his Heirs pay 10 *l.* by a Day, the Feoffment to be void; and the Feoffor before the Day commits Treason, and is executed, and so dieth without Heir, and after before the Day the Heir is restored, and he at the Day pays the Money; in this Case this is a good Performance notwithstanding there was once a Disability.

So that if heretofore one had made a Feoffment, on Condition to reinfess by a Day, and before the Day the Feoffee had entered into Religion, and then had been deraigned, and at the Day had made the Feoffment; this had been a good Performance of the Condition. *Co. Lit.* 222. *Perk.* §. 802, 803.

By and to whom Money shall be paid upon a Condition.

If a Feoffment be made, upon Condition that if the Feoffee shall pay to the Feoffor 10 *l.* such a Day, that then he shall have the Land to him and his Heirs, otherwise that the Feoffor shall re-enter; or if it be made on Condition that the Feoffee shall pay 10 *l.* to the Feoffor such a Day; and before the Day the Feoffee sells the Land; in this Case the Seller or the Buyer either of them may tender the Money at the Day, and this will be a good Performance of the Condition, for he that has Interest in the Land on the one Side, or in the Condition as Party or Privy on the other Side, may tender and perform the Condition to save the Estate. *Co. Lit.* 208. 5 *Co.* 96.

If Lands be mortgaged (or which is all one) if a Feoffment be made of Lands, on Condition that if the Mortgagor or Feoffor pays 10 *l.* to the Feoffee such a Day, that then the Estate shall be void, and before the Day the Mortgagor or Feoffor dies; in this Case the Heir or Executor of the Feoffor, the Ordinary, the Guardian in Chivalry or Socage of the Heir of the Feoffor, or any other by either of their Commandment precedent, or Assent subsequent, may pay this Money at the Day, and Payment or Tender of it by either of them at the Day, is a good Performance of the Condition. *Lit.* §. 534, 537. *Co. Lit.* 206. 15 *H.* 7. 2.

And

And so also it seems is the Law upon a Devise of Land to *J. S.* paying to *J. D.* 20*l.* if *J. S.* dies, his Heir or Executor may pay the 20*l.* and this is a good Performance of the Condition.

But in these Cases, if a Stranger of his own Head without any such Commandment or Agreement pay the 10*l.* it will be no good Performance of the Condition.

And yet perhaps if the Party that is to pay it be an Ideot, the Payment or Tender by any one in his Behalf shall be a good Performance of the Condition. *Shep. Touch.* 140. *Lit. §. 337.*

If a Feoffment be made, on Condition that if the Feoffor and *J. S.* pays 10*l.* such a Day, the Feoffment to be void, and the Feoffor dies before the Day, and *J. S.* alone pays it; this is a good Performance of the Condition. *Co. Lit. 207. Bro. Condition 109.*

If a Feoffment be made, on Condition that the Feoffor pays to the Feoffee or his Heirs 10*l.* such a Day, and before the Day the Feoffee grants the Land away to another; in this Case the Money may be paid to the Feoffee himself, or if he be dead to his Heirs; and this Payment is a good Performance of the Condition.

And if the Words of the Condition be (*that if he pays to the Feoffee, his Heirs or Assigns, &c.*) in this Case Payment to either of them is a good Performance of the Condition, so that if in this Case the Feoffee makes a Feoffment over, it is in the Election of the first Feoffor to pay the Money to the first or second Feoffee, and if the first Feoffee dies, to pay it to his Heir or the second Feoffee: But to an Executor or Administrator in this Case is not a good Performance.

And yet if the Words of the Condition be, *that if he pays to the Feoffee* (without the Words *Heirs, Executors, &c.*) 10*l.* such a Day; in this Case the Payment may be made to the Executor or Administrator of the Feoffee after his Death, and such a Payment is a sufficient Performance of the Condition; and if the Words of the Condition be (*that if the Feoffor pays to the Feoffee, his Heirs, Executors or Administrators, &c.*) in this Case Payment to either of them is a good Performance of the Condition: But Payment to an Assignee in this Case is not good.

And if the Words be, *that if he pays to the Feoffee and his Heirs, &c.* in this Case Payment to his Executors or to his Assigns is not a good Performance of the Condition, so that in all these Cases it seems for the Person to whom Payment is to be made, the Words of the Condition are precisely to be pursued. *Shep. Touch. 141. Co. Lit. 210. 5 Co. 96. 6 Co. 69. Lit. §. 339.*

If a Feoffment be made, on Condition that if the Feoffor shall tender Twelve-pence to the Feoffee such a Day, the Feoffment to be void, and afterwards the Feoffee is disseised of the Land, and after the Feoffor renders the Twelve-pence to the Feoffee at the Day; this is a good Performance of the Condition. *Shep. Touch. 141.*

If a Feoffment be made to two Men, on Condition that they shall reinfeoff the Feoffor, or make a Lease to him by a Day, and before the Day one of them dies, and the Survivor does reinfeoff, or make the Lease; this is a good Performance of the Condition. *To reinfeoff.*

And so the Law is if both the Feoffees be living, for by his own Acceptance he has dispensed with the Condition, and so cannot enter for the Breach of it. *Dyer 69. 41 Ed. 3. 25.*

If a Feoffment be made, on Condition that the Feoffee shall enfeoff the Feoffor of the Manor of *Dale* by such a Time, and before the Time appointed the Feoffee grants a Rent-charge out of the Manor to a Stranger, and then at the Time appointed makes a Feoffment of the Manor according to the Condition; in this Case this is a good Performance of the Condition.

But if in this Case the Feoffee before the Time appointed grants away to a Stranger twenty Acres, Parcel of the Manor, and then makes a Feoffment of the Manor according to the Condition; this is a good Performance of the Condition.

And if a Feoffment be made, on Condition that the Feoffees or Lessees in Trust of such Land shall grant an Annuity out of it, and some of them only do grant this Annuity; this is no good Performance of the Condition. *Plow. 23. 3 H. 7. 4. 1 H. 6. 10.*

(EE) *At what Time a Condition is to be performed where no Time is limited.*

Presently
within con-
venient Time.

WHEN the Act by the Condition of an Obligation to be done to the Oblige is of its own Nature transitory, (as Payment of Money, Delivery of Deeds, and the like) and no Time limited, it ought to be performed in convenient Time.

6 Co. 31. Co. Lit. 208.

If the Condition of an Obligation be to pay a less Sum, and no Day of Payment limited, he ought to pay it presently, viz. within a convenient Time. Cro. Eliz. 798. 20 Ed. 4. 1. b. 18. 44 Ed. 3. 9. Bro. Condition 166. Bro. Obligation 55. 21 Ed. 4. 39. b. 14 H. 8. 23. Contra 10 H. 7. 15. Contra 9 Ed. 4. 22. b.

But where the Condition of a Feoffment is for the Payment of Money by the Feoffor, without limiting any Time, he has Time during his Life. Co. Lit. 208. 2. Secus where the Condition is to pay Money. 2 And. 73.

If the Condition be to make a *Retraxit* of a Suit, he ought to make it within a convenient Time. 1 Roll. Abr. 436. 20 Ed. 4. 8. b.

If the Condition be to perform the Award of J. S. who awards the Obligor to pay 10 l. without limiting any Time, he ought to pay it in convenient Time. 1 Roll. Abr. 436. 22 Ed. 4. 25. Bro. Condition 182.

So if the Condition be to acknowledge Satisfaction in such Court, he ought to do it within a convenient Time. Co. Lit. 208. b. 6 Co. 30. b.

So if the Condition be to deliver to the Plaintiff an Obligation of 20 l. in which the Plaintiff and B. stood bound to the Defendant: Tho' no Time be limited for doing thereof, yet he ought to do it in a convenient Time. 6 Co. 30. b.

If A. demises to B. and C. certain Tithes for ninety-nine Years, if A. so long lives, and after B. assigns over by Indenture his Moiety to D. and B. also delivers to D. an Obligation, in which D. then stood bound to B. in 400 l. for the Payment of 200 l. to B. at a Time then past: And thereupon, in Consideration that B. at the Instance and Request of D. would deliver to D. the Counterpart of the said Indenture of Assignment, sealed with the Seal of D. D. assumed, that if he would sell to any Person his Interest in the said Moiety so to him assigned by B. then D. would pay to B. 200 l. in Satisfaction of the said Obligation; and that if he sold the said Interest in the said Moiety to him assigned for more than 200 l. then he would pay to B. one Moiety of such Money as he should sell it for more than 200 l. and that if he did not sell the said Interest in the said Moiety so assigned, then he would re-deliver to B. the said Counterpart of the Indenture of Assignment and the said Obligation safe and not cancelled; and thereupon B. delivers to D. the said Counterpart and Obligation: This Promise being made 20 July 18 Car. and B. brought an Action thereupon, Hil. 20 Car. and averred in his Declaration, that D. had not sold his said Interest in the said Moiety, and yet had not re-delivered the said Counterpart and Obligation according to his Promise, *licet ad hoc faciend' postea*, 20 Sep. 20 Car. at such Place, &c. he was requested: The Action lies upon the Declaration, for D. shall not have all his Life to sell it, but he ought to do it in a convenient Time; for otherwise he may stay till the old Age of A. upon whose Life the Estate is to determine, and then it will be but of small Value, which was not the Intent of the Parties; but the Intent was to sell it for the best Value, or to re-deliver the Counterpart and Obligation; for tho' he does not take upon him to sell it, but only to pay so much if he sells it, and if he does not sell, to re-deliver, &c. yet upon the whole Contract it appears that this amounted to a taking upon him to sell, or re-deliver, &c. which ought to be within a convenient Time, or otherwise it will be of no Effect to B. 1 Roll. Abr. 436, 437. Stile 11.

If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time: This ought to be done in convenient Time. 1 Roll. Abr. 437.

So where the Condition was in convenient Time, to assure the Land for the Maintenance of a School, and the Devisee did not do it in eight Years, it was adjudged a Breach. 1 Co. 25.

If a Devise be made to another, upon Condition to pay his Debts; if he does not pay them within a convenient Time, the Condition is broke. 1 Roll. Abr. 437. Contra 38 Ed. 3. 11. b.

If a Man devises Lands devisable to his Executor to sell, and to distribute the Money for the Payment of his Debts; he ought to sell it as soon after the Death of the

the Devisor as he can, otherwise the Condition is broke. 1 *Roll. Abr.* 437. 38 *Aff.* 3. *Bro. Condition* 215. *Entry Congeable* 124. *Fitz.* 46.

For if after the Death of the Testator a Man tenders to him a certain Sum for the Lands, and he refuses it, because it is not to the Value of the Lands, and after retains the Lands in his Hands, to the Intent to sell it dearer to another, and in the mean Time takes the Profits to his own Use, and not for the Soul of the Testator, the Condition is broke. 1 *Roll. Abr.* 437. 38 *Aff.* 3. *Bro. Condition* 215. *Entry Congeable* 124. *Fitz.* 46.

If a Feoffment be made, upon Condition that he shall sell it as soon as he can, and as profitable as he can, and the Money taken for the same Lands shall be distributed for his Soul: If the Feoffee continues the Possession a Year and Half, because he finds not a Chapman to buy it, and takes the Profits of the Land, but never claims any Estate but under the Condition aforesaid, and is always of good Will to sell the Lands if he could find a Chapman, the Condition is not broke; for there is no Default in him. 1 *Roll. Abr.* 437. 26 *Aff.* 39. *dubitatur.*

If A. in Consideration of 50 *l.* given to him by B. undertakes to procure the Wardship of the Body and Lands of C. to be granted by the King (to whom it belongs) to B. during the Minority of C. who was then of the Age of thirteen Years: He ought to procure it within a convenient Time, without any Request; because otherwise the Benefit of the Profits of the Land will be lost in the mean Time. 1 *Roll. Abr.* 437.

If Land be granted to the King, upon Condition to grant to any Stranger, he is not bound to do it before Request. 1 *Roll. Abr.* 437, 438. Not before Request.

If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time, it ought to be paid within a convenient Time, without any Request. 1 *Roll. Abr.* 438.

If the Condition of an Obligation be to pay a certain Sum to the Obligee, without limiting any Time, he is not bound to pay it before Request. *Ibid.*

If the Condition of a Feoffment be to enfeoff a Stranger upon Request, he is not bound to enfeoff him before Request. 1 *Roll. Abr.* 438. 19 *H.* 6. 34. *b.* *Fitz. Entry Congeable* 2.

So it is if it be to enfeoff the Feoffor upon Request. *Ibid.*

So if the Condition of a Feoffment be, that he shall reinfeoff the Feoffor, he is not bound to do it before Request. 1 *Roll. Abr.* 438. 38 *Aff.* 7. *Br. Condition* 217. *Tender* 33. 44 *Ed.* 3. 9.

So where the Condition extends to the Feoffee, or his Heirs, to reinfeoff the Feoffor, the Heir after the Death of the Feoffee is not bound to do it before Request. *Roll. Abr.* 438. 38 *Aff.* 7.

If a Feoffment be upon Condition to give it to a Stranger in Tail, the Remainder to the right Heirs of the Feoffor; the Feoffee is not bound to do it before Request, because the Feoffor is to have an Estate by the Condition. 1 *Roll. Abr.* 438. 44 *Aff.* 6. *Bro. Condition* 26. *Fitz. Entry Congeable* 33. 44 *Ed.* 3. 9. *b.*

If W. in Consideration that T. will marry M. his Cousin, before the Return of W. from London to Norwich, assumes and promises after his Return from London to Norwich aforesaid, to pay to T. 10 *l.* and to find sufficient Security for the Payment of 40 *l.* more at the Death of W. and after T. marries with M. and W. returns from London to Norwich, he ought to pay the 10 *l.* and find the Security for the 40 *l.* within a convenient Time after his Return, at his Peril; and there needs no Request to be made by T. for he has taken upon him to do it at his Peril. 1 *Roll. Abr.* 438.

If A. in Consideration of twelve Pieces of Stuff of the Value of 40 *l.* by B. delivered to A. undertakes to B. to deliver to B. so many Pipes of Sack, which A. then had lying in a certain Cellar in London, as should be of the Value of the said Stuff, to be chosen by the said B. B. must request A. to let him make his Election; for before such Election A. cannot deliver the Wine; and there is no Reason that A. should request B. to make his Election, as he ought to have done, if the Promise had been to deliver them to a Stranger. *All.* 25. adjudged, and that a Request at Norwich to deliver the Wines was good, both in Respect of the Place and Manner; for B. must request A. where he could meet with him, and thereupon A. ought to have appointed a reasonable Time when he would be ready to go with B. to the Cellar, that he might make his Election; and as to the Manner, it was as much as if he had requested

requested *A.* to perform his Promise, which must be by shewing the Wine, to the Intent that *B.* might taste it, and make his Election, &c.

And if a Feoffment be made, on Condition that if the Feoffor pays 10*l.* to the Feoffee, that the Estate shall be void, and no Time is set for the Payment of this Money, and the Feoffor dies before any Payment or Tender made; in this Case his Heir cannot tender it, and so perform the Condition. *Shep. Touch. 140.*

If the Thing be to be done to a Stranger, and one that is no Party to the Condition, and it be done in any other Manner, and he accepts thereof; this is no Performance of the Condition. And so also if the Time of doing the Thing be past, as if one makes a Feoffment to me, on Condition that if he pays me 10*l.* such a Day, the Feoffment shall be void; and he does not pay me at the Day, but dies, and after by Agreement between his Heir and me he pays me the 10*l.* and I receive and accept it, and thereupon I suffer him to enter and hold the Land: In this Case the Condition is not performed, but I may enter upon him and oust him notwithstanding. *Perk. §. 392.*

Upon Request.

If a Feoffment be upon Condition to reinfeoff the Feoffor and his Wife, he ought to do it upon Request. *1 Roll. Abr. 439.* But if not hastened by Request, he has Time during his Life, because the Feoffor, who is privy to the Condition, is to take jointly with her. *Co. Lit. 219. a. Hetl. 56.*

If the Condition of an Obligation be to pay a certain Sum, without limiting any Time, it ought to be paid upon Request. *1 Roll. Abr. 439.*

If a Man devises Lands, upon Condition to pay his Debts; he ought to pay them upon Request, otherwise the Condition is broke. *Ibid.*

If the Condition of an Obligation be, that *whereas A. the Obligor has conveyed Lands to B. the Obligee; if A. the Obligor, and C. his Son, shall do all Acts and Devises for the better Assurance of these Lands to B. which shall be devised by B. or his Counsel, then the Obligation shall be void:* And after *B.* devised and tendered a Release, to be sealed by *A.* and *C.* his Son; and *A.* presently sealed it, but *C.* because he was illiterate and could not read it, prays *B.* to deliver it to him, to shew to some learned in the Law, who might inform him whether it was according to the Condition; and if it was according to the Condition, he would seal it; which *B.* refused, upon which *C.* refused to seal it: This was a Breach of the Condition, because he did not require the Writing to be read to him; and he was bound to take Conulance of the Law, whether it was according to the Condition, and shall not have reasonable Time to shew the Writing to his Counsel learned in the Law, to be instructed by them. *2 Co. 3.*

If *A.* covenants with *B.* to make such Conveyance of certain Lands to *B.* as by him shall be devised at the Costs and Charges of *B.* and after *B.* devises, and tenders a Writing, containing a Bargain and Sale to *B.* and *A.* requires Time to shew it to his Counsel, to be advised thereupon, and *B.* refuses it, upon which *A.* does not seal; he has broke his Covenant, for the Covenant was peremptory, *scilicet*, to be performed presently, at his Peril. *1 Roll. Abr. 424. pl. 11. 440. pl. 5.*

If the Condition be to pay when he comes to his House, it shall be paid when he comes there, and not before. *1 Roll. Abr. 448. 20 Ed. 4. 18. Bro. Obligation 56.*

Notice.

If *A.* promises *B.* in Consideration that he will marry *C.* his Daughter, that he will give in Marriage Portion to *B.* with *C.* such Portion, and as good an Estate in Money, as he had given, or after should give, with any other: In an Action upon this Promise, if the Plaintiff avers that he married *C.* and that after *A.* gave 100*l.* in Money and Goods to *D.* another Daughter, in Consideration of the Marriage Portion of *D.* This is a good Declaration, without any Averment that he gave Notice of the Marriage of him with *C.* to *A.* because he had taken this upon himself. *1 Roll. Abr. 468.*

If one promises another, in Consideration that he will marry his Daughter, to give him 20*l.* at the Day of his Marriage: He ought to take Notice of his Marriage at his Peril, without any Notice given thereof by the other. *1 Roll. Abr. 462, 468.*

So if no Time of Payment had been appointed in this Case. *Ibid.*

So if a Man, in Consideration of 6*d.* promises to give me 20*s.* at the Day of my Marriage: He ought to take Notice of my Marriage at his Peril, without Notice given by me, because he has undertaken to pay it at the Day. *1 Roll. Abr. 468.*

If a Man sells certain Weyes of Barley to me, upon which I promise to pay him so much for every Wey as other Men give for a Wey: In this Case an Action does not lie without Notice before given for how much he sells a Wey to other Men. *Ibid.*

If I promise another, for a Consideration, to give him 20 *l.* when he comes into *S.* He needs not give me Notice when he goes there, because this is a Duty by the coming into *S.* 1 *Roll. Abr.* 462, 469.

If a Man sells Lands by the Name of twenty Acres, and covenants to repay so much for every Acre under this Number, and that it shall be measured by such a Man before such a Day: If it is measured accordingly, the Covenantor ought to take Notice thereof at his Peril, without any Notice given by the other. 1 *Roll. Abr.* 469.

But if the Covenant had been, that the Land should be measured by two Men, *scilicet*, one by the Assignment of each Party, before such a Day, and one assigns, and gives Notice to the Covenantor of the Time of the Measuring: If the other does not assign any for him, but he that is assigned measures it alone, the Covenantor ought to take Notice thereof at his Peril, for it is his Default that his Man was not there, and therefore it is as if the other had been only appointed to measure it. 1 *Roll. Abr.* 462, 469. 1 *Roll. Rep.* 314. *Cro. Jac.* 391.

If a Man makes a Feoffment, upon Condition to reinfeoff him; if he does not reinfeoff him during the Life of the Feoffor, the Condition is broke, if he had convenient Time to reinfeoff him before his Death. 1 *Roll. Abr.* 438. 18 *Aff.* 18. *Co. Lit.* 209. *a.* 2 *Co.* 79. *b.* During the Lives of the Parties.

But tho' the Feoffor dies before any Re-feoffment, yet the Condition is not broke. *Co. Lit.* 219. *a.* *Kelw.* 137. 2 *Co.* 79. *b.*

Regularly, if the Feoffee or Grantee be upon Condition to reinfeoff or regrant any Estate to the Feoffor or Grantor, without limiting any Time, the Feoffee or Grantee has Time to do it during his Life, if he be not hastened by Request. 2 *Co.* 78. *b.* 79. Note, That if a Man covenants to grant an Estate to another, it must be done in convenient Time. 2 *And.* 73, 74.

But in the said Rule, if the Case be, that it appears by the Thing to be performed, or by any Accident, that the Feoffor cannot have all the Benefit intended him by the Condition, the Condition is broke without any Request, and during the Life of the Feoffee or Grantee. 2 *Co.* 79.

As if *A.* conveys a Manor to which an Advowson is appendant to *J. S.* in Fee, upon Condition that *J. S.* shall regrant the Advowson to *A.* for his Life, and if it happens not to be void in his Life, then one Turn to his Executors. Tho' in this Case *J. S.* has all his Life to regrant it, if he be not hastened by Request, and the Church becomes not void in the mean Time, yet if the Church becomes void during his Life, before any Request, the Condition is broke, because the Feoffor cannot have all the Effect which was intended him by the Regrant, which was to have all the Presentations during his Life. 2 *Co.* 78. *b.* 79. 1 *And.* 17. *Moor* 105. *pl.* 249. *Dyer* 311. *b.* *Co. Lit.* 222. *b.*

If *A.* enfeoffs *B.* the first of May, upon Condition that he shall grant to *A.* an Annuity or Rent during his Life, payable yearly at Michaelmas and the Annuntiation: In this Case the Feoffee has not Time to do it during his Life, but he ought to do it before the first of the said Feasts, or otherwise *A.* shall not have all the Advantage of the Rent intended him by the Condition. 2 *Co.* 79. *Co. Lit.* 208. *b.* *Moor* 472. *Goulf.* 117.

Where one is to grant a Reversion, he may do it any Time during his Life, if it so long continues a Reversion, if he be not hastened by Request. 1 *Lev.* 44.

If a Man makes a Feoffment in Fee, upon Condition to be void upon Payment of Money by the Feoffor: The Feoffor may pay it at any Time during his Life. *Lit.* §. 337. *Co. Lit.* 208. *a.* *Secus* if upon Condition that the Feoffee shall pay Money; for it is not reasonable the Feoffee should have the Benefit of the Land without Payment of the Money. 2 *And.* 73.

If the Condition of an Obligation be to do a local Act to the Obligee, to which the Concurrence of the Obligor and Obligee is necessary, as to make a Feoffment, &c. (no Time being limited) the Obligor has Time during his Life to perform it, if not hastened by Request. *Co. Lit.* 208. *b.* 6 *Co.* 30. *b.*

But tho' the Condition be Local, yet if it may be performed for the Benefit of the Obligee in his Absence, as the Acknowledgment of Satisfaction upon Record, &c. it ought to be done in convenient Time. *Co. Lit.* 208. *a.* 6 *Co.* 30. *b.*

When by the Condition the Obligor, Feoffor, Feoffee or Stranger, are to do a sole Act or Labour, as to go to Rome, &c. they shall have Time during Life, and cannot be hastened by Request. *Co. Lit.* 208. *b.* 209. *a.*

The

The Lord Clifford held, &c. *in Capite*, and the King licensed him to alien to B. and C. so that they should give the same to my Lord Clifford, and the Heirs of his Body, the Remainder over, &c. and the Lord Clifford, according to the Licence, enfeoffed B. and C. and before any Re-conveyance the Lord Clifford died, and it was adjudged his Heir might enter; for if they should make the Estate to the Issue of the Lord Clifford, the King might seize for want of a Licence, and that in Default of the Feoffees. *Co. Lit. 222. b.*

If A. pawns a Jewel to B. for Money, but no certain Time is appointed for the Redemption thereof, and B. dies, it may be redeemed afterwards. *Cro. Jac. 244. Sed dubitatur per Telv. and Croke.*

Otherwise if A. dies before Redemption. *Cro. Jac. 244.* For the Condition is Personal, and being generally pawned, it extends but to the Person of him who pawned it. *1 Bulst. 29, 30. Noy 137.*

To the Obligor, Feoffor, &c. If the Condition be to be performed to the Party himself only, who is to take Advantage of the Breach of the Condition, the Feoffee is not bound to do it before Request. *1 Roll. Abr. 439.*

If A. enfeoffs B. of Blackacre, upon Condition to be void if C. enfeoffs B. of Whiteacre: C. has Time during his Life to do it, if not hastened by Request. *Co. Lit. 208. b. 6 Co. 31. a.*

To a Stranger. So in Case of the Condition of an Obligation. *Co. Lit. 208. b.* Feoffee, upon Condition to enfeoff a Stranger, ought to do it presently. *1 Roll. Abr. 439.*

Secus where the Condition is, That a Stranger shall enfeoff the Feoffee. *Co. Lit. 208. b.*

To a Stranger and Obligor, &c. *Secus* where to enfeoff the Feoffor and a Stranger jointly. *Co. Lit. 219. b.* If the Condition be to enfeoff a Stranger in Tail, Remainder to the right Heirs of the Feoffor, he is not bound to do it before Request. *1 Roll. Abr. 439. Co. Lit. 219. a.* the same Point *contra*, because the Stranger, who is not privy to the Condition, ought to have the Profits presently.

If Land be granted to the King, upon Condition that he, his Heirs and Successors, shall give other Lands in Consideration thereof: The King is not bound to do it in his Life, but any of his Successors may; for the Word *his* extends to every of them. *1 Roll. Abr. 439.*

If the Condition be to make a Gift in Tail to the Feoffor, the Remainder to a Stranger in Fee: The Feoffee has Time during his Life to do it, because the Feoffor, who is Party and Privy to the Condition, is to take the first Estate. *Co. Lit. 219. b.*

(FF) Of performing Conditions where a Place is limited.

IF a Place of Payment be limited by a Condition, he is not bound to pay it in any other Place. *1 Roll. Abr. 445. 17 Ed. 3. 16. 42. b. 17 Aff. 2. Bro. Condition 103.*

And if the Place be limited by the Condition where it shall be performed, the other is not bound to receive it in another Place. *1 Roll. Abr. 445, 446. 17 Ed. 3. 2. b. 3. 16. 17 Aff. 2.*

As if a Release be upon Condition of Payment of 20*l.* to another at D. he is not bound to receive it out of D. upon a Tender to his Person. *1 Roll. Abr. 446. 17 Ed. 3. 2. b. 15. b. Bro. Condition 103.*

So if the Condition be to come to the Releasee at D. to help him with his Counsel; it is not performed if he tenders his Counsel at the Day at another Place. *1 Roll. Abr. 446. 17 Ed. 3. 2. b.*

If the Condition of an Obligation be to pay 10*l.* at a Day at S. he is not bound to pay it at any other Place. *1 Roll. Abr. 444. 41 Ed. 3. 25. Bro. Condition 21.*

Neither in such Case is the Obligee bound to receive it in any other Place upon a Tender. *1 Roll. Abr. 444, 446, 456. 41 Ed. 3. 25. Bro. Condition 21. Fitz. Dette 121. 46 Ed. 3. 4. b. Bro. Defeasance 14. Fitz. Audita Querela 1.*

If the Condition of an Obligation be to appear *Coram Justiciariis apud Westmonasterium*, he ought to appear in B. and not in B. R. for this is not the Stile of the King's Bench. *1 Roll. Abr. 445.*

(GG) *At what Place a Condition must be performed where no Place is limited.*

IF the Condition be, that a Stranger shall shew certain Evidences of such an Annuity to the Counsel of the Obligee upon Request: When the Request is made, the Stranger ought to seek the Counsel where they are. 1 Roll. Abr. 443. 19 Ed. 4. 1. b.

If the Condition of an Obligation be to perform Covenants, of which one is, that *whereas he is a common Surgeon, and has taken J. S. to be his Apprentice; he covenants to instruct him in his Trade, and to keep him in his own proper House and Service: If he afterwards sends the Apprentice to the East-Indies in a Voyage, to exercise his Trade; this is a Forfeiture of the Obligation, because he cannot send him out of the Realm for the Danger thereof; for this is not keeping him in his own proper House and Service.* 1 Roll. Abr. 445, 427. Hob. 134. Conditions to perform Covenants.

But in this Case it was agreed *per Curiam*, that he may, without Forfeiture of the Condition, send him to any Place in *England* to cure a Patient. *Ibid.*

And if an Apprentice be bound to a Merchant, and the Master binds him with such Words as above, he may send him over the Sea; for this is his Trade, and incident to it. *Ibid.*

If an Annuity be granted, upon Condition to do Service to the Grantor, and to counsel him in Time of War and Peace; and after the King warns the People to go with him into *Britany*, upon which the Grantor goes there with the King, and warns the Grantee to go with him, &c. if he refuses, the Condition is broke, tho' it be out of the Realm, because the Word *War*, which cannot be properly within the Realm, implies as much. 1 Roll. Abr. 445. *Dubitatur* 17 E. 3. 26.

But if the Condition had been to serve him and counsel him generally, he had not been bound to go with him out of the Realm, because of common Right a Man is not to travel out of the Realm. 1 Roll. Abr. 445. 17 Ed. 3. 26.

If a Man mortgages Lands, upon Condition to enter upon Payment of 10 l. he may tender it upon the Land, without seeking the Person of the Mortgagee, because this is to be paid in Recompence in Lieu of the Land. 11 H. 4. 62. b. *per Skreene*. 19 H. 6. 50. b. *per Fortescue*. Lit. 78. 1 Roll. Abr. 445. The Money being a Sum in Gross, and Collateral to the Title of the Land, the Feoffor must tender the Money to the Person of the Feoffee, if in *England*. Co. Lit. 210. b.

If a Man releases all his Right in the Land, upon Condition *that if he pays the other 10 l. such a Day, the Release shall be void*; it shall be paid upon the Land, or to his Person. 1 Roll. Abr. 445. 17 Ed. 3. 16.

In this Case the Payment should be made in what Place his Person could be found. *Ibid.*

If a Man makes a Feoffment, reserving a Rent, to a Stranger, and for Default of Payment, that it shall be lawful for the Feoffor to re-enter: This is not any Rent, because it cannot be reserved to a Stranger; and therefore the Feoffee ought to tender the Sum to the Person of the Stranger where he may be found, otherwise the Condition is broke. Lit. §. 80.

If the Condition of a Bond or Feoffment is to make a Feoffment, it is sufficient to tender it upon the Land, because the Estate must pass by Livery. Co. Lit. 210. b.

But if the Condition be to make an absolute Estate of Inheritance, it is otherwise, unless he first gives Notice that he will do it such a Time by Feoffment. All. 24, 25.

If the Condition of a Bond or Feoffment be to deliver twenty Quarters of Wheat, or twenty Loads of Timber, &c. the Obligor or Feoffor is not bound to carry the same about, and seek the Feoffee, &c. but before the Day he must go to the Feoffee, &c. and know where he will appoint to receive it, and there it must be delivered. Co. Lit. 210. b. 3 Leon. 260.

If a Condition be to pay a small Sum, and no Place is limited, he ought to seek the Obligee. 21 Ed. 4. 6. b. 1 Roll. Abr. 443. Lit. §. 340. Co. Lit. 210.

If a Condition be to do a Thing upon Request, and the Plaintiff assigns for Breach, that the Defendant could not be found to make a Request to him, and therefore he made a Proclamation at the Church where he was born, and another Proclamation in several Markets in the same County, thereby giving Notice of his Request; yet this is not a Request, for it ought to be made to his Person. 1 Roll. Abr. 443.

A Man leases Lands, rendring Rent, and the Lessee binds himself in 20 l. to perform the Covenants: This does not alter the Place of Payment of the Rent, for it may

Where the Person to whom the Condition is to be performed must be sought.

may be tendered upon the Land without seeking the Obligee. 1 Roll. Abr. 443. 21 Ed. 4. 6. 20 Ed. 4. 18. b. Fitz. Dette 97.

But where the Condition is for the Performance of Homage, or other special corporal Service, to the Person of the Lord, the Tenant by the Law of Convenience ought to seek him in any Place in England. Co. Lit. 211. a.

If the Lessee binds himself to pay a greater Sum if he does not pay the Sum reserved at the Day, yet he is not bound to make Tender in another Place than upon the Land. 1 Roll. Abr. 444. 21 Ed. 4. 6. b. Fitz. Dette 97.

If the Condition of an Obligation or Feoffment be to deliver twenty Quarters of Wheat, or twenty Loads of Timber, &c. to the Obligee or Feoffee, the Obligor or Feoffor is not bound to carry the same about, and seek the Feoffee; but the Obligor or Feoffor before the Day must go to the Obligee or Feoffee, and know where he will appoint to receive it, and there it must be delivered. Co. Lit. 210. b. 3 Leon. 260.

(HH) *How a Condition shall be performed.*

As to the Intent.

IF a Man leases an House and Land, upon Condition that the Lessee shall not parcel out the Land, nor any Part thereof, from the House; and after the Lessee leases the House and Part of the Land to A. and after leases the Residue of the Land to C. This is a Breach of the Condition; for by the Word *parcelling*, is intended Division or Separation of the Land from the House; and if the first Grant be not a Forfeiture, the second is. 1 Roll. Abr. 427. 2 And. 42, 90. The first Grant was a Breach of the Condition, because every Division and Severance of the House and Land is within the Words and Intent of the Condition. 1 Moor 425.

If a Man makes a Feoffment in Fee to B. of all his Lands, and after bargains and sells the same Lands to him for further Assurance; and after the Feoffor covenants with the Feoffee to make such further Assurance of all such Lands that he has bargained and sold to him, as the Counsel of the Feoffee shall devise, and binds him to perform the Covenants: And after the Counsel devises, that he shall suffer a common Recovery, he is bound to perform it; for tho' he covenanted to make an Assurance of all Lands that he had bargained and sold, and he has not bargained and sold any Land, for the Bargain and Sale was void, being made after the Feoffment, and for no Bargain *omnino* in strict Exposition of Law; yet it is a Bargain and Sale in Appellation, to which the Covenant shall have Reference. 1 Roll. Abr. 427. Cro. Eliz. 833. The Bargain and Sale of the same Lands must name them particularly, for *secus* if it was by general Words only. Cro. Eliz. 833.

If a Lessee of an House covenants not to lease the Shop, Yard, or other Thing belonging to the House, to one who sells Coals, nor that he himself will sell Coals there; and after he leases all the House to one who sells Coals, he has broke the Condition.

If A. enfeoffs B. upon Condition that B. will make a Gift in Tail to A. and his Wife, and the Heirs of their two Bodies, Remainder to the right Heir of the Feoffor, and A. dies, B. ought to make an Estate for Life to the Wife, without Impeachment of Waste, Remainder to the Heirs of A. for the Estate shall be made as near the Intent of the Condition as it can be. Lit. §. 352. Co. Lit. 219. a. b.

If the Condition of an Obligation be, that the Obligor shall permit his Wife to make a Will, and to dispose in Legacies of any Sum not exceeding 500 l. and that he will pay what she so appoints to be paid. This is a good Condition; for tho' the Feme Covert cannot in Strictness of Law make a Will of the Goods of her Husband, yet she may make such a Will or Disposition within the Intent of the Condition that the Obligor must perform. Cro. Car. 219.

If A. enfeoffs B. upon Condition that if A. within a Month after the Death of B. shall pay 100 Marks to the Heirs, Executors or Administrators of B. then the Feoffment shall be void; and B. enfeoffs C. and dies; and after it is agreed between A. and the Heirs of B. that A. shall pay but 32 l. of the 100 Marks; but that in Appearance, and for the better Performance of the Condition, the Whole shall be paid to the Heir, and after repaid to A. which is done accordingly: This is not a good Performance of the Condition, for the Estate shall not be devested out of the Assignee, without any effectual and real Payment; but this Payment was guided by the precedent Agreement. 5 Co. 95. b. 96. a. Cro. Eliz. 383, 384. Moor 708. pl. 989. Godb. 177. Poph. 99, 100. Co. Lit. 209. b. Godb. 299.

If *A.* is bound to *B.* in an Obligation, conditioned that *A.* shall deliver to *B.* before such a Day an Obligation in which *B.* is bound to *A.* if *A.* sues *B.* upon the Obligation, and recovers, and after, before the Day, delivers it to *B.* This is no Performance of the Condition, for notwithstanding the Delivery of the Obligation, he may take Benefit of the Judgment, and so the Intent of the Condition is not performed. *Cro. Eliz.* 7.

The Condition of an Obligation was, that he should suffer his Lessee for Years to enjoy the Land during the Term, and that without Trouble of him or any other Person: A Stranger enters by an elder Title. *Per Curiam* the Condition is not broke, because the Word suffer is passive, and all the Rest is to be referred thereto; but if any Procurement or Occasion of Disturbance be by the Lessor, his Executors or Assigns, then he has forfeited his Obligation. *1 Roll. Abr.* 425. In Respect of the Words.

If the Condition be performed in Substance, it is good, altho' it differs in Words; as where it is to deliver the Testament of the Testator, if he pleads that he has delivered Letters Testamentary, yet it is good. *1 Roll. Abr.* 426. *17 Ed.* 4. 3.

So if the Condition is to deliver Letters Patent, and he loses them, and delivers an Exemplification. *Ibid.*

So if a Condition be to make a Feoffment, a Lease for Years and Release is a good Performance. *Quere.* *1 Roll. Abr.* 426. *17 Ed.* 4. 3. *Co. Lit.* 207. a. *Bro. Condition* 158.

If the Condition of an Obligation be, that the Obligor shall procure a Grant of the next Avoidance of the Archdeaconry of *S.* to be made to *B.* so that the Obligee, at such next Avoidance, may present, if he does procure the Grant of the next Avoidance to be made to him: But before the Church becomes void, the present Archdeacon is made a Bishop, so that it appertains to the King to present; the Condition is broke, by Reason of these Words, so that the Obligee may present. *3 Leon.* 151. *2 Roll. Abr.* 396. pl. 2. *4 Leon.* 61, 62. *Goulf.* 45.

If a Man leases for six Years, and covenants, that if he shall be disposed to lease the Land after the Expiration of the Term of six Years, that the Lessee shall have the Refusal; and within the six Years he leases to another: This is no Breach, because out of the Words of the Covenant. *Godb.* 335.

If the Condition be to grant the Reversion of Tenant for Life or Years, and he enters upon the Lessee, and makes a Feoffment, and the Lessee re-enters; the Condition is performed, for the Effect is performed. *1 Roll. Abr.* 426. *21 Ed.* 4. 39. b.

If the Condition be to give Licence to the Obligee to carry Trees that he has bought of him, or other Things; if he gives him Licence, yet altho' a Stranger who has Right thereto disturbs him, the Condition is performed, for it extends but to the Person of the Obligor by the Words. *1 Roll. Abr.* 426. *18 Ed.* 4. 20. b. *Bro. Licence* 13.

But otherwise it had been if the Words had been, that he should have Licence, &c. for this extends to all Strangers. *Ibid.*

A Condition ought to be performed in Substance; as if the Condition be to withdraw such a Suit, a Discontinuance thereof is not a Performance, because it differs in Substance; for a *Retraxit* is a Bar in another Action, and not a Discontinuance. *20 Ed.* 4. 8. dub. *1 Roll. Abr.* 426.

Conditions precedent must be literally performed; and Equity will seldom give Relief in Case of precedent Conditions, as it often does in Cases of Conditions subsequent; which not being favoured, because they go in Defeasance of Estates, this Court may relieve, if performed in the substantial Part, tho' some of the Circumstances are not pursued. *3 Chan. Caf.* 130. Conditions precedent and subsequent.

It is sufficient if the Intent and Substance of these Conditions be performed. *Vern.* 83.

Where a Condition is in the Conjunctive, both Parts must be performed; otherwise where in the Disjunctive. *Co. Lit.* 225. How where divers Things are to be performed in the Conjunctive or Disjunctive.

The Condition of an Obligation was, that if the Obligor before Michaelmas made a Lease to his Obligee for thirty-one Years if *A.* would Assent, and if he would not Assent for twenty-one Years, then the Obligation shall be void; and *A.* would not Assent to a Lease for twenty-one Years, it ought to be made before Michaelmas. *1 Roll. Abr.* 446.

If the Condition be to enfeoff the Obligee of *D.* or *S.* the Obligor has Election. *18 Ed.* 4. 17. b. *5 Co.* 22.

So if a Devise be made upon a Disjunctive Condition to be performed by the Devisee, he has his Election. *Palm.* 76.

So if the Condition be to enfeof him of *D.* or *S.* upon Request, the Obligor has his Election. 18 Ed. 4. 17. b.

The same Law is if it be to pay 20 *l.* or a Pint of Wine, upon Request. *Ibid.*

The same Law if it be to shew Evidences to the Obligee, or his Counsel, upon Request made by the Obligee. 18 Ed. 4. 17. 20. b. 19 Ed. 4. 1. Bro. Condition 161.

The same Law if it be to cut twenty Acres of Meadow or Corn upon Request. *Dubitatur* 18 Ed. 4. 20. b.

The same Law if it be to go with me or my Wife to Church, upon Request. 18 Ed. 4. 21.

The same Law if it be to go to *York*, or marry my Daughter, upon Request; for in all these Cases the Request is of no other Effect but to appoint a Time when the Obligee shall do the one or the other. 18 Ed. 4. 21. 1 Roll. Abr. 446.

If I am obliged in 10 *l.* to pay 5 *l.* at the Feast of *P.* next, &c. or before, at the Request of the Obligee; the Obligor has given his Consent that the Obligee shall have his Election in this Case. 1 Roll. Abr. 446.

But it is otherwise if the Words are *retrosum*; as if the Condition be to pay 5 *l.* before the Feast of *P.* at the Request of the Obligee, or at the Feast of *P.* there the Obligor has the Election. *Ibid.*

If an Obligation be conditioned to pay *B.* or his Heirs annually 12 *l.* at *Midsummer* and *Christmas*, or to pay him or his Heirs at any of the said Feasts 150 *l.* The Obligor has Election to pay the 12 *l.* or the 150 *l.* but he ought to continue the Payment of the 12 *l.* annually, until he pays the 150 *l.* tho' he may at any Time determine the Payment of the 12 *l.* by Payment of the 150 *l.* Cro. Jac. 594. 2 Roll. Rep. 215.

If an Obligation be conditioned to pay Money if a Ship puts to Sea, or the Goods or the Obligor returns safe, and the Obligor dies before his Return, yet the Money is payable; for all these Things being contingent and uncertain which of them will happen, the Law supplies the Words, *which shall first happen*, and prejudices the Election of the Obligor. 1 Lev. 55.

Tender.

If the Condition of an Obligation be, that if the Obligor delivers certain Obligations to the Obligee before such a Day to be cancelled, or else if he seals a Deed of Release of all Actions which the Obligee shall cause to be made by the Advice of his Counsel, and shall deliver it to the Obligor to be sealed before the Day aforesaid, &c. in this Case both are in the Election of the Obligor; for if the Obligee does not deliver to him any Release to be sealed by him, he is not bound to deliver the Obligations, for both are only in his Power. 1 Roll. Abr. 447. 3 Lev. 137, 138.

In this Case if the Obligee had delivered to him a Release to be sealed by him, then he ought to have had his Election, either to deliver the Obligations to be cancelled, or to seal the Release. 1 Roll. Abr. 447. Cro. Eliz. 396, 539.

So if the Condition of an Obligation be to deliver to the Obligee such Obligations before such a Day, or to pay to him 10 *l.* if he requests it: If he does not Request the 10 *l.* the Obligor ought to deliver the Obligations, for he has no Election till Request made; but after Request made, he has Election which of them he will do. 1 Roll. Abr. 447. Cro. Eliz. 539.

If the Condition of an Obligation be to pay 30 *l.* or twenty Kine, within a Month after the Death of *K.* at the Election of the Obligee: He must, at his Peril, make his Election within the Time limited, for the Obligor is not bound to tender both. 1 Leon. 69. Secus if at the then Choice of the Obligee, &c. for in such Case the Obligor must tender both. 1 Leon. 68.

If the Condition of an Obligation be, that if the Obligor within six Months after the Death of *B.* shall assure a Rent of 20 *l.* yearly to *C.* as the Counsel of *C.* shall advise, at the Costs and Charges of *C.* if *C.* requires the same; or if the Obligor shall not grant the Rent, if then he shall pay to *C.* 300 *l.* the Obligation shall be void; and *B.* dies, and *C.* tenders no Grant of the Rent within the Time, the Obligor is not bound to pay the 300 *l.* 1 Mod. 265. 2 Mod. 200, 201.

If the Condition of an Obligation be, that the Obligor shall work out 40 *l.* at the usual Prices in Packing, when the Obligee shall have Occasion for himself or Friends to employ him therein, or otherwise shall pay 40 *l.* If the Obligee has not Occasion to make use of him in Packing, he must pay the 40 *l.* 2 Mod. 304.

Pro consilio impendendo.

If an Annuity be granted to a Lawyer, *pro consilio impendendo*, the Grantee is not bound to travel, nor do any Thing, but counsel where he may be found. 41 Ed. 3. 6. 8 H. 6. 24. 21 E. 3. 7. b. 1 Roll. Abr. 434.

And the Grantor ought to disclose his Case to the Grantee, otherwise he is excused of his Counsel. 41 Ed. 3. 6. b. Bro. Annuity 7. 1 Roll. Abr. 434.

If the Grantee cannot counsel him, yet if he does as much as he can, he is excused.

41 Ed. 3. 6. b.

So if an Annuity be granted *pro consilio & auxilio* to a Physician, the Grantee is not bound to travel for him, but to give his Advice and Help where he may be found; also he ought to certify to him what Malady it is. 1 Roll. Abr. 434. Q. For a sick Man cannot travel to the Physician.

So if an Annuity be granted to a Lawyer, *pro consilio & servitio suo impendendo*, he is not bound to go with him, nor to counsel him in any other Place than where he is found. 8 H. 6. 24. 1 Roll. Abr. 434.

So he is not bound to go with him, tho' the other will bear his Charges. 8 H. 6. 24.

If an Annuity be granted *pro consilio impenso & impendendo* to a Counsellor, he is not bound by this to put his Hand to a Bill *in camera stellata*; for tho' he is bound to give his Advice, yet he is not bound to set his Name to every Bill, for that may be inconvenient to him. 1 Roll. Abr. 434. Cro. Jac. 482, 483. Popb. 135, 136.

But when an Annuity is granted *pro consilio impendendo*, and the Grantee in the same Deed binds himself by such Words, *pro qua quidem concessione*, that he will go with him to any Place within the County; there he ought to go with him, because he has specially bound himself so to do. 8 H. 6. 24. 32 Ed. 3. 30. 1 Roll. Abr. 434, 435.

If the Grantee of such Annuity refuses to give his Counsel upon Demand, the Annuity is determined absolutely, not for one Payment only but for ever. 1 Roll. Abr. 434. Co. Lit. 204. a. Hob. 41, 42.

But if the Grantor dies, so that the Counsel is discharged by the Act of God, yet the Annuity continues. Plow. Com. 456. b.

If the Grantee of an Annuity, *pro consilio impenso & impendendo*, refuses after to give Counsel: This does not determine the Annuity, because this was granted as well for the Services past, as those to come. 1 Roll. Abr. 435.

If a Dean and Chapter grants to another the Office of chief Cook, with 5 l. for the Exercise thereof, provided that he exercises the Office in the great Kitchen of the Church; and after the Dean requires him to exercise it in his own Kitchen, and he refuses, yet the Annuity is not determined. Adjudged Hil. 37 Eliz. C. B. 1 Roll. Abr. 435.

If an Annuity be granted till the Grantee be promoted and preferred to the Benefice of 30 l. *per Ann.* by the Grantor, and after the Grantor presents him, but the Grantee is found insufficient, the Annuity shall cease. Ibid.

If an Annuity be granted till the Grantee be promoted to a Benefice by the Grantor; if he proffers a Benefice to him which is litigious, yet the Annuity is determined, for perhaps he has a good Title thereto tho' it be litigious. 17 Ed. 3. 11. *du-tatur*. 1 Roll. Abr. 435.

But if the Church be full of another at the Time of the Presentation, the Annuity is not determined tho' he accepts the Presentation, for the Presentation and Acceptance is void. 26 Ed. 3. 69. b.

If an Annuity of 20 l. *per Ann.* be granted till he be promoted to a Benefice, the Benefice ought to be of the Value of 100 Marks *per Ann.* 16 Ed. 2. 47. 1 Roll. Abr. 435.

If an Annuity be granted to another till he be promoted to a competent Benefice; if the Grantor after tenders to him the Presentation to a Vicarage, which is worth 100 Marks *per Ann.* which he refuses, the Annuity is determined. 3 H. 6. 2. 31 Ed. 3. 8. 1 Roll. Abr. 435.

The Benefice ought to be of as much yearly Value as the Annuity is, otherwise it is not determined. 3 Ed. 3. 40.

The Value of the Benefice shall be reckoned according to the Demerit of the Party promoted. 31 Ed. 3. 28.

If an Annuity be granted till promoted, &c. by the Grantor or his Heirs, it is a good Performance of the Condition, that he was promoted by the Mother of the Grantor, at the Request of the Grantor, in Discharge of the Annuity. 33 Ed. 1. 51. 1 Roll. Abr. 435.

If an Annuity be granted to an Infant till he be promoted to a Benefice: If the Grantor tenders him a Benefice, tho' he cannot take it for the Non-ability of his person, yet the Annuity is determined. 3 Ed. 3. 40.

If the Grantor resigns a Prebend to the Grantee, and the Bishop, at the Request of the Grantor, tenders the Prebend to the Grantee: If he refuses it, the Annuity is determined. 16 Ed. 2. 47. 1 Roll. Abr. 435.

If the Annuity be granted *quousque de beneficio sibi providerit quod duxerit acceptans*, the Grantee is not bound to accept any Benefice of any Value, but at his Pleasure, because of the said Words; and by his Refusal the Annuity shall not be determined. Temp. Ed. 1. Annuity 50. 1 Roll. Abr. 436.

If an Annuity of 40 l. per Ann. be granted till promoted to a Benefice, a Vicarage of the Value of 5 l. per Ann. is not sufficient within this Condition. 1 Roll. Abr. 436.

But it ought to be of the Value of ten Marks per Ann. at the least; and this is sufficient. *Ibid.*

To make a
Lease.

If a Feoffment be made, upon a Condition that the Feoffee shall make a Lease of Land to the Feoffor for Life, the Remainder to J. S. in Fee, and the Feoffee makes a Lease to the Feoffor for Life, and after by another Deed grants the Reversion to J. S. this is a good Performance of the Condition. 44 Ed. 3. 22.

To purchase
Lands.

If a Feoffment be made upon Condition that the Feoffee shall purchase Lands or Tenements to the Value of 20 l. per Ann. and he purchases a Rent, Common, or such like Thing to that Value, this is a good Performance of the Condition.

But if in this Case the Feoffee and another purchase so much Land together jointly, this is no good Performance of the Condition.

So if the Feoffee alone purchases Lands to the Value of 20 l. per Ann. and there is a Rent issuing out of it which must be deducted, this is no good Performance.

And yet in these Cases if the Stranger Jointenant releases to the Feoffee all his Right in the Land, or the Grantee of the Rent releases to him the Rent before the Time of the performing of the Condition, the Condition is well performed in both Cases. *Tantum valet terra quantum vendi potest.* Perk. §. 807, 808. 21 H. 6. 28. Dy. 15.

And if one makes a Feoffment in Fee, on Condition that if the Feoffee purchases Land to the Value of 20 s. the Feoffment shall be void; and after the Feoffee disfeises another Man of Land to that Value, it is said that by this the Condition is performed; *sed quare*; and that if he recovers so much Land in Value by an Action, that this is no Performance of the Condition. *Sed quare*; for this seems to be a better Performance of the Condition than the former. *Shep. Touch.* 142. Perk. §. 812.

To pay Mo-
ney.
Tender.

If Lands be granted on Condition to pay Money, and the Money is tendered according to the Condition, but either no Body is ready to receive it, or it is refused; this is a good Performance of the Condition.

And after a Man has once refused the Money so tendered to him according to the Condition, he has no Remedy in Law to recover it, except it be Money lent upon a Mortgage. *Dyer* 181. *Lit.* §. 334, 335, 338. *Co. Lit.* 209.

Acceptance.

And if the Payment be made Part of it with counterfeit Coin, and the Party accepts it and puts it up; this is a good Payment, and consequently a good Performance of the Condition. *Terms de Ley*, Tit. *Coin*.

And if at the Day of Payment the Parties do account together, and he to whom the Money is to be paid being indebted to the other, that Debt by Agreement is allowed, and the Residue is paid and accepted; this is a good Performance of the Condition. *Co. Lit.* 212. *Fitz. Barre* 343.

So if the Party that is to receive it accepts and takes new Security by Bond or Statute for the Money; this is a good Performance of the Condition. *Co. Lit.* 212.

And so in most Cases, when by a Condition a Thing is to be done one way, and to be done to the Party to the Condition himself, and not to a Stranger, and he does accept it another way; this is a good Performance of the Condition. *Volenti non fit injuria*.

If the Mortgagor pays the Money according to the Condition, and after the Mortgagee delivers it to the Mortgagor as his own Money, the Condition is performed, and the Mortgage discharged notwithstanding. *Shep. Touch.* 143.

If a Feoffment be made to J. S. on Condition that if the Feoffor pays to the Executors or Administrators of J. S. 10 l. the Feoffment shall be void; and J. S. dies, and the 10 l. is paid to the Executors of J. S. according to the Condition, but it is covinously done, *i. e.* there is a private Agreement that the Feoffor shall have all, or Part of his Money again: This Payment in this Case is no good Performance of the Condition, but that Payment, that must be a Performance of a Condition in this Case to fetch Lands out of the Hands of an Heir, must be real, full and effectual. *Co. Lit.* 209. 5 *Co.* 96.

If a Lease be made, on Condition that the Lessee shall get the good Will of *J. S.* To get the and the Lessor does come to *J. S.* first and ask his good Will, and he denies it him, good Will of and after when the Lessee does ask, if he does grant it him, in this Case the Condi- *J. S.* tion is performed.

So if the Condition be, that he shall get his good Will by such a Day, and at the first being desired he denies it, but afterwards and before the Day he grants it: And yet if no Day be set, and he desires his good Will, and *J. S.* denies it, and afterwards he gets his good Will; it seems this is no Performance of the Condition. 14 H. 8. 17.

If there be two Things in the Copulative to be done by the Condition, both must be done, otherwise the Condition will not be performed. *Perk. §. 746.*

If a Feoffment be made on Condition, that if the Feoffor and *J. S.* pays 10 l. at Michaelmas the Feoffment shall be void, and before the Day the Feoffor dies, and *J. S.* pays the Money; this is a good Performance of the Condition, but if the Feoffor be living *contra. Co. Lit. 219.*

If a Feoffment be made on Condition to make an Estate to a Stranger by a Day, and before the Day he dies; in this Case if an Estate be made as near the Condition as may be, it is sufficient. *Plow. 133. 3 Co. 64.*

If a Feoffment be made to *J. S.* on Condition that he shall enfeoff *J. D.* and his Heirs, and *J. S.* tenders the Feoffment to *J. D.* and he refuses to take it; this is no Performance of the Condition in this Case.

But if it be to be done to the Feoffor himself *contra.*

And so also it is if the Condition be to make an Estate-tail, or any lesser Estate to a Stranger, and he tendered it, and the Stranger refuses it; this is no good Performance of the Condition.

And if a Feoffment be made on Condition to reinfeoff the Feoffor and his Wife in Tail, the Remainder to *W.* in Fee, and he tenders it to the Wife only, and not to him in Remainder; this is no good Performance of the Condition.

And the same Law for the most part is in Conditions of Obligations. *Co. Lit. 209. 9 H. 6. 67. Perk. §. 8, 15, 816. 2 Ed. 4. 2. 19 H. 6. 67. Shep. Touch. 144.*

If a Condition be to save a Man harmless from *J. S.* if *J. S.* after says to him, that To save if he goes to his House he will beat him, by which Menace he dares not go to his harmless. House about his Business, the Obligation is forfeited. 1 Roll. Abr. 432. 18 Ed. 4. 28.

If the Condition of an Obligation be to perform an Award, which is, that the Obligee staret acquietatus de qualibet materia, contained in a Bill in Chancery that the Obligor has depending against him, and that the said Suit shall cease; and after the Obligor exhibits a new Bill in Chancery against the Obligee for the same Matter, and in the End of the Bill prays Process, but never takes out Process thereupon against him: This is not any such Molestation that it shall be a Forfeiture of the Condition, for he is not at any Damage thereby. 1 Roll. Abr. 432. Cro. Jac. 340. 1 Bulst. 93, 94. 1 Roll. Rep. 7.

If the Condition be to discharge another against *J. S.* of an Obligation in which he is bound, he ought to discharge him of the Obligation by Release or otherwise, and it is not sufficient to save him harmless. 22 Ed. 4. 40. b. 1 Roll. Abr. 432.

If the Condition be to discharge and save harmless the Sureties from the Penalty of an Obligation, if the Obligation be forfeited; yet this Condition as to the Sureties is not broke, for they may be discharged and saved harmless from the Penalty of the Obligation notwithstanding. D. 4, 5. Ma. 161, 44. (But it seems the Resolution there is *contra.*) 1 Roll. Abr. 432.

If a Man covenants to make such Assurance of the Manor of *D.* as the Counsel of the other shall devise; and the Counsel devises, that he shall be bound in a certain Obligation, that the other shall occupy the Manor peaceably, &c. he is not bound to perform it, for this is no Assurance within the Intent of the Covenant. 1 Roll. Abr. 423. Cro. Eliz. 370. Condition for further Assurance.

If a Man be obliged to do such Act for the Assurance of the Manor of *B.* as the Counsel of the other shall devise; and the Counsel devises that he shall make an Obligation or Statute, that the other shall enjoy it; he ought to perform it, otherwise he has broke his Covenant. 1 Roll. Abr. 423. Cro. Eliz. 371.—Telv. 45. and 1 Brownl. 84. the like Point held *contra.*

If a Man covenants to make such Assurance as the Counsel of the Covenantee shall devise of an Annuity of 30 l. and of 200 l. in Money; and the Counsel devises, that he shall make an Obligation, in which he shall oblige himself, his Heirs, Executors and Administrators, to pay to the other the Annuity, and also the 200 l. at certain Days; he

he is not bound to perform it, for this Obligation is not any Assurance of the Annuity. *Dubitatur*, 1 Roll. Abr. 423. Cro. Eliz. 370.

If A. covenants to make such Assurance for the Payment of 100 l. to B. as his Counsel shall devise; and his Counsel devises that A. shall make an Obligation of 1000 l. for the Payment of 100 l. he ought to perform it. 1 Roll. Abr. 423.

But if the Covenant in this Case had been to make such reasonable Assurance as the Counsel of the Covenantor should devise, it had been otherwise; for it is not reasonable to make an Obligation of 1000 l. for the Payment of 100 l. 1 Roll. Abr. 423. Godb. 445.

If a Man undertakes to make a Surrender of a Copyhold upon Request, he is not bound to make it into the Hands of two Customary Tenants, for that is but a particular Way of Surrender grounded upon a particular Custom. All. 68. Stil. 107.

So if a Man be bound to make such an Assurance as the Obligees shall devise, he is not bound to acknowledge a Fine by *Dedimus*, for that is but a special Way of taking the Conusance. All. 69.

Secus if there is a Proviso that he should not go above five Miles from his House, and his House is above five Miles from Westminster. All. 69.

If the Condition be to assure certain Lands to such Persons as the Obligees shall name, and after he assures it to the Obligees himself; this is a good Performance of the Condition, tho' it be not alledged that the Obligees named himself, for this Acceptance is a Nomination of himself. 1 Roll. Abr. 424.

If the Condition be to make such Assurance in the Law of certain Land to the Obligees, as by the Counsel of the Obligees upon Request made shall be advised; and after J. S. was of Counsel with the Obligees, and gave his Advice to the Obligees, that the Obligor should make a certain Assurance; and the Obligees gave Notice to the Obligor of the said Advice, and required him to perform it: He ought to perform it, or otherwise the Condition is broke; for it is more convenient that the Counsellor should give the Advice to the Obligees than to the Obligor; for the Obligor does not know whether he be of his Counsel in this Matter, for he may be of his Counsel in one Thing and not in another. 5 Co. 19. Cro. Eliz. 9, 97, 298, 299. Moor 595. pl. 811.

But if the Condition had been to make such Assurance as his Counsel should devise, then his Counsel ought to have drawn and ingrossed it ready to be sealed. Moor 595, 596. pl. 811.

If the Condition be to make such Assurance, &c. to the Obligees as the Obligees shall devise, and after the Obligees devise an Indenture, &c. and tenders it to him, and he requires Time to shew it to his Counsel to be advised thereupon, which is denied to him; yet if he does not seal it presently, the Condition is broke, because the Condition is peremptory, *scilicet*, to be performed presently. 1 Roll. Abr. 424.

If a Man undertakes to be obliged in an Obligation to J. S. and an Obligation is tendered, in which he, his Heirs and Executors are bound, he ought to seal it, because this is the common Course to make Obligations in such Manner, tho' the Heir or Executor was not named in the Promise. 1 Roll. Abr. 424. 1 Roll. Rep. 71. — Cro. Eliz. the like Point *dubitatur*.

If a Man be bound to make a Conveyance of certain Lands; if a Warranty or Covenant be put in the Deed, he is not bound to seal it. 1 Roll. Abr. 424. 1 Roll. Rep. 71.

So if he be bound to make a reasonable Assurance, tho' ordinary Covenants are only inserted. Coles and Kinder, Cro. Jac. 571, 572. 2 Roll. Rep. 191. But in the Case of *Lassels* and *Chatterton* in T. Raym. 190, 191. 1 Sid. 467. 1 Mod. 67. it was said by *Twisden*, that the Law was altered since this Case, as to Covenants, if reasonable and usual, but not as to a Covenant that he is seised of an absolute Estate in Fee, &c. *similia*; but the principal Case of *Lassels* and *Chatterton* was determined on another Point, which *vide* also 2 Keb. 685.

A. bargained and sold Land to B. and B. covenanted, that if A. paid 100 l. at a Day, that he would make such Assurance thereof back to A. as the Counsel of A. should advise; and A. paid the Money, and his Counsel advised, that B. should execute a Conveyance, in which the Receipt of the 100 l. was acknowledged. Per Coke and Gaudy, B. must execute it; but Popham doubted, for B. was not bound to execute a Receipt only, nor by the same Reasons when joined with the Assurance. Owen 65.

If a Man undertakes to become bound with J. S. and J. D. to B. in a certain Sum, and B. tenders an Obligation, in which they should be obliged jointly and severally: He is not bound to seal this, for by the *Assumpsit* a joint Obligation is intended. 1 Roll. Abr. 424. 2 Bulst. 287. 1 Roll. Rep. 71.

A Man undertakes to become bound with J. S. and J. D. to B. *per hujusmodi scriptum*, and payable at such a Time as two Strangers should agree between them; and the Strangers agreed, that the Obligation should be joint and several; yet he is not bound to seal it, for by the promise a joint Obligation is intended, and the Word *hujusmodi* gives not Power to alter that which the Law made joint, but only refers to the Sum and Time. 1 Roll. Abr. 424. The same Case is in 1 Roll. Rep. 71. and at the End of the Case there is a *Nota* by the Reporter, That as it was not expressly agreed that it should be joint, but implied by Law only, perhaps the Words, *per hujusmodi scriptum*, should relate whether joint or several, which is more agreeable with the Manner of the Obligation, (as *hujusmodi* imports) than the Sum or Time.

If a Man covenants for further Assurance to levy a Fine of all his Lands in D. and at the Time of the Covenant he is seised only of two Houses in D. and after two other Houses descend to him, and the Covenantee renders him a Fine of four Houses to be levied by him; he is not bound to levy it; for this will comprehend the other two Houses, of which he is not bound to levy a Fine; and tho' the Use of these two Houses which are not within the Covenant shall be to the Conusor, yet he is not bound to levy a Fine of them, for perhaps he is Tenant in Tail of them, and this will dock the Intail. Adjudged between *Wilson and Welch*, M. 12 Jac. B. R. 1 Roll. Abr. 424, 425. 1 Roll. Rep. 103, 117. 2 Bulst. 317. But it appears by the two last mentioned Reports, that the Plaintiff declared that the Defendant sold four Houses, &c. and the Defendant pleaded that he sold but two, &c. so that the Plaintiff would extend the Covenant, and by Consequence the Fine, to more than was comprehended in the Covenant.

If the Condition of an Obligation be, that if he makes a good and absolute Assurance in Fee to the Obligee of certain Copyhold Lands, then, &c. if he after surrenders it upon Condition of Payment of Money, and the Surrender is presented accordingly: This is not any Performance of the Condition, because the Assurance ought to be absolute without a Condition. 1 Roll. Abr. 425.

So if a Covenant be with a Purchaser to make further Assurance; if he makes an Assurance upon Condition, this is not any Performance of the Covenant. *Ibid.*

If A. in Consideration that B. at the Request of A. would surrender a Copyhold Tenement, Parcel of the Manor of D. to A. in due Form of Law, according to the Custom of the Manor, to the Use of A. and his Heirs, assumes to B. to pay him 20*l.* in an Action upon the Case by B. against A. for the 20*l.* if he avers the Performance of the Consideration, that he after the Request of A. surrendered by a Straw to one J. S. a Customary Tenant of the said Manor, the said Tenement into the Hands of the Lord of the said Manor, according to the Custom of the said Manor, to the Use of the said A. and his Heirs, and yet the Defendant A. had not paid the 20*l.* this is not a good Performance of the Consideration which is a Condition precedent, for he is bound to make an effectual Surrender to the Use of A. and his Heirs at his own Costs; and he has made a Surrender here into the Hands of a Tenant of the Manor, which is a good Beginning of a Surrender; yet it is not a compleat Surrender till it is presented in Court, and he has taken upon him to make a perfect Surrender; and therefore he ought to procure the Tenant to present it at the Court according to the Custom, and to procure a Court to perfect it, which does not appear to be done. For if a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment with a Letter of Attorney to B. to make Livery to me, and he does it accordingly, this is a good Beginning; yet if Livery is not made, this is a Forfeiture of the Condition. 1 Roll. Abr. 425.

If a Man by Indenture bargains and sells his Lands to another in Fee, and covenants to make a good sufficient Estate thereof before Christmas next to the Vendee, and before Christmas the Vendor causes this Deed to be inrolled: Yet this is not a good Performance, for by the Intention of the Covenant some other Assurance was to be made. 1 And. 27. Bendl. 36. pl. 32. 3 Leon. 1.

If A. covenants to make such Assurance of Lands to B. as the Counsel of B. shall devise; B. himself, tho' learned in the Law, cannot devise the Assurance, but it ought to be devised by some of his Counsel; for if the Party himself might advise it, then it would be no Plea to say, *Quod consilium non dedit advisamentum*. 5 Co. 19. b. Cro. Eliz. 297, 298.

If A. covenants with B. to assure certain Lands to B. before a certain Day, at the Costs of B. A. must notify to B. what Manner of Conveyance he will make, viz. Fine, Feoffment, &c. and his Readiness to do it, that B. may know what Costs he is to tender.

tender. *Cro. Eliz.* 517. The Charges ought to precede the Assurance, tho' it ought first to be declared what Manner of Assurance shall be made. *Ow.* 157.

And where the Covenant is to make a particular Assurance, as a Feoffment, &c. A must tender it. *Cro. Eliz.* 517. It is all one where the Covenant is general, and where particular. *5 Co.* 22. b.

A Man 22 Jan. 38 *Eliz.* undertook to make such Assurance of all his Lands in Y. as S. should appoint, and S. the said 22 Jan. appointed that he should make a Bargain and Sale of all his Lands in T. and the 14 Sep. 39 *Eliz.* a Bargain and Sale of all his Lands in T. was tendered; and whether he was bound to execute it, was a Doubt, because he might have other Lands in T. 14 Sep. 39 *Eliz.* which he had not. *Adjournatur*, *Cro. Eliz.* 660.

If A. covenants with B. to make such reasonable Assurance to B. in Fee of such Lands, reserving to A. and his Heirs 20 s. Rent per Ann. as the Counsel of B. shall advise; and after B. tenders to A. a Deed Poll, by which A. enfeoffs B. of the Land in Fee, reserving the said Rent to A. in Fee: This is not such reasonable Assurance to bind A. to seal, for this is a Rent-seck, and the Deed appertains to the Feoffee, and then A. without the Deed cannot have any Remedy for the Rent. *1 Roll. Abr.* 423.

But if A. by Indenture grants and sells Lands without Livery or Inrolment to B. in Fee, reserving 20 s. Rent to him and his Heirs, and covenants to pass any other reasonable Assurance, as the Counsel of B. shall advise; and after the Counsel advises a Feoffment by Deed Poll, reserving the said Rent in Fee: This is a good Assurance within the Covenant, so that A. is bound to seal it, for then the Reservation does not depend only upon the Deed Poll, but upon the Indenture, which directs the Use of the Feoffment, by which A. may recover the said Rent-seck without shewing the Feoffment; but the Parties were ordered to make a new Feoffment by Indenture rendering the Rent. But afterwards the Parties could not agree, and so this Judgment was given against the Plaintiff, *scilicet*, against their Opinion before, because the Deed tendered was a Deed Poll, which should be after the Execution thereof in the Possession of the Plaintiff; and then the Defendant could not without the Deed have his Rent, not being able to prove the Feoffment. *1 Roll. Abr.* 423.

If the Condition of an Obligation be to make to the Obligee or his Assigns as good a Lease as Counsel could advise; and after the Obligee comes to the Obligor and appoints him to make a Lease to J. S. he ought to make it accordingly, tho' no Counsel advised it but the Obligee himself; for by the Words it is not necessary to have the Advice of Counsel, but only that the Lease should be as good as Counsel could advise. *Per Coke contra Doderidge.* *1 Roll. Abr.* 424. *1 Roll. Rep.* 373. *3 Bulst.* 170. *Bridg.* 39, 40, &c.

If one be obliged to assure twenty Acres of Lands, the Acres shall be accounted according to the Estimation of the Country where the Land lies, and not according to the Measure limited by the Statute. *Cro. Eliz.* 665. Which was said by *Popham* to have been resolved by all the Justices. But there is a Diversity where the Acres lie in an open Field, and the Parcels are known by Metes and Bounds, and where they lie in a great Close, and the Number of the Statute Acres therein contained are certainly known. *Poph.* 55.

If A. covenants with B. to make such Assurance of all his Lands at the Costs of B. as B. or his Counsel shall advise; B. may require one Assurance for one Parcel, and another Assurance for another Parcel, for being to be made at the Costs of B. it is no Prejudice to A. *Cro. Eliz.* 681. *Moor* 570. pl. 780.

But if the Assurance is to be made at the Costs of the Covenantor; if an Assurance of Part only is required, he must make it, but then he is discharged from making any Assurance of the Residue. *Cro. Eliz.* 681. *Moor* 570. pl. 780.

If the Condition of an Obligation be, that the Obligor before Michaelmas shall make, &c. all and every reasonable Act and Thing for assuring the Manor of D. to J. S. and his Heirs; and the Obligee requests him generally to convey, the Obligor must make an Assurance; and if thereupon the Obligor makes a Feoffment, and if the Obligee after requests a Fine, the Obligee must acknowledge it, and so upon every Request he ought to make several Assurances. *Telv.* 44. *Moor* 682.

But if it had been to be devised by the Obligee or his Counsel, he ought to have shewed he had devised and required such a particular Feoffment or Fine, &c. *1 Brownl.* 84.

If a Man covenants to make further Assurance, and to do any Act or Acts, &c. as shall be devised, &c. and a Note of a Fine is tendered, and he is required to acknowledge

knowledge it before a Judge of Assise, he must acknowledge it tho' no Writ of Covenant is depending, for he has covenanted to do every Act, and this Note of a Fine is an Act, and whether it be well levied, or to no Purpose, is not material. *Cro. Jac.* 251. 1 *Bulst.* 90. Because the Note is an Act preparatory to the Fine, and the Writ of Covenant may be sued out after; and so it is an Act for further Assurance tho' the Writ of Covenant is not depending. *Moor* 810. *pl.* 1096.

If a Man covenants to make a Jointure to his Wife, within one Year after his Marriage, of Lands in England of the yearly Value of 500 l. *ultra reprizas*, so as A. and B. Counsellors, should devise and advise; he must give Notice to A. and B. what Lands he is determined to settle, and of what Estate therein he is seised. *Godb.* 338.

But it was said by *Ley* Chief Justice, That if a Man is bound to make such Assurance of Land as J. S. shall advise, he is not bound to shew his Evidence, but the Obligee must seek it out at his Peril; and then J. S. may advise conditionally, if he has a Fee, such an Assurance; and if a Tail, such an Assurance; and if a Remainder over, then a Recovery. *Ibid.* But this is where the Land is certainly named, for he thought otherwise, where the Land is not certainly named. 2 *Roll. Rep.* 333.

But if the Covenant be to make a Jointure, &c. as the Counsel of the Covenantee shall advise, he must give Notice to the Covenantee what Lands he is determined to settle, and he must inform his Counsel. *Godb.* 338. 2 *Roll. Rep.* 335.

If a Man undertakes to seal two Instruments for the Assurance of a Reversion, according to two Draughts between them before agreed upon, he must execute them without any tender. 1 *Lev.* 44.

If an Obligation be conditioned to seal and execute such a Release as shall satisfy the Counsel of the Obligee, the Obligor must tender a Release to the Counsel of the Obligee, to know whether it will satisfy him. 2 *Lev.* 95.

A. covenanted to make such Assurance to B. according to an Agreement made between them as Counsel should direct and advise; and whether this Covenant should not be taken according to the general Intendment, and that therefore the Counsel of B. should advise. 3 *Mod.* 191, 192. Q.

(11) *What shall be said a Performance of a Condition, and what a Forfeiture.*

IF the Condition of a Feoffment be to enfeoff J. S. if he enfeoffs J. S. and two others, this is no good Performance, but the Condition is broke. 21 *Aff.* 28. *Bro. Condition* 107.

If the Condition be, that whereas B. has bound himself Apprentice to the Obligor for seven Years: If the Obligor retains, keeps and employs the said Apprentice in his own House and Service, in the Art of Surgery, during the Term, the Obligation shall be void; and after the Obligor sends the Apprentice in a Voyage to the *East-Indies*, in the Company of other expert Surgeons, the better to learn the said Art: This is a Breach of the Condition; tho' by the Condition he is not restrained from sending his Apprentice into other Places about his Cures, yet he ought always to be of his Household, going and returning, and in his Service, and not put over to any other; for the putting an Apprentice to another, is a great Trust for his Diet, Health and Safety: And generally a Man cannot compel his Apprentice to go out of the Realm, if it be not expressly agreed, or the Nature of the Apprenticeship imports it, as if he be bound Apprentice to a Merchant Adventurer, or Sailor. 1 *Roll. Abr.* 427, 428.

If an Obligation be conditioned, that the Obligor shall repair, sustain and amend a Messuage during his Term, and leave it in sufficient Repairs at the End thereof: If the Timber of a Bakehouse, Part thereof, is so rotten that it cannot be repaired nor sustained, if the Obligor pulls it down, and builds it again, yet he cannot plead this in Discharge of his Obligation; for tho' the Condition may be impossible, yet the Obligation is good. *Sav.* 96, 97. 2 *Leon.* 189.

If a Man makes a Feoffment in Fee of Lands in five Counties, upon Condition to re-assure: If the Re-assurance is made of the Lands in four Counties, but not in the fifth, the Condition is broke for the Lands in that County only. *Moor* 823. *pl.* 1112.

King Henry the 8th granted Lands to A. and his Heirs, provided that he and they *Perpetuis futuris temporibus invenirent & sustinerent duos Capellanos in Ecclesia Parochiali de W. ad orandum pro anima H. 8. his Heirs and Successors, & ad celebranda divina servitia, & curam animarum Parochianorum*; and A. conveyed the Lands to B.

and

and his Heirs, who appointed two Chaplains, one of which was not resident, but neglected his Duty: This is a Breach, for the Estate was tied with the Condition, into whose Hands soever it came; and *B.* ought not only to have found Chaplains, but also to have taken Care that they had been such as would have done their Duty. *Lit. Rep.* 94, 105, 128, &c.

If a Man leases for Life, upon Condition that the Lessee shall not do any Waste; and after the Lessee suffers the House to fall for want of Covering and Reparation, which is not any Act of *doing*, but a *Permission*; yet the Condition is broke, for the Words are, *any Waste*; and such Waste is within the Statute of *Gloucester*, which speaks of doing of Waste: And it seems, that the Permission of the House to fall, may properly be said a doing of Waste, which is a Collateral Thing; which is but as much as if he had said, if he had disinherited him. *Sed Q.* 1 *Roll. Abr.* 428. 2 *Inst.* 145. *Ow.* 92, 93.

If a Man leases Land, upon Condition that the Lessee shall not do Waste, and after a Stranger does Waste; yet this is not any Forfeiture, because a Condition shall be taken strictly. 1 *Roll. Abr.* 428. 1 *Leon.* 64. 4 *Leon.* 39.

So if the Condition of an Obligation be, that I shall not continue such an Action, and my Attorney, without my Privy, continues it: This is no Breach. *Cro. Jac.* 525. 2 *Roll. Rep.* 63.

If a Woman covenants not to do any Act to discontinue or countermand an Action, and after she marries, *per quod*, &c. this is a Breach. *Goulf.* 59.

If the Condition of an Obligation be, that he shall not be aiding and assisting to *E.* in any Action to be prosecuted against *F.* the Obligee; and after the Obligor joins in a Writ of Error with *E.* and another against *L.* upon a Judgment in Trespass against them three, which is apparently erroneous: This is not any Breach of the Condition, for this is not properly an Action, but a Suit to Discharge of tortious Judgment, in which they ought all to join. 1 *Roll. Abr.* 429. *Hob.* 304. *Hut.* 40.

If a Man makes a Feoffment in Fee, reserving Rent, upon Condition that if the Rent be behind, and no Distress to be found upon the Premises, to re-enter: If the Rent be behind, and no Distress but a Cup-board in the House lock'd, so that the Feoffor cannot come at it; this is a Forfeiture, for when the Place is not open to the Distress, it is all one as if there had been no Distress there. 1 *Roll. Abr.* 428.

A. made a Feoffment in Fee to the Use of himself and his Heirs, and 21 H. 8. devised the Use to *B.* his younger Son, and the Heirs Male of his Body, Remainder to *C.* his eldest Son in Fee, provided *B.* or any of his Issue, should not discontinue or alien, but only to make a Jointure for a Wife; and *B.* after the Statute of 27 H. 8. leased for three Lives, pursuant to the said Statute, and after levied a Fine *Sur consuance de droit come ceo*, &c. with Proclamations to the Use of himself and his Wife, and the Heirs Male of their two Bodies, the Remainder to himself in Tail Male, the Remainder to the right Heir of *A.* This was a Breach of the Condition, for he might have made an indefeasible Jointure by Fine *Sur Grant & Render*: But by this Fine the Tail created by the Devise is dock'd; and if he had Issue by a former Wife, they should not inherit. 1 *Leon.* 298.—Adjudged, because other Uses are limited by the Fine than what were before, *viz.* the Fee is limited to the Heirs of *A.* whereas it was before limited to *C.* in Fee. *Sav.* 76, 77.

If a Man devises Lands in Tail, upon Condition that the Devisee shall not give or grant the Premises otherwise than by Lease for any Number of Years, determinable upon the Death of any three Persons to be named in the Leases, and he leases for 1000 Years, &c. This is no Breach, because it determines by his Death. *Cro. Jac.* 61, 62. *Moor* 772. *pl.* 1067.

If there be Lessee for Years, upon Condition not to devise it to any Body but only to his Sons or Daughters, and he devises it to a Stranger, and dies, and his Executor never consents to the Devise; yet this is a Forfeiture, because he has done all that was in his Power to pass it by the Will, and this puts it in the Power of an Executor to execute it. 1 *Roll. Abr.* 428.

And so it is a Forfeiture if he devises to his Executors, and they accept the same only as Executors. 3 *Leon.* 67. 4 *Leon.* 5.

So if such Lessee devises the Term to his Executor for Payment of his Debts, (as it seems it is to be intended to make the Devise void): Tho' this Devise is void, because the Law had vested it in him for the same Cause, yet inasmuch as he has done his Endeavour to pass it by the Devise, this is a Forfeiture. 1 *Roll. Abr.* 428, 429.

If a Lessee for Years, upon Condition not to alien without the Assent of the Lessor, makes his Executor, and devises it to him, and the Executor enters generally, the Testator not being indebted to any Body: This is a Forfeiture of the Condition. 1 Roll. Abr. 429. Cro. Eliz. 815, 816. 4 Co. 119. b.

If there be a Grantee of a Reversion, upon Condition not to grant it over to J. S. and he grants the Reversion to J. S. by his Deed: Tho' the Lessee never attorns, yet this is a Forfeiture, because he has done his Endeavour to grant it, and put it into the Power of a Stranger to perfect it. 1 Roll. Abr. 429.

If Lessee for Years covenants not to assign it, by which it may come to J. S. and obliges himself to perform Covenants, and after he assigns it to J. D. this breaks the Condition, inasmuch as by this Means it may come to J. S. Ibid.

If A. grants the next Avoidance of a Church to B. and C. and A. becomes bound to C. in an Obligation that he shall enjoy the said Presentment without the Claim of A. and after B. grants his Interest to A. and the Church becoming void, A. offers to join with C. in the Presenting: This is a Breach, tho' A. had a puisne Title to it after the Obligation entered into. 4 Leon. 18.

(KK) *By whom Collateral Things conducive to the Performance of Things limited shall be done.*

WHEN a Man is bound to do a Thing, he ought to do all that which depends thereupon in the Performance of the Thing. 11 H. 4. 25. b. 1 Roll. Abr. 422.

If the Condition be to levy a Fine to the Obligee, and it is not determined at whose Costs it shall be done, it shall be at the Costs of him that ought to levy the Fine, for this depends upon the other. Ibid.

So in Case of a Covenant. Stil. 280.

Upon such a Condition the Obligor ought to sue out a Writ of Covenant in the Name of the Obligee, and the Obligee is not bound to do it. 11 H. 4. 25. b. 1 Roll. Abr. 422.

If the Condition be to levy a Fine upon Warning, a Warning by the Sheriff upon a Writ of Covenant is not sufficient, (for perhaps he cannot know by this whether it be to levy a Fine or other Action) but it ought to be upon Warning by the Obligee himself. 11 H. 4. 18. Bro. Condition 39. 1 Roll. Abr. 422.

(LL) *In what Cases a Collateral Thing is in Satisfaction of a Condition.*

IF a Man be bound in 20 l. to do a Collateral Act, as a Feoffment, or to be bound in a Statute, or to render a true Account: There Money, or any other Thing given in Satisfaction, is no Performance of the Condition. 9 Co. 79. b. 1 Roll. Abr. 455. But when the Condition is to pay Money, there any Collateral Thing will be a Satisfaction. 9 Co. 79. Co. Lit. 212. b. 3 Bulst. 149.

A Man bound in 200 Quarters of Malt, upon Condition to pay 20 l. a Ring, or Horse, or other Collateral Thing, is a Satisfaction. 9 Co. 79.

So a Feoffment upon Condition to pay 20 l. a Collateral Thing is a Satisfaction. 9 Co. 79. Co. Lit. 212. b.

If a Bond or Feoffment is conditioned for the Payment of Money to a Stranger, he cannot accept a Horse, or other Thing, in Satisfaction, because in this Case the Condition is to be strictly performed. Co. Lit. 212. b.

But if the Condition be, that a Stranger shall pay Money to the Feoffee or Obligee, the Feoffee or Obligee may receive an Horse, &c. in Satisfaction. Ibid.

An Obligation was conditioned for the Payment of 7 l. at the Birth of the first Child of the Obligee; and whether a Load of Lime might be accepted in Satisfaction before the Birth of the first Child, *dubatur*; but because it was pleaded to have been accepted in Satisfaction of the Bond, whereas it ought to have been pleaded in Satisfaction of the Sum mentioned in the Condition of the Bond, it was adjudged the Plea was naught. Cro. Jac. 254. Vide Telv. 192. 1 Bulst. 66, 67. 1 Brownl. 109, 110.

A Man bound in twenty Quarters of Grain, conditioned to pay five Quarters; Money, or other Collateral Thing, is not a Satisfaction, because of the original Contract.

But otherwise it is in a Contract without Deed. 9 Co. 79. b.

If the Condition be to pay a less Sum at a Day; if the Obligee agrees that he shall pay an Horse or other Thing in Satisfaction, yet if he refuses it, the Obligor ought to pay the small Sum at the Day, otherwise he has forfeited the Obligation; for the Agreement by Parol without Acceptance, cannot alter the Agreement by Deed before. 19 Ed. 4. 1. b. 2. Bro. Condition 161.

So if the Condition be to erect an House of such a Length, &c. he cannot plead another Agreement in another Manner in Satisfaction thereof, unless it be by Deed. 19 Ed. 4. 2. b. Cro. Eliz. 193, 304.

So if the Condition be to pay a small Sum at D. at such a Day; an Agreement to pay at another Place (or at another Day) without Acceptance, is not a Discharge. 19 E. 4. 1. b.

So if a Thing be to be done by Implication of Law to the Person of any one, and the Obligee appoints him to do it at a Place in certain; yet if the Person be not there to accept it, it is not discharged, but the other ought to seek him. 19 E. 4. 1. b. Bro. Condition 161.

If a Condition of an Obligation be to pay 10 l. at a Day to D. if the Obligee accepts it at another Place, it is a good Performance without Deed. 41 Ed. 3. 25. Bro. Condition 21, 31. Bro. Debt 43. 46 Ed. 3. 29. b. 1 Roll. Abr. 456.

So if the Defeasance of a Statute be to pay to D. so much Rent. 46 Ed. 3. 4. Bro. Defeasance 14. Fitz. Audita Querela 1.

If a Condition be to pay a Rent to the Obligee; an Agreement to pay to his Bailiff, who refuses, is no Plea without Deed. Dubitatur, 9 H. 6. 29. b.

If the Condition of an Obligation be to pay 10 l. at a Day; if at the Day of Payment he enters into another Obligation to the same Obligee for the same Sum as the first was, and this with a Surety, which was more than was done in the other, yet this is not any Discharge of the first Obligation, because it is but a Thing in Action, and no present Satisfaction. 1 Roll. Abr. 470. Hob. 94.

If a Man be bound in 20 l. in a Statute, and he makes an Obligation to him for it, and he accepts it; this is not any Satisfaction, because the Statute is of greater Advantage than the Obligation. 12 H. 4. 23. b. 1 Roll. Abr. 470.

If the Condition of an Obligation be to pay 25 l. at Michaelmas, and the Obligor leases Land to the Obligee, rendring 39 l. Rent at the said Feast of St. Michael; and after before the said Day of Payment, concordatum & agreeatum fuit, that the said Obligee, being the Lessee, should retain 25 l. of the said Rent, in Satisfaction of the said Obligation, and for the Residue of the Rent, that he should remain answerable to the Obligor; and after at the said Day, because of the said Agreement, the Obligor does not pay the 25 l. this Obligation is forfeited, for this Agreement cannot be any Discharge of the Obligation, inasmuch as the Rent at the Time of Agreement made was not due. 1 Roll. Abr. 470.

If the Condition of an Obligation be to pay 10 l. at a Day, which is not paid at the Day, but after the Day the Obligee accepts a Statute-Staple from the Obligor for the same Debt, in full Satisfaction of the Obligation; yet this is not any Satisfaction, for tho' the Statute be a Matter of Record, and higher than the Obligation, yet the Obligation remains in Force, and the Obligee has his Election to sue the one or the other. 6 Co. 44. b. Vide Cro. Jac. 579.

If a Condition be, that a Stranger shall enfeof the Obligee of Land, which the Stranger tenders, and he refuses to accept, but by his Command he enfeoffs another; This is a good Performance without Deed. 42 Ed. 3. 23. Bro. Condition 24.

If the Defeasance of a Statute be to pay 10 l. Rent at a Day; it is a good Performance without Deed, that he paid Part for the Expences of one of the Conusees, and the Residue for the Reparations of the Houses, (which he himself was not bound to repair) by the Command of the Conusee. 46 Ed. 3. 33. b. Bro. Condition 32. Audita Querela 6.

If a Lease be made by Deed, rendering Rent, upon Condition: It is a good Performance, that by Accord the Rent should be recouped for the Table of the Lessor. 47 Ed. 3. 24. b. Bro. Condition 228. Covenant 13.

If I deliver Money to another without Deed to my Use, and make a Defeasance by Deed to pay a less Sum: If I accept Corn in Satisfaction without Deed, this is not any Discharge. Contra 18 Ed. 3. 39. b. 1 Roll. Abr. 456.

If the Obligee accepts the Thing to be done after the Condition is broke; yet this is not a Discharge of the Obligation without Deed. 46 Ed. 3. 29. b. 47 Ed. 3. 14. Contra 18 Ed. 3. 58. b. 1 Bulst. 39.

If the Condition be to stand to an Award to be made such a Day; if at the Day no Award is made, but the Arbitrators, by Assent of Parties, appoint another Day to do it, and make it at the Day, yet he is not bound to perform it. 43 Ed. 3. 9. Fitz. Barre 224.

If a Grantee of an Annuity, *Pro consilio impendendo*, promises the Grantor to come to a certain Place at a certain Day to give him Counsel: If he does not come at the Day there, yet the Condition is not broke, for he is not bound by the Condition to go there, and this cannot alter it. 21 Ed. 3. 7. b. 1 Roll. Abr. 457.

If the Condition of an Obligation be to pay 100 Marks at a Day, and at the Day the Obligor and Obligee account together at another Place, and because the Obligee owes to the Obligor 20 l. by another Contract, the Obligee allows the 20 l. in Payment of the 100 Marks: This is a good Satisfaction of the Condition, for this is all one as if the Obligor had paid the Obligee, and he had repaid him. This is a Payment by way of Retainer. 1 Roll. Abr. 471. Co. Lit. 213.

If the Obligee and Obligor, before the Day of Payment of the Money to be paid by the Condition, agree together, that the Obligor shall do several particular Things, as, amongst other Things, to assign his Interest in the Form of the Customs of French Wines, and he pleads, that he did all in particular, shewing how, and it appears to the Court that he could not by Law assign his Interest in the said Customs, they being in Covenant only; tho' the Obligee had enjoyed them accordingly, yet this is not any Discharge of the Obligation, inasmuch as this is like an Accord; so that all ought to be performed, otherwise it is not good, because the Obligee has not any Remedy for that which is not performed. 1 Roll. Abr. 471. Cro. Car. 193.

If an Obligation or Feoffment be conditioned for the Payment of Money at a certain Time and Place; a lesser Sum cannot be paid at the Time and Place in Satisfaction thereof, because it is apparent that a lesser Sum of Money cannot be a Satisfaction of a greater. Co. Lit. 212. b. 5 Co. 117. a. Moor 47, 677.

But if the Obligee or Feoffee accepts a lesser Sum before the Day, or at another Place; this is a good Satisfaction. Co. Lit. 212. a.

Or if the Obligee or Feoffee at the Day receives Part, and thereof makes an Acquittance in full Satisfaction of the Whole; this is sufficient, because the Deed amounts to an Acquittance of the Whole. Co. Lit. 212. b.

If the Condition of an Obligation be to pay 20 l. at a Day, and a Stranger surrenders a Copyhold to the Use of the Obligee in Satisfaction of the 20 l. which the Obligee accepts: This is a good Satisfaction and Discharge of the Obligation. 1 Roll. Abr. 471. Cro. Eliz. 541.

(MM) *What will excuse the Performance of a Condition.*

1. *Acts of God.*

If a Condition, which was possible at the making thereof, becomes impossible by Acts of God. the Act of God, the Obligation is discharged. 1 Roll. Abr. 449, 451. Co. Lit. 206. a.

As if a Man has Liberty to perform a Condition till a certain Day; if it after becomes impossible by the Death of any Person before the Day, the Obligation is saved. *Dubitatur*, 14 Ed. 4. 3. Bro. Condition 155. 1 Roll. Abr. 451.

If a Man be let to Mainprize, it is a good Plea at the Day when the Manucaptors ought to have the Body, &c. for the Manucaptors to say, that he who was let to Mainprize was dead before the Day, so that they could not have his Body at the Day. 21 Ed. 4. 70. b. *Curia, contra* 21 Ed. 3. 51. b. *scilicet*, that this cannot be averred by the Manucaptors; but it ought to come in by Return of the Sheriff, upon a *Capias* against him and the Manucaptors. 1 Roll. Abr. 449, 451.

But it is clear by these Books, that his Death excuses the Manucaptors. *Ibid.* and Cro. Eliz. 199. 2 Leon. 101.

If A. agrees with B. to give him eight Marks to serve him three Years, and because he has not the Money ready, in Surety of Payment he enfeoffs him of Land in Fee, upon Condition to continue till the eight Marks are paid, &c. and after A. dies within three Weeks after this Agreement, yet his Death shall not excuse the Payment of the eight Marks; for the Heir cannot enter before Payment thereof, or raising thereof out of the Land. 21 Ed. 3. 11. b. 21 Aff. pl. 18. Fitz. Aff. 102. Bro. Condition 106. Bro. Affise 229. 1 Roll. Abr. 449.

If *A.* recovers a Debt against *B.* in Banco, and *B.* brings a Writ of Error, and finds Manucaptors to prosecute with Effect, and after dies before the Return of the Writ: This Act of God will excuse the Manucaptors. 1 Roll. Abr. 449, 450. 1 Roll. Rep. 329.

If a Man becomes Bail for another in an Action, and after the Plaintiff recovers against the Principal, and the *Capias* against him is returned *Non est inventus*, and this is filed, and after the Principal dies before any *Scire Facias* sued against the Bail; yet this shall not excuse the Bail, inasmuch as he died after the *Capias* returned and filed, (yet it seems, that after this, and before the Return of the *Scire Facias*, the Bail is excused *de gratia*, by bringing him in). 1 Roll. Abr. 450.

But it had been otherwise if he had died before a *Capias* returned or filed. *Ibid.*

If a Man covenants to do a Thing certain before a certain Time: Tho' it becomes impossible by the Act of God, this shall not excuse him, inasmuch as he has bound himself precisely to do it. *Ibid.*

If a Man for a certain Consideration given by *A.* assumes to deliver to *A.* certain Goods in London: Tho' he after puts the Goods into a Boat to carry to London accordingly, and in going, the Boat is overturned by the Violence of the Tempest and Water, yet this shall not excuse him in an Action upon the Case upon this Promise. *Ibid.*

If a Man covenants to build an House before such a Day, and after the Plague is there before the Day, and continues there till after the Day: This shall excuse him from the Breach of the Covenant for the not doing thereof before the Day, for the Law will not compel a Man to venture his Life for it, but he may do it after. 1 Roll. Abr. 450.

If the Condition consists of two Parts in the Disjunctive, in which the Party has an Election which of them to perform, and both possible at the Time of making the Condition, and one becomes impossible afterwards by the Act of God: This shall excuse the Performance of that and the other also, for otherwise his Election should be taken away by the Act of God. 5 Co. 22. The Condition being that if *B.* should alien his Wife's Lands, if then he purchased other Lands of as great Value to his Wife and her Heirs, or should leave her the Value by his Will, then the Bond should be void; and he aliened his Wife's Lands, and before any Purchase made, the Wife died, living *B.* Cro. Eliz. 398.

If a Condition consists of two Parts, of which one was not possible at the making of the Condition to be performed, he ought to perform the other. 21 Ed. 3. 30. 5 Co. 22. Cro. Eliz. 780.

As if the Condition be to enfeoff *J. S.* or his Heirs, when he comes to such a Place: He is bound to enfeoff *J. S.* when he comes, because the other is not possible, for he cannot have Heir during his Life, and so he had not any Election. *Ibid.*

If the Condition of an Obligation be to make an Assurance of certain Land to the Obligee and his Heirs, and after the Obligee dies, yet he ought to make the Assurance to his Heir, for this Copulative, and his Heirs, shall have the Signification of a Disjunctive. 1 Roll. Abr. 450. 1 Brownl. 72. Palm. 552, 553. 1 Jon. 180.

If the Condition of an Obligation be to enfeoff two before such a Day, and one dies before the Day, yet he ought to enfeoff the other. 1 Roll. Abr. 451. N. Bendl. 35.

If the Condition of an Obligation be, that whereas a Marriage is intended between *A.* and *B.* if the said Marriage takes Effect, and if *B.* the Wife survives *A.* and does not receive 300 *l.* of *A.* by his Will, or by the Custom of London, within three Months after the Death of *A.* that then if the Obligor pays to *B.* or her Executors 500 *l.* within six Months after, the Obligation shall be void: And after the Marriage takes Effect, and *B.* survives *A.* and dies within three Months, without receiving any Thing of the said 300 *l.* by the Will of *A.* or by the Custom of London; the Death of *B.* within the three Months shall not excuse the Obligor from paying the 500 *l.* to the Executors of *B.* because it is not any disjunctive Condition, of which the Obligor has any Election to do the one or the other. But the Condition is, that if a Stranger pays so much within a Time, that he himself will pay another Sum; so that the Death of the Party who is to receive from the Stranger shall not excuse the Obligor. 1 Roll. Abr. 451. S. C. 1 Jon. 171. Palm. 513, 516. adjudged *contra.* And it was said, that there was no Difference when the Election is in a Stranger, or in the Obligor.

If *A.* enters into a Bond to *B.* conditioned that *C.* shall perform an Award to be made between *B.* and *C.* and it is awarded that *C.* shall pay to *B.* 10 *l.* at Michaelmas and

and 10*l.* at *Lady-day*, and *C.* pays the 10*l.* at *Michaelmas*, and dies before *Lady-day*; yet because the Sum awarded is a Duty, it is as if the Condition of a Bond had been for the Payment of the Money, and if not paid, the Bond is forfeited. 2 *Leon.* 155. *Cro. Eliz.* 10.

But if the Condition of an Obligation be, that the Obligor shall enfeoff the Obligee at such a Day, and before the Day the Obligor dies, and the Land descends to his Heir, the Condition is become impossible by the Act of God, and the Performance thereof excused. 2 *Leon.* 155.

If the Condition be to enfeoff *J. S.* within a certain Time, if *J. S.* dies before the Time be passed, the Obligation is discharged. 8 *H.* 4. 14.

If two be enfeoffed to re infeoff, and one dies, the Survivor ought to perform it, and may. 41 *Ed.* 3. 17. *b.* 2 *Co.* 79.

But if Feoffee to re infeoff dies before the Feoffment, the Condition is broke, for he is to perform it, and ought to do it during his Life. 2 *Co.* 79.

But if the Condition had been, that the Feoffee, or his Heirs, should re infeoff, and he dies, his Heir may perform it. 2 *Co.* 79.

If *A.* binds himself Apprentice to *B.* for seven Years, and *B.* enters into a Bond to *A.* conditioned to pay *A.* his Executors or Assigns 10*l.* at the Time of the End or Determination of his Apprenticeship; and *A.* serves six Years, and then dies, the Money shall not be paid to his Executor. 1 *Brownl.* 97.

2. Acts of the Parties.

If a Condition be to enfeoff the Obligee; tho' the Obligee disseises him of the Land, yet this does not excuse the Performance of the Condition, for he may re-enter and perform it notwithstanding. 2 *Co.* 59. 8 *Co.* 92.

Acts of him
who is to
have the Ad-
vantage.

If the Condition of an Obligation be, that the Obligor shall enfeoff the Obligee of the Land before such a Day, and after before the Day the Obligee disseises the Obligor, and keeps it with Force till after the Day, so that the Obligor cannot enter: This will excuse the Performance of the Condition. 8 *Co.* 92. *Co. Lit.* 206.

If a Lease be made upon a Condition that the Lessee shall not permit or harbour any Whore within the House to him let, and that if he suffers such a Woman to stay there for six Weeks after Warning, &c. it shall be lawful for the Lessor to enter; and after the Lessee suffers such a Woman to be there, and Warning is given him by the Lessor: Altho' after the Lessor commands the Woman to stay there six Weeks, yet this shall not excuse the Performance of the Condition, because the Lessor did not do any Act; and notwithstanding the Command, the Lessee might have removed her. 35 *H.* 6. *Barr* 162. 8 *Co.* 91. *b.*

But in the said Case, if the Lessor ousts the Lessee, and with Force, and against the Will of the Lessee, puts in the Woman, and violently makes her stay there with Force, against the Will of the Lessee, for six Weeks: This shall excuse the Performance of the Condition. 35 *H.* 6. *Barr* 162. 8 *Co.* 92. *a.*

If a Bond be conditioned to procure a Marriage between the Obligee and *B.* before a certain Day, and before the Day the Obligee calls *B.* a Whore, and tells her, If he marries her, he will tie her to a Post; by Reason whereof the Obligor could not procure *B.* to marry him: This will excuse the Non-performance, but then it must be shewed in Pleading, that the Obligor did what he could to procure her to marry, &c. *Cro. Eliz.* 694.

If a Man be bound to build a House, &c. he is excused if the Obligee will not suffer him to build it; for he cannot come upon the Land without his Will. 1 *Roll. Abr.* 453.

If a Condition be to repair an House; he is excused thereof, if a Stranger by the Command of the Obligee himself disturbs him, and will not suffer him to do it. 1 *Roll. Abr.* 453.

If a Condition be to erect a Mill, and after he comes to the Obligee, and says all is ready for the Erecting thereof, and demands of him when he shall come with the Mill to erect it: If the Obligee says he will not have the Mill, and entirely discharges him of the Mill, this shall excuse him of the Performance. 1 *Roll. Abr.* 453, 454.

If two are bound in a Statute, with a Defeasance that they two shall make such Assurance as shall be devised, &c. if an Assurance be tendered to one, and he refuses to seal it, the Condition is broke for both; for he need not request both at one Time. 1 *Roll. Abr.* 454. *Cro. Eliz.* 655.

If *A.* is bound to *B.* that *J. S.* shall marry *J. G.* before such a Day, and before the Day *B.* marries her: He shall take no Advantage of the Condition, because by his Means it could not be performed. *Co. Lit.* 206. *b.*

If a Man makes a Feoffment in Mortgage, upon Condition to be void upon Payment of Money by the Feoffor, &c. to the Feoffee at a Day: If at the Day the Feoffee is out of the Realm, the Feoffor is not bound to seek him, or to go out of the Realm to him; and therefore because the Feoffee is the Cause that the Feoffor cannot tender the Money, the Feoffor may enter into the Land as if duly tendered. *Co. Lit.* 210. *b.*

If *A.* leases to *B.* for Years, upon Condition that if *B.* pays Money to *A.* or his Heirs at a Day, that *B.* shall have the Fee; and before the Day, *A.* is attainted of Treason, and executed: Now tho' the Condition became impossible by the Act and Offence of *A.* yet *B.* shall not have a Fee, because a precedent Condition to increase an Estate must be performed, and if it becomes impossible, no Estate shall rise. *Co. Lit.* 218. *a.*

A. entered into a Bond to *B.* conditioned to save *B.* harmless from a Bond made to *C.* for Payment of 100 *l.* at a Day and Place, and at the Day of Payment *A.* was going to the Place to pay it, and *B.* by Covin caused *A.* to be imprisoned till after Sun-set, to the Intent the 100 *l.* should not be paid. This being pleaded to an Action of Debt upon the Bond, it was adjudged upon Demurrer that such a bare Surmise was no Bar. *Cro. Eliz.* 672.

If the King grants a Reversion in Tail, upon Condition that if the Grantee pays 20 *s.* at the Receipt of the Exchequer, &c. the Grantee shall have a Fee: If afterwards the King, under his Great Seal, refuses to receive the Money, yet if the Grantee tenders it at the Receipt of the Exchequer, he shall gain a Fee; for the King by no Means can countermand or hinder the increase of the Estate in such Case. 8 *Co.* 76. *b.* 2 *Brownl.* 252.

If the Condition of an Obligation be, that the Obligor shall pay 10 *l.* to the Obligee, which is for the Rent of certain Land, and the Obligee enters upon the Land, and so suspends the Rent, yet this shall not excuse the Payment; for it is but a Recital that it was for Rent, and not material. *Hob.* 130. So if by Pleading it had been applied to the Lease, &c.

If the Condition be to do a Collateral Act, and not to pay Money, which is the Nature of the Principal; if the Obligee refuses it at the Day, this discharges the whole Obligation. 1 *Roll. Abr.* 455. *Co. Lit.* 207. *a.*

If the Condition of an Obligation be, that the Obligor, being a Parson, should resign to the Obligee within a certain Time, for a certain Pension, as they should agree: The Obligee ought to agree for the Pension, and tender a Deed thereof to the Obligor before he is bound to resign. 1 *Roll. Abr.* 458.

If an Annuity is granted till he is promoted to a Benefice by the Grantor: If the Grantee after accepts a Benefice from another, and after the Grantor proffers him a Presentation to his Benefice, and he refuses, the Annuity is determined. 17 *Ed.* 3. 11. *Dubitatur*, 1 *Roll. Abr.* 458.

Where a Rent is to be paid upon Condition at a certain Day, he cannot enter for the Condition broke before a Demand of the Rent. *Co. Lit.* 201. *b.*

And the Demand ought to be at the Day, and it is not sufficient after. *Contra* 20 *H.* 6. 30, 31. 1 *Roll. Abr.* 458.

Where a Rent is reserved to be paid upon Condition at a certain Day, the Lessor ought to demand it at the Day, otherwise the Performance of the Condition is saved, altho' the Lessee was not there ready. *Contra* 4 *H.* 6. 9. 1 *Roll. Abr.* 458.

If the Condition of an Obligation be to pay a Sum at a certain Day, the Obligor ought to tender it without any Demand. 20 *H.* 6. 30. 2 *Ed.* 4. 3. *b.* 8 *Ed.* 4. 1. 1 *Roll. Abr.* 458.

If I am bound to be attendant upon you at all Times when you come to your Manor of *D.* I shall be bound to take Notice when you come to your Manor of *D.* at my Peril, without any Notice given by you. 8 *Ed.* 4. 1. *b.* *Fitz. Arbitrament* 15. 1 *Roll. Abr.* 458.

If the Condition of an Obligation be to stand to the Award of *J. S.* &c. who awards a certain Thing to be done to another at a Day: He ought to perform it at his Peril, without any Notice given by any other. 8 *Ed.* 4. 1. 1 *Roll. Abr.* 458.

A. made a Deed of Feoffment of Lands in several Counties, dated the 15th of October, 4 *Mar.* upon Condition the Feoffee should re infeoff him of the Lands within

twenty Days after the Date of the Deed; and yet because *A.* made his Feoffment but of Part within the twenty Days, it was held the Condition was not broke, tho' all was not re-conveyed within the twenty Days, according to the Letter of the Condition, which is entire; for it was the Fault of *A.* that it was not conveyed, without which it could not be re-conveyed. *Hob. 24.*

If the Condition be, that the Son of the Obligor shall serve the Obligee for seven Years: If he tenders his Son, and the Obligee refuses, it is no Forfeiture. *1 Roll. Abr. 455.* Acts of the Obligee.

Where the Condition is to deliver a Release to the Obligee, it is not enough to say, That it was written and Wax affixed to it, and that he was ready to seal and deliver it, but that the Obligee refused to accept it; for he ought to have done all that he could, and he might have sealed it notwithstanding. *2 Roll. Rep. 238.*

If *A.* is obliged to *B.* and the Condition is, that the Son of *A.* shall serve *B.* for seven Years: If *B.* takes him, and after within the Term commands him to be gone from him, the Obligation is not forfeited. *22 Ed. 4. 26. 1 Roll. Abr. 455.*

If the Condition of a Bond be, that the Obligee shall peaceably enjoy certain Copyhold Land without the Interruption of any, and after the Lord enters for a Forfeiture by Non-payment of the Rent according to the Custom, yet the Obligation is not forfeited, for this was the Neglect of the Obligee himself. *1 Roll. Abr. 455.*

If the Obligor pays Part of a small Sum contained in the Condition at the Day, without any Mention of the Rest, yet the whole Obligation is forfeited. *1 Roll. Abr. 455.* Acts of both Obligor and Obligee.

If the Condition be, that he shall not disturb the Obligee in certain Land leased to him; yet if he surrenders to the Obligor, this is a good Discharge of the Obligation. *Ibid.*

If *A.* leases Lands to *B.* for seventeen Years, and after *B.* enters into an Obligation to *A.* conditioned to pay an annual Rent to *C.* for the Term of seventeen Years, if *C.* lives so long; and the said *B.* or his Assigns, or any claiming under him, shall or may so long enjoy the said Land, and *B.* after surrenders to *A.* yet he must continue the Payment of the Rent, because merely Collateral, and to be made to a Stranger. *Popb. 39, 40. Cro. Eliz. 313. Owen 104. Moor 597. pl. 815.*

But if the Condition had been, that *C.* during the Term should hold Part without the Interruption of *B.* or his Assigns; if after the Surrender *A.* had interrupted him, *B.* should not have forfeited his Bond, for that the Obligee should not take Advantage of his own Act. *Popb. 40. Owen 104. Cro. Eliz. 313.*

If *A.* in Consideration of 10*l.* given to him by *B.* assumes to pay 20*l.* when such a Ship, which was ready to go from *D.* to *Hamburg* beyond the Seas, should go from *D.* to *Hamburg*, and return to the same Place, *scilicet*, to *D.* aforesaid: He ought to pay the 20*l.* upon the Return of the Ship, without any Notice given by the Obligee, for he has taken upon himself to pay it at his Peril upon the Return of it. *1 Roll. Abr. 463, 469.* Where want of Notice will excuse.

If *A.* promises *B.* in Consideration that *B.* will permit *A.* and *C.* to enjoy a Tavern in *Sturbridge* Fair during the Fair, to pay to *B.* 10*l.* for the Use of the Tavern; and also that before the End of the Fair he will pay all such Money as *B.* shall disburse for Wine and Beer for the said *A.* and *C.* during the Fair aforesaid, to be expended in the said Tavern. In an Action upon this Promise, after the End of the Fair, if the Plaintiff does not aver, that he gave Notice before the End of the Fair how much he had disbursed for Wine and Beer for them to be there expended: This is not good, tho' he avers how much he disbursed for it; and a Demand thereof after the Fair is not sufficient, for *A.* could not know how much he had disbursed without Notice, and Notice thereof after the Fair is not sufficient, inasmuch as it is to be paid for by *A.* during the Fair. *1 Roll. Abr. 469, 470. Stil. 172.*

If *A.* and *B.* agree and promise to marry one with another, and after *B.* the Man, promises *A.* in Consideration that she will disengage him of his said Promise, he will give her 1000*l.* In an Action by *A.* against *B.* for the 1000*l.* if *A.* avers, that she after the same Day *Exoneravit ipsum* (*Anglice*, did disengage) of his said Promise, and yet he has not paid the 1000*l.* this is a good Averment of the Performance of the Promise, without alledging any Notice given to *B.* of the Disengagement; for it shall be intended *prima facie* that this Disengagement was made to *B.* himself, and not in the Absence of *B.* for it shall be a full Disengagement made to the Person of *B.* so that he should have his Liberty to marry any other. *1 Roll. Abr. 470. Stil. 295, 303, 304.*

If *A.* promises *B.* a Woman, that if she will leave her Father's House, and come to his House, that he will marry her: In an Action by *B.* against *A.* upon this Promise, if she avers, that she has left the House of her Father, and come to the House of *A.* and there *obtulit* to marry him, and yet the said *A.* did not marry her; this is a good Averment that *B.* had Notice thereof, for by the *obtulit* to marry the Defendant, is intended that she *obtulit* herself to the Person of the Defendant himself, inasmuch as this is a personal Act to be done between them. 1 Roll. Abr. 470. Stil. 263, 273.

If *A.* and *B.* levy a Fine to the Use of *A.* in Fee, if *B.* does not pay 10 s. to *A.* at Michaelmas after, and if he does pay, then it shall be to the Use of *A.* for Life, and after to *B.* in Fee, and after *B.* dies before Michaelmas: The Heir of *B.* ought to take Notice of this Condition at his Peril; so that if he does not pay the 10 s. at Michaelmas, *A.* shall have the Land absolutely in Fee, for *A.* is not bound to give him Notice, nor is any other appointed by the Law to give Notice in this Case, and therefore he ought to take Notice thereof at his Peril, for he is as privy in the Law to the Estate limited by the Fine and Indenture of Uses as the Ancestor himself, and the Ancestor had Power to give the Land absolutely, and divers Times in such Case it is not known who is Heir. 1 Roll. Abr. 469.

Where Absence will excuse.

If a Thing be to be performed by a Condition, which cannot be performed without the Presence of the Obligee; there his Absence shall excuse the Performance. 12 H. 4. 23. b. 1 Roll. Abr. 457.

If a Condition be to make a Feoffment to the Obligee; if the Obligee be not present at the Time, the Performance is excused. Ibid.

If a Rent be reserved to be paid at a certain Day, upon Condition: If the Lessee be ready at the Day, and none comes for the Lessor, this will excuse the Performance of the Condition, (and here the Lessor ought to demand). Contra 4 H. 6. 9. Bro. Entry Congeable 39.

As if the Condition be to enter into a Statute to the Obligee: If the Obligee be absent at the Day, yet because it may be performed in his Absence, he ought to do it. 12 H. 4. 23. b. Otherwise *econtra*, 12 H. 4. 24. b. 1 Roll. Abr. 457.

If a Condition be to take an Estate to himself for Life, Remainder to another, who is privy to the Condition, and is to have Benefit by the Obligation at a certain Day: Tho' he in Remainder be not there at the Day, yet it is forfeited if it is not taken accordingly; for this may be performed notwithstanding his Absence. 40 Ed. 3. 12. 1 Roll. Abr. 457.

But in this Case if the Condition had been also, that he in the Remainder should be present at the Day; his Absence would excuse the Performance of the Condition, *scilicet*, of the taking of the Remainder, and of the Lessee to himself also. Contra 40 Ed. 3. 12. 1 Roll. Abr. 458.

3. Acts of a Stranger.

A. and *B.* submit themselves to the Award of *C.* and *A.* enters into an Obligation to *C.* to stand to the Award, and so *B.* also, and *C.* awards *A.* to pay 10 s. to *B.* who tenders it, and *B.* refuses; the Obligor is excused, because *B.* is not a meer Stranger, but privy, and so is the Obligee. 22 Ed. 4. 25. b. Bro. Condition 182. Bro. Arbitrament 41. 1 Roll. Abr. 452.

So if a Recognizance, Bond, &c. is made to *A.* to the Use of *B.* conditioned to pay Money, &c. to *B.* and *B.* refuses, &c. Cro. Eliz. 755. Cro. Jac. 14.

But if the Condition be, that the Son of the Obligor shall marry the Daughter of the Obligee; if the Daughter of the Obligee refuses the Son, yet the Condition is forfeited, for the Daughter is a meer Stranger, and the Obligor has taken upon him that his Son shall marry her. Bro. Condition 182. Perk. §. 756.

So if the Condition be to enfeoff a Stranger, who refuses, yet the Condition is forfeited. 1 Roll. Abr. 452. This is where he is a meer Stranger. Co. Lit. 209. a. Hnt. 48. Winch 30. But it is otherwise where it is made to the Obligee, or any other for his Benefit. Co. Lit. 209. a.

Secus where the Condition is, That a Stranger shall enfeoff a Stranger. Co. Lit. 209. a.

If there be a Feoffment upon Condition to enfeoff a Stranger; if the Stranger refuses, yet the Condition is broke, because the Intent was not that the Feoffee should retain it. 1 Roll. Abr. 452. Co. Lit. 209. a. 1 Leon. 266. 2 Leon. 222.

But otherwise it had been if the Condition was to make a Gift in Tail to a Stranger, and he refuses; for there the Intent was, that he should have the Reversion. 1 Roll. Abr. 452. Co. Lit. 209. a. 1 Leon. 266. 2 Leon. 222.

So if the Condition be, that he shall grant a Rent-charge to a Stranger, and he refuses, because intended the Feoffee should retain the Land. Co. Lit. 209. a.

Regularly, if the Condition be to be performed by a Stranger, and he refuses, the Obligation is forfeited, for the Obligor has taken upon him that the Stranger shall do it. 1 Roll. Abr. 452.

As if the Condition be, that my Son shall serve 7. but if he will not, my Obligation is forfeited. 1 Roll. Abr. 453.

If the Condition of an Obligation be, that whereas the Obligor and Obligee are jointly seised of the Office of the Court of Admiralty: If the Obligor shall permit the Obligee to use the said Office, and to take the Profits thereof only to his own Use during his Life, without Interruption made by the Obligor, then, &c. altho' after the Admiral dies, and the new Admiral grants the said Office to a Stranger, (as he may by Law) and he interrupts and ousts the Obligee, yet if the Obligor after this interrupts the Obligee also, the Condition is broke. Ibid.

If A. is bound to B. to pay 10 l. to C. if A. tenders it to C. and he refuses, the Bond is forfeited. Co. Lit. 208. b.

Otherwise if bound to pay it to the Obligee, or his Assigns, and the Obligee appoints C. to receive it as his Assignee, and it is tendered to C. and refused by him. Dal. 38.

If A. disseises B. and after leases to C. for Years, and C. covenants, at the End of the Term, to leave and yield up the Tenements well repaired to A. and after B. enters, &c. C. is excused. Cro. Eliz. 656. Noy 75.

If the Condition of an Obligation be, that the Obligee shall in Michaelmas Term next give unto the Obligor, &c. such Release as by the Judge of the Prerogative Court shall be thought meet: The Obligor ought to procure the Judge to devise and direct such Release; for the Judge is a Stranger to the Condition, and the Condition is for the Benefit of the Obligor, and he has taken upon him to perform it at his Peril. 5 Co. 23. b. Moor 645. pl. 892. Cro. Eliz. 864. Lit. Rep. 13, 14. 1 Lev. 91. 1 Sid. 313.

So if the Condition of an Obligation be, that a Stranger shall release all the Right which he has, or pretends to have, in a certain Manor, the Obligor must procure him to make a Release *de facto*, tho' he has no Right. 1 Sand. 215, 216.

If A. leases his Land for forty Years, rendering Rent, and devises the Reversion to J. S. in Tail, &c. provided that B. and his Wife shall have the Rent to their own Use till J. S. comes of Age, upon Condition that B. and his Wife, within three Months after his Death, enter into a Bond to his Overseers for the Payment of 34 l. per Ann. in such Penalty, and as his Overseers shall advise, and A. dies: B. and his Wife must give Notice of this to the Overseers, and at their Peril procure them to advise, &c. Winch 26, 69.

4. Acts of the Law.

If an Annuity be granted upon Condition that the Grantee shall be Attorney of the Grantor in all Pleas: If he afterwards be made Sheriff, yet this shall not excuse him from the Performance of the Condition, but he ought to be his Attorney, otherwise the Condition shall be broke. 5 Ed. 2. Annuity 44. 1 Roll. Abr. 451.

If A. devises Land to B. and his Heirs, upon Condition that he, his Heirs and Assigns, with the Issues and Profits of the Land, shall pay yearly so much for certain charitable Uses, and dies, and after the Devisee dies, his Heir within Age, and in Ward to the King, the Payment shall be excused during the Time the King has him in Ward; for by the Intent of the Condition, the Payment ought to be made with the Issues and Profits, which are transferred by Act in Law to the King. Ibid. Ward. 10, 11, 16. 3 Bulst. 58, 59.

But it had been otherwise if the Money had not been limited to be paid out of the Profits of the Land. Cro. Jac. 374. 1 Roll. Rep. 198, 199.

If a Recognizance be conditioned for the Appearance of B. at the next Assises held in the County of S. and before the next Assises B. sues a *Certiorari* out of the King's Bench, to remove the Recognizance, and at the next Assises delivers the *Certiorari* to the Judge; yet this does not excuse his Appearance, for tho' the *Certiorari* was the Command

Command of the King, yet the Purchase thereof was the Act of B. and he could by no such Slight save his Recognizance. *Telv. 207.*

If the Condition of an Obligation be, to deliver a certain Thing to the Obligee bought by him from the Obligor, it is not any Discharge that a Stranger recovered it from him after. *1 Roll. Abr. 452.*

If a Man be bound in a Recognizance in Court for the Appearance of another in a *Scire Facias*, he shall not avoid this Recognizance by a saying, that he that ought to appear was imprisoned at the Day. *Ibid.*

But in such Case, at the Day of Appearance, if the Manuaptors come and shew it to the Court, and the Court of Curtesy do not record the Default, but send to the Gaoler to certify whether he be imprisoned, and for what; by this way he shall have Advantage of the Imprisonment to avoid the Recognizance. *22 Ed. 4. 27. Br. Condition 182.*

If there be a Constitution upon a Penalty in Parliament, that J. S. shall render himself in B. R. within a certain Time: If he renders himself to the King within the Time where he is imprisoned until the Time is passed, he has forfeited the Penalty, because it was his Folly to render himself where he ought not. *Bro. Parliament 11.*

If there be a Constitution made in Parliament, upon a Penalty that J. S. render himself before the Justices in B. R. within a Quarter of a Year after Proclamation made: If Proclamation be made *Termino Pasche*, so that the Quarter of a Year is passed before *Michaelmas* Term, yet if he does not render himself within a Quarter, he shall forfeit the Penalty. *Ibid.*

(NN) *What Things will dispense with a Condition.*

Acts of him
that will have
the Advan-
tage.

IF a Condition be to recover certain Land against J. S. and thereof to enfeof another, who is Party to the Obligation: If he to whom the Feoffment is to be made accepts the Feoffment of the Land before any Recovery had by the other, the Condition is performed, because he has dispensed with the Condition. *39 Ed. 3. 3. 5. 6. b.* But *Quare*, for perhaps he has disseised J. S. But it is there said, that it shall be intended that he himself was seised thereof. *1 Roll. Abr. 453.*

If a Lease for Years be made upon Condition not to alien without Licence, and after the Lessor licenses the Lessee to alien, and dies before any Alienation; yet the Lessee may alien; for the Death of the Lessor is not any Countermand, for this was executed on the Part of the Lessor as much as could be. *Co. Lit. 52. b.*

(OO) *Who may dispense with a Condition.*

A Stranger.

IF the Condition of an Obligation be to assure a Copyhold to A. and B. his Wife (who are Strangers to the Obligation) for the Life of C. and the Obligor, at the Request of A. surrenders it to the Use of A. &c. to the Use of such Person as he shall nominate: This is not any Performance of the Condition, for A. who is a Stranger, cannot dispense with the Condition, nor by his Agreement alter the Thing to be done; but he ought to take it as the Condition limited it. *1 Roll. Abr. 457. Vide Co. Lit. 219. b.*

(PP) *In what Cases the Dispensation or Extinguishment of Part of a Condition shall be of the Whole.*

IF a Man leases for Years, upon Condition that the Lessee or his Assigns shall not alien without Licence of the Lessor; and after the Lessor licenses the Lessee to alien to whom he pleases, who after aliens to J. S. the Condition is quite gone by this Licence; for by the Dispensation to the Lessee, the Condition is utterly discharged as to the Assigns. *4 Co. 119. Cro. Eliz. 815, 816.* For a Condition is to be strictly taken; and by his Alienation with Licence the Condition is satisfied. *1 Roll. Abr. 471.*

If a Man leases Land, upon Condition that he shall not alien the Land, nor any Part thereof, without the Assent of the Lessor; and after he aliens Part with the Assent of the Lessor: He may after alien the Residue without his Assent, for all the Condition is gone by this, for it cannot be divided or apportioned. *4 Co. 119.*

If a Man be bound to build an House, and the Obligor discharges one Post, he is discharged of the Whole. 1 Roll. Abr. 471.

If a Man be bound to go with A. C. and D. and the Obligor discharges him from D. he is discharged by this from going with A. and C. tho' that which is discharged is for his Advantage, for the Condition is intire. Ibid.

So if the Obligation be to plough my Land in such a Town, and I discharge him of Parcel; this also discharges the Rest. Ibid.

If a Man has a Power of Revocation, and he by his own Act extinguishes his Power of Revocation in Part, as by levying a Fine of Part; yet the Power of Revocation remains for the Residue, because this is in Nature of a Limitation, and not of a Condition. Co. Lit. 215, 237. a. Hob. 313.

If A. leases Land to three, upon Condition that they, or any of them, shall not alien without Licence of the Lessor; and after one aliens with the Licence of the Lessor: This discharges all the Condition as to the other two also. 1 Roll. Abr. 472. Noy 32. Cro. El. 816.

If the Owner of a Ship covenants with B. that he will receive such Lading as he shall appoint at York by such a Day, and then to go with the first Wind to R. and there to unload and take in other Wares; and after B. discharges him from taking in Goods at T. but that he shall receive his Lading at R. This Discharge of Parcel of the Covenant is not any Discharge of the Residue. 1 Roll. Abr. 472.

If Lessee for Years has Execution by Elegit of a Moiety of the Rent and Reversion against the Lessor, where the Lease is upon Condition; this is a Suspension of all the Condition during the Time of the Extent; and tho' but a Moiety of the Rent is extended, yet the entire Condition is suspended. Moor 22. pl. 75.

The like if a Stranger has Execution by Elegit. Moor 91. pl. 225. 71. pl. 193. Dal. 72.

If a Man leases for Years, upon Condition that the Lessee, his Executors or Assigns, or any other who shall have the Term, shall not alien without Licence of the Lessor, but only to his Wife or Children, and the Lessee devises the Term to his Wife, and dies; the Wife cannot alien without Licence, for she is restrained by express Words as well as the Lessee. This Point was so adjudged between Thornhill and King, M. 41 & 42 Eliz. by three Judges, but Walmesley doubted, because the Words are, That the Lessee or his Assigns, &c. should not alien but to his Wife or Children; and the Wife is not within these Words, for she cannot alien to herself. Cro. Eliz. 757. The same Point is in Dyer 152. pl. 7. by three Judges against two, but in 4 Co. 120. b. the Opinion of the two Judges is cited as Law.

(QQ) What will destroy a Condition, and what not.

BY a Grant of a Reversion of Part of the Land, upon a Lease for Years, upon which a Rent upon Condition is reserved, all the Condition is confounded, because it is Penal, and therefore cannot be divided, and he must destroy his own Grant if the Condition shall remain; also this Condition was reserved upon several Rents. 5 Co. 55. b. Co. Lit. 215. 4 Leon. 27.

If the King grants Part of the Reversion, his Patentee shall not take Advantage of the Condition, but the King by his Prerogative may, because it remains in him. 5 Co. 55. Co. Lit. 215.

If a Man leases for Life upon Condition, the Remainder over; the Condition is destroyed, for otherwise he destroys the Remainder which he has created. 1 Roll. Abr. 472.

So if a Man devises for Life upon Condition, the Remainder to another; this destroys the Condition. 29 Aff. 17. 10 Co. 40. b. who in 41. b. cites 4 Ma. Per Cur. contra, 2 Ma. 127, 52. because it is made at the same Time.

If a Man leases for Years upon Condition, and after leases for Years by Indenture to another, to commence presently: This second Lease has not given away the Condition, for it is but by Estoppel between the Parties. 1 Roll. Abr. 472.

If a Man leases for Years, upon a Condition to be performed on the Part of the Lessor, and before the Time of the Performance of the Condition he leases to a Stranger for Years by Indenture: The Condition is not suspended or destroyed, but may be performed notwithstanding, for it is an Estoppel only between the Lessor and second Lessee. Cro. El. 665. Owen 65.

But

But if a Man makes a Feoffment upon such Condition, and after levies a Fine to a Stranger, the Condition is gone. *Cro. Eliz.* 665.

A&S in Law. If the Reversion of a Lease for Years be severed in any Part, the entire Condition reserved upon the Lease for Years shall not be destroyed, if the Severance be by Descent, Eviction, or Act of the Law; but it is otherwise if by the Act of the Party. *1 Roll. Abr.* 473.

If a Man makes a Feoffment to the Use of himself for Life, the Remainder to another, &c. with Power of Revocation, and after makes a Lease for Years, he cannot after revoke during the Lease. *Ibid.* But after the Lease expired he may revoke. *Dubitatur, ibid.*

Yet *per Coke C. J.* If one makes a Conveyance with Power to make Leases, and with Power to revoke, if he makes a Lease he may notwithstanding revoke for the Residue. *Moor* 788. *pl.* 1087.

But if the Lease be made for Life, it is doubted whether it only suspends the Power, as a Lease for Years would do, or extinguishes it as a Feoffment. *1 Vent.* 42.

If a Lease be made of two Acres, one of the Nature of *Borough English*, and the other at the Common Law, upon Condition, &c. and the Lessor, having Issue two Sons, dies; each of them shall enter for Breach of the Condition. *Co. Lit.* 215. a.

(RR) *What shall be said a Condition impossible and void, and what not.*

IF a Woman makes a Feoffment to a Man that is married to another, upon Condition that he shall marry her: This is a good Condition, for his Wife may die, and then he may marry her. *40 Aff.* 3. adjudged by Admittance; but *Quære.* *1 Roll. Abr.* 419.

If the Condition of an Obligation be, that the Obligor shall assign to the Obligee a Commission of Bankrupts: This is an impossible Condition, and therefore void, and the Obligation single, for it is impossible to assign the Commission. *1 Roll. Abr.* 419.

If the Condition be, *quod debet pluerre cras*: This is a good Condition; for tho' the Obligor is not certain thereof, yet if he will take this upon himself, and run the Hazard thereof, he may at his Peril, for this is not impossible of itself. *22 Ed.* 4. 26. *1 Roll. Abr.* 420.

So, for the same Reason, if the Condition be, that the Pope shall be at *Westminster* To-morrow; this is a good Condition. *22 Ed.* 4. 26. *1 Roll. Abr.* 420.

If the Condition be, that the Obligor should go from the Church of *St. Peter's* in *Westminster* to the Church of *St. Peter's* in *Rome* within three Hours; this is impossible, and void. *Co. Lit.* 206. b.

If by the Condition a Thing is to be done within a Franchise; this is a good Condition, for it may be tried here. *Contra* *10 H.* 6. 14.—*1 Roll. Abr.* 420.

If by the Condition a Thing is to be done beyond Sea; this is a good Condition, for it may be tried here. *Contra* *21 Ed.* 4. 10. *Quære.* *4 H.* 6. 23. b.

If the Condition be to save harmless the Obligee against a Stranger, from an Obligation in which the Obligee stood bound to the Obligor: This is a good Condition; for tho' by no Possibility the Stranger could have any Thing to do with it, yet if he saves him harmless against him it is within the Condition, for it may be that he has some Fear of Damage by him. *Contra* *21 Ed.* 4. 53. b. but *Quære.* *Bro. Condition* 175.—*1 Roll. Abr.* 420.

(SS) *The Effect of a Condition impossible at the making thereof.*

IF the Condition of an Obligation or Feoffment be impossible at the making thereof, it is a void Condition; but the Obligation or Feoffment is not void but single, because the Condition is subsequent. *14 Ed.* 4. 3. *Co. Lit.* 206.

But if the Condition precedent be impossible at the making thereof, then all is void, because nothing passes before the Condition is performed. *Co. Lit.* 206. b.

As if a Man leases for Life, upon Condition that if he goes from the Church of *St. Peter's* in *Westminster* to the Church of *St. Peter's* in *Rome* within three Hours, he shall have a Fee, which is impossible; yet because it is precedent, no Fee can accrue. *Co. Lit.* 206. b.

If the Condition of an Obligation be to sustain and maintain an House in sufficient Repairs, and so to leave it at the End of the Term: If at the Time of the Entry into a Bond the Timber was so rotten that it was impossible to sustain and maintain it in Repairs, yet the Obligation is good, because tied by his own Act: But the Law never binds Men to Impossibilities. *Sav. 96. 2 Leon. 189.*

(TT) *The Effect of a Condition which becomes impossible after the making thereof.*

IF the Condition of a Feoffment, &c. be possible at the making thereof, and after becomes impossible by the Act of God, yet the Estate of the Feoffee shall remain. *Co. Lit. 206. a.*

As if the Condition of a Feoffment, &c. be, that the Feoffor, &c. shall appear in such a Court next Term, and the Feoffor dies before; the Estate of the Feoffee, &c. is absolute, because executed, and not to be redeemed back but by Matter subsequent. *Co. Lit. 206. a.*

But if the Condition of a Bond, Recognizance, &c. is possible at the making, but before it can be performed, becomes impossible by the Act of God, of the Law, or of the Obligee, &c. the Obligation is saved. *Co. Lit. 206. a.*

(UU) *What Condition shall be said to be repugnant.*

IF the Condition be, that if the Obligee shall pay to J. S. 10 l. such a Day, then the Obligation, being 100 l. shall be void, otherwise not: Tho' this was not the Intent of the Parties, yet the Condition is good; for if the Obligee does not pay the 10 l. the Obligation is forfeited. *39 H. 6. 9. b. 1 Roll. Abr. 419.*

So if the Condition be, that if the Obligor does not pay to the Obligee such a Day 10 l. then the Obligation, being 100 l. shall be void: This is a good Condition; and the Obligor, in an Action upon the Obligation, may say, that he did not pay the 10 l. and so avoid the Obligation: For tho' the Intent was not so, yet because the Words were so, he ought to adjudge according to the Words. *39 H. 6. 10. Bro. Condition 98. Bro. Obligation 42.*—This Case was cited in *2 Mod. 285.* when the Chief Justice doubted whether it was Law.

If a Lease for Years be made, upon Condition that if the Lessor grants over his Reversion, the Lessee shall have a Fee; if the Lessor grants his Reversion by Fine, the Lessee shall not have a Fee; for when the Fine transfers the Fee to the Conusee, it would be absurd, and against Reason, that the same Fine should work an Estate in the Lessee. *Co. Lit. 378. b. 1 Co. 84. b.*

If an Obligation is conditioned for the Payment of 7 l. by 2 s. per Week, till 7 l. is paid, and that if he fails of Payment of the 2 s. at any of the Days on which he ought to be paid, that the Obligation shall be void, or else remain in Force: This Condition shall be taken distributively, *Reddendo singula singulis, viz.* That if he pays the 7 l. the Obligation shall be void; but that if he fails in Payment of the 2 s. at any of the Days, it shall be in full Force; for the Obligation shall not be taken to be of no Effect, if by any Means it may be made good. Adjudged upon a Demurrer to the Defendant's Plea, That he did not pay 2 s. at one of the Days. *1 Lev. 77. And in T. Raym. 68.* same Case is adjudged, because the Condition is senseless, and therefore the Obligation is single. And in *1 Sid. 105.* the Obligation was single, and the Condition repugnant and void; and *contra* the *39 H. 6. 10.* which see in the last Paragraph but one.

If the Condition of an Obligation be made in this Manner, *viz. The Condition of this Obligation is such, that if the Obligor shall appear coram Dom' Rege apud Westmonasterium such a Day, ad respondend', &c. then the Condition of this Obligation shall be void, or else the same shall be in full Force and Virtue:* Yet this is a good Condition; for the Sense is perfect without these last Words, and they shall be rejected for their Absurdity and Repugnancy. *2 Saund. 78. 1 Sid. 456. 1 Mod. 35, 36. 2 Keb. 625. 1 Vent. 39.*

If the Condition of an Obligation be, that if the Obligor shall die without Issue, that then if he be by his last Will, or otherwise, in his Life-time shall lawfully assure and convey certain Lands to the Obligee and his Heirs, that then the Obligation shall be void, &c. This Condition

Condition is not repugnant, but shall be construed according to the Intention of the Parties, to be collected out of the Words of the Condition. 1 Jon. 180. Palm. 552, 557.

Repugnant to the Estate.

A Gift in Tail, or in Fee, upon Condition that the Feme shall not be endowed, or that the Baron shall not be Tenant by the Curtesy, is repugnant. 10 Co. 38. b. 22 Ed. 3. 19. b.

So upon Condition, that he shall not make a Lease within 32 H. 8. or levy a Fine within 4 H. 7. or that he shall not suffer a common Recovery, or that he shall not make any Conclusion to suffer a Recovery, is repugnant. 10 Co. 38. b. Co. Lit. 224. a. 6 Co. 41. a. 1 Brownl. 65, 66, 138.

But as to making a Lease, vide Co. Lit. 223. b. S. P. contra, for this Power is not incident to his Estate, but given to him collaterally by the Statute.

So upon Condition that he shall be punished in Waste, or that Tenant after Possibility shall, or that a Collateral Warranty shall not bind, is void. 10 Co. 39. Co. Lit. 224. 6 Co. 41. a.

But a Condition that he shall not alien in Fee, in Tail, or for Life of another, is good. 10 Co. 39.

So if for his own Life; for tho' the Estate be lawful, yet the Estate is good, because the Reversion is in the Donor. Co. Lit. 223.

So to restrain a Fine by the Common Law. 10 Co. 42.

A Gift in Tail, upon Condition that the Donee may alien for the Profit of the Issue, is a good Condition. 46 Ed. 3. 4. b. Co. Lit. 204. b.

A Condition upon a Feoffment in Fee, that his Daughters shall not inherit, is not good. Dav. 34. b.

If A. being seised in Fee of Land, leases it to B. for ninety-nine Years, if he so long lives, the Remainder to C. for ninety-nine Years, if he so long lives; and after A. demises it to C. and D. for ninety-nine Years, if three others, or any of them, so long live, to begin after the Determination of the first Estate, upon Condition that if C. and D. both die either before the Beginning of the Term, or before the End of the Term, that then it shall be lawful to the Lessor to re-enter: This is a good Condition, for this is not repugnant to the Estate, nor to the Limitation; but this is a collateral contingent Thing that shall give Cause of Re-entry. 1 Roll. Abr. 418, 419.

If a Feoffment be made, upon Condition that the Feoffee shall not alien in Mortmain; this is a good Condition, because such Alienation is prohibited by Law, and regularly what is prohibited by Law (as the Alienation of an Infant, or of a Bishop without his Chapter) may be prohibited by Condition. Co. Lit. 223. b.

So if a Feoffment be made to Baron and Feme, upon Condition that they shall not alien: This is good to restrain any Alienation by Deed, because such Alienation is tortious and voidable; but to restrain their Alienation by Fine, it is repugnant and void. Co. Lit. 224. a.

Before the Statute of *Quia emptores terrarum*, a Man might have made a Feoffment, upon Condition that if the Feoffee or his Heirs should alien without Licence, they should pay a Fine, and this had been good. Co. Lit. 223. a. 1 Leon. 298.

The Lord might have restrained the Alienation of his Tenant by Condition, because the Lord had a Possibility of Reverter. Co. Lit. 223. a.

So it is in the Case of the King at this Day, because he may reserve a Tenure to himself. Co. Lit. 223. a.

If A. has issue two Sons B. and C. and covenants to stand seised to the Use of himself for Life, Remainder to B. in Tail, Remainder to C. in Tail, &c. provided that if B. &c. or any of the Heirs Males of his Body, shall alien, &c. the Uses to him limited shall cease only in Respect of him as if dead, &c. This Proviso is repugnant, impossible, and against Law; for the Estate of the Tenant in Tail does not cease by his Death, but by his Death without Issue. 1 Co. 84. a. adjudged tho' B. had no Issue at the Time of the Breach of the Proviso.

Repugnant to the Grant.

If a Tenth be granted by the Clergy, Proviso that no Person that is indicted in the Court of the King shall pay any Fine; and if he does, he shall be discharged of the Tenth; this is a good Proviso. 1 Roll. Abr. 419.

So if such Grant be made, Proviso the Collectors shall not account in the Exchequer before the Barons, but before special Auditors assigned by the King; this is a good Proviso. Ibid.

If a Man makes a Feoffment in Fee, provided that the Feoffor shall have the Profits; this Condition is void, because it is repugnant to the Grant. Ibid. 3 Co. Lit. 206. b.

So if there be a Lease to three during their Lives, provided that one shall not take the Profits during the Life of the other two. 2 Leon 132.

If a Man for himself and his Heirs warrants Lands to another and his Heirs against all Men; yet it is provided that the Warranty shall be void: This Proviso is altogether repugnant to the Grant; and therefore the Grant is good, and the Proviso void.

1 Roll. Abr. 413.

So in the Case aforesaid, if the Proviso had been, *that he to whom the Warranty was made, nor his Heirs, should not have in Value by Force of the Warranty*, that the Proviso is not good; yet he may rebut, if the Proviso be good, and so the Warranty not wholly defeated. But it is not a good Proviso, because then the Words, *against all Men*, would be wholly defeated; for the other Words will give a Rebutter without them. Ibid.

If a Rent-charge be granted out of the Manor of D. (in which the Grantor has nothing) with a Proviso, *that it shall not charge his Person*: Tho' the Repugnancy does not appear in the Deed, yet the Proviso is void, else it would take away the whole Effect of the Grant. Co. Lit. 146. a.

So if a Grant of a Rent out of Land to which he has Title, without a Clause of Distress, provided that it shall not charge his Person: This is void and repugnant if he does not give Seisin upon the Grant. 6 Co. 58. b.

If a Man grants a Rent-charge out of Land, provided *it shall not charge the Land*; tho' the Grantee might notwithstanding charge his Person, yet the Proviso is repugnant, because the Land is expressly charged. Co. Lit. 146. a. Popb. 87.

If a Man grants a Rent-charge out of Land to another for Life, provided it shall not charge his Person, and the Grantee dies, his Executors may bring Debt for the Arrears, for they cannot distrain, because the Estate in the Rent is determined, and the Proviso cannot leave the Executors without Remedy. Co. Lit. 146. b.

Q. If this is not as it was at Common Law before the Stat. 32 H. 8. c. 37. for by the said Statute the Executors of such Tenant for Life may distrain at this Day.

(VV) *What Condition shall be said against Law, and what shall be void, and e contra.*

IF the Condition of an Obligation in which A. is bound to B. is, that whereas A. in a short Time is to be presented, instituted and inducted to the Church of D. if A. after his Admission, Institution and Induction to it, at all Times, upon Request of B. his Heirs, Executors or Administrators, resigns the said Rectory and Church to the Ordinary or Guardian of the Spiritualities for the Time being, by which B. his Heirs or Assigns, Patrons of the said Church, may present de novo to the said Church, discharged of all Charges and Incumbrances made or suffered by A. This is a good Condition of itself without an Averment that it was for a simoniacal Purpose. 1 Roll. Abr. 417. Cro. Jac. 248, 274.

A Condition to renounce an Administration, is good. 15 Ed. 4. 30. Bro. Condition 65.

A Condition to do a Thing which will be Maintenance, is void; as to save J. harmless from such an Appeal of Robbery that B. has against him: This is against Law. 18 Ed. 4. 28. Cart. 229, 230. All. 60.

The Condition of an Obligation was, That if the Obligee in an Action in the Name of C. recovers against R. at the Costs of the Obligee, C. should enfeoff him of the Land; and if he does not enfeoff him, then the Obligor shall be bound by the Obligation in 20 l. This is a Condition against the Law, for it is Maintenance. 42 Ed. 3. 6. b. Quere, but after 23. the Condition is admitted good; for the Defendant had other Matter to help him. 1 Roll. Abr. 417.

If a Tenth be granted by the Clergy to the King, on Proviso that no Parson that is indicted in the Court of the King shall pay any Fine; and if he does, that he shall be discharged of the Tenth: This is a good Proviso. 21 Ed. 4. 46. 1 Roll. Abr. 418.

If a Lease for Life be made upon Condition, that if the Lessee marries without Licence, he shall re-enter: This is a good Condition. 43 Ed. 3. 6.

If the Condition of an Obligation be not to sell the Apparel of the Wife: This is good. 1 Roll. Rep. 334.

So if a Man gives a Bond to a Stranger, conditioned for the Payment of 20 l. yearly to his Wife: This is good. 1 Roll. Rep. 334. Co. Lit. 206. b.

But

But if the Condition be to enfeoff his Wife, it is void, because against a Maxim in Law, and yet the Bond is good. *Co. Lit.* 206. b.

If the Condition of an Obligation be, that if the Son of the Obligor, before a certain Time, do, as Apprentice, Servant or Master, or otherwise, use the Trade of an Haberdasher within the County of K. then if the Obligor do upon Request pay 20 l. to the Obligee, the Bond shall be void: This Condition is against Law; for a Man ought not to be restrained from his Trade and Livelihood; and if he might be restrained for a certain Time and Place, he might be restrained for longer Time or more Places. *Cro. Eliz.* 872. *Moor* 115. pl. 259. 242. pl. 379. 2 *Leon.* 210. 3 *Leon.* 217. *March* 191, 192. In *Owen* 143. it was said by *Anderson*, that he might as well bind himself that he would not go to Church.—In 3 *Lev.* 241. the same Point is adjudged *contra* in B. R. but afterwards reversed upon a Writ of Error in *Cam. Scac.* by the unanimous Consent of all the Justices, because this being a penal Obligation to prevent the Exercise of a Trade, tho' in a particular Place only, it is void; otherwise if it had been on an *Assumpsit*, for a good Consideration not to use a Trade in a particular Place, because in such Cases all being to be recovered in Damages, it is in the Power of the Jury to assess the Damages, on weighing the Consideration of the Promise and the Mischief to the Party promising; but in this Case the whole Penalty is to be forfeited, be the Consideration what it will, and let the Offence be never so small; as in the Case of an Infant, a Bond or Bill for Necessaries is void, but an *Assumpsit* is good; and some Judges held, that a Covenant or Promise to pay a certain Sum if he uses his Trade is ill, because that is a Debt for which an Action of Debt will lie; but a Promise upon a good Consideration, as for transferring his Trade and Shop, that he shall not use the Trade in the Town where he ought to use it, they allow'd to be good, because all is uncertain, and is to be ascertained by the Jury which tries the Cause, *viz.* of what Value the Consideration is, and what Damage the Use of the Trade is to the Party to whom the Promise is made.

If an Under-Sheriff covenants with the High-Sheriff to discharge and save him harmless from all Escapes of Prisoners arrested by the Under-Sheriff, or any by him appointed: This is a good Covenant; for since the High-Sheriff transfers his Authority, it is but reasonable he should take Security for the faithful Execution of it; and there is nothing intended against Law, but rather to prevent than connive at Escapes. *Hob.* 12, 13. *Moor* 856. pl. 1175. *Godb.* 212. 1 *Brownl.* 65, 66.

If A. is imprisoned for Felony, and B. bound by Recognizance to prosecute, if B. after gives Bond to C. conditioned, that B. will not give Evidence against A. the Condition is against Law, and the Bond void. Adjudged, and the Court advised that C. should be prosecuted for taking such Bond. 2 *Vent.* 109.

Where the Condition of a Bond is to do any Thing that is not *Malum in se*, tho' against Law, the Condition is only void, and the Bond single. *Comb.* 246.

If the Condition of such an Obligation be, that he, after Institution and Induction into the said Church, shall at all Times after ordinarily be resident, and serving the Cure of the said Benefice without Absence by eighty Days in any one Year during the Time that he shall be Parson of the said Church: This is a good Condition, without any Averment taken to be for any simoniacal Purpose. 1 *Roll. Abr.* 418.

If the Sheriff of a County makes B. his Under-Sheriff, and takes a Covenant from his Under-Sheriff, that he will not serve Executions above 20 l. without his special Warrant: This is a void Covenant, because it is against Law and Justice, inasmuch as when he is made Under-Sheriff, he is liable by the Law to execute all Purposes as well as the Sheriff is. *Hob.* 12, 18. 1 *Brownl.* 65. 2 *Brownl.* 281, 282. *Moor* 856. pl. 1175. *Godb.* 212, 213.

If the Condition of an Obligation be, that the Obligor shall be always ready to give Evidence, and to testify the Truth, in any of the King's Courts, in all Things which shall be demanded of him, &c. and that he shall not hurt, endanger or molest the Obligee in his Lands or Goods, *ratione alicujus rei*: This is a good Condition, and not against Law; for as to the first Part, if he had not been obliged thereto, he had been compellable by Law; and by the last Part, it shall be intended that he shall not hurt, &c. tortiously, but not to restrain him from pursuing the Obligee for Felony, or other just Cause. *Cro. Eliz.* 705.

(WW) *The Effect of a Condition against Law.*

IF a Feoffment of Land be made upon Condition to kill *J. S.* this Condition is against Law, and void; but the Feoffment is good, and not made void by it. *Co. Lit. 206. b.*

If the Condition of an Obligation be to do a Thing against Law, the Obligation is void. *2 H. 4. 9. Bro. Condition 34. Obligation 20. Fitz. Obligation 13. Bro. Dette 51. Co. Lit. 206. b.* As if it be to kill or rob *J. S.*

So if it be to save a Sheriff harmless if he imbezils a Writ that he has against him. *2 H. 4. 9. Bro. Condition 34. Fitz. Obligation 13. Bro. Dette 51.*

So if the Condition be to save a Sheriff harmless for the Delivery of Cattle taken in *Witbernam* to one of the Parties, for the Sheriff ought to keep them till, &c. *2 H. 4. 9. Plow. 64. b.*

If the Condition be for doing a Thing that is *Malum in se*; this is void, and makes the Obligation void. *Co. Lit. 206. b.*

But if it be for doing a Thing that is against Law, because it is repugnant to the Estate, or against some Maxim or Rule in Law, it makes not the Obligation void. *Ibid.*

If *A.* being a Custom-house Officer by Patent, makes *B.* his Deputy, and covenants *inter alia* to surrender the old Patent, and procure a new one to *B.* and himself before a Day; and that if *B.* dies before *A.* that *A.* shall pay 300*l.* to the Executors of *B.* and gives Bond for the Performance thereof: Admitting these Covenants void, *per 5 Ed. 6. cap. 16.* the whole Bond is void, tho' some of the Covenants are not void or illegal. *Cro. Eliz. 529.*

(XX) *What Act shall be a Breach of a Condition.*

IF a Feoffment be made, on Condition that the Feoffee shall not enfeoff *J. S.* of the Land; and the Feoffee makes a Feoffment to *J. S.* and *J. D.* This is a Breach of the Condition. Breach of a Condition in Deed.

And so it is if the Feoffee makes a Feoffment to *J. D.* to the Intent that he shall alien to *J. S.* *Quando aliquid prohibetur fieri directo, prohibetur & per obliquum.* Not to alien.

And yet if the Feoffee in the Case before aliens to *J. D.* and afterwards he aliens to *J. S.* This is no Breach of the Condition.

And if the Condition be, that the Feoffee shall not enfeoff *J. S.* and he dies, and his Heir enfeoffs *J. S.* This is no Breach of the Condition. *Co. Lit. 222. Dy. 45, 46.*

If a Lease for Years be made, on Condition that the Lessee shall not assign or alien the Term or the Land during his Life without Licence of the Lessor, and the Lessee gives it by his Will without Licence: This is a Breach of the Condition and Forfeiture of the Estate; but if he makes an Executor of his Will only, this is no Breach.

And if the Condition be that the Lessee shall not alien, and he dies, and his Executor aliens: This is no Breach of the Condition. *Dyer 45, 65.*

And if the Condition be that the Lessee shall not alien but to his Children, and the Lessee by Will devises it to his Executors: This is a Breach of the Condition.

So if he devises that *A.* his Son shall have his Term after his Wife, and makes *A.* his Son his Executor: This is a Breach of the Condition.

But if he does not make *A.* his Executor, *contra.*

And in Cases of Devise, altho' the Executors do not assent, yet the Condition is broken; as where a Reversion is granted on Condition that the Grantee shall not alien it, and he does alien it, but no Attornment is to this Grant: Yet this is a Breach of the Condition. *Shep. Touch. 144.*

And if a Lease for Years be made, on Condition that the Lessee or his Assigns shall not alien, and the Lessee makes his Wife his Executrix, and she takes another Husband, and he aliens it: This is a Breach of the Condition, and a Forfeiture of the Estate.

But if a Lease be made on Condition that the Lessee shall not alien without the Licence of the Lessor, and after the Lessor dies, and the Lessee assigns, or the Lessee dies, and his Executors or Administrators assign: This is no Breach of the Condition in either of these Cases.

So if a Lease be made on Condition that the Lessee shall not alien the Term during his Life, and he makes an Executor, but does not devise it to him: This is no Breach of the Condition. *Dy. 6.*

And if a Lease be made on Condition that the Lessee, his Executors or Assigns, shall not alien the Term to any Persons without the Licence of the Lessor, but to the Wife or one of the Children of the Lessee, and the Lessee dies, and his Executors alien to one of the Children of the Lessee, and he aliens to a Stranger without Licence: This is no Breach of the Condition. *Dy. 152. 4 Co. 120.*

And if one makes a Lease of a House and Land, on Condition that the Lessee shall not parcel out the Land, or any Part of it from the House; and the Lessee grants all his Term in the House and Part of the Land, and keeps the Rest, and after leases that Part also: This is a Breach of the Condition. *Shep. Touch. 145.*

Not to suffer
a Woman
with Child in
the House.

If a Lease be made of a House, on Condition that the Lessee shall not suffer any Woman great with Child to harbour or lodge in the House six Days after Notice given by the Lessor, and the Lessee suffers any such Person after Notice given, altho' the Lessor consents to it, yet the Condition is broken. *8 Co. 92.*

Not to do
Waste.

But if the Lessor do *nolens volens* keep such a Woman there against the Mind of the Lessee, this is no Breach of the Condition. *Ibid.*

If a Lease be made, on Condition that if any Waste be done the Lessor shall re-enter; in this Case if the House falls by a Tempest, this is no Breach of the Condition, for this is no Waste: But if it be uncovered by a Tempest, and the Tenant has a convenient Time to repair it, and does not, but does suffer the Timber to perish for want of covering: This is a Breach of the Condition, and the Lessor may enter, and put out the Lessee. *12 H. 4. 5. Bro. Condition 40.*

Not to sell
without the
Lessor's ha-
ving the first
offer.

And if a Lease be made, on Condition that the Lessee shall not do Waste, and he suffers Waste to be made in Decay of the Houses, &c. the Condition is broken. *Sed quære. Dy. 281.*

To make an
Estate.

If a Lease be made, on Condition that if the Lessee be minded to sell his Estate the Lessor shall have the first Offer thereof, giving as much as another will give: In this Case if the Lessee does not give Notice when he is minded to sell it, he breaks the Condition; but if when he is minded to sell he tells the Lessor of his Purpose, and what he is offered for it, and the Lessor does either say he will not have it, or that he will not give so much for it, or does not accept it, but delays, &c. and then the Lessee sells it to another: This is no Breach of the Condition, neither is he bound to wait upon him in this Case. *Dyer 13.*

If a Feoffment be made, on Condition that the Feoffee shall make a Feoffment in Fee, Gift in Tail, Lease for Life or Years of the Land to the Feoffor, or to a Stranger by a Day; and before the Day the Feoffee disables himself to do it, either by making some Estate of the same Thing to some other Person in Tail, for Life, Years, in present or future, or for one Year, or by taking a Wife whereby she may be intitled to Dower, or by suffering a Recovery of the Land, or by granting of any Rent, Common, or the like, or by entering into any Statute, &c. or by suffering any Judgment to be had against him, or by doing any other such like Act, whereby he cannot convey the Land according to the Condition in the same Plight, Quality and Freedom it was at the Time of Conveyance made: In either of these Cases the Condition is *ipso facto* broken.

And altho' the Land be afterwards discharged, and the Party again enabled before the Day to perform the Condition, yet this will not save the Breach. And so also it is of a Limitation.

But when the Condition is to be performed of the Part of the Feoffor or Grantor, there Disability before the Time will not hurt, so as he be again enabled at the Time.

And so it is when the Condition is to be performed on the Part of the Feoffee, and there is no certain Day set for the Performance of the Thing, for altho' in this Case he be once disabled, yet if afterwards he be again enabled, and does it within the Time that the Law gives him to do it; in this Case the Condition is not broken.

And so also it is if the Feoffee be disseised, and during the Disseisin he does any such Act as before; in such Case before his Entry it is no Breach of the Condition, for till then the Charge does not bind the Land.

And so likewise it is when the Disability proceeds from another Cause, as where one makes a Feoffment, on Condition that the Feoffee shall reinfcoff before such a Day, and before the Day the Feoffor disseises the Feoffee and keeps him out till the Day be past; or one makes a Feoffment, on Condition that the Feoffee shall marry before

before such a Day, and before the Day the Feoffor himself marries her, so that the Feoffee cannot perform the Condition; in these Cases the Condition is not broken.

Shep. Touch. 146. Co. Lit. 221, 222, 206. Lit. §. 355. 2 Co. 58. Perk. §. 802, 803.

If one makes an Estate of Lands (held *in Capite*) on Condition that he to whom it is made shall employ the Profits thereof to divers charitable Uses, and he dies, his Heir being within Age, by Reason whereof the King has the Land during the Minority of the Heir, so that the Profits cannot be employed: This is no Breach of the Condition. *Shep. Touch. 146, 147.*

If one makes a Feoffment of Land, on Condition to reinfeoff in convenient Time, and the Feoffee does not so, but makes a Lease to another: This is a double Breach of the Condition. And the same Law is of a Devise by Will in this Manner 1 Co. *Porter's Case, 22, &c.*

If a Feoffment be made, upon Condition that the Feoffee shall make some Estate to the Feoffor, or some other, by a Day, and the Feoffee before the Day says to him to whom the Estate is to be made, that he will never make the Estate, notwithstanding he does make the Estate before the Day according to the Condition; in this Case it is said the Condition is broken. *Sed quere*; for it seems if he really denies it before, and actually performs it at the Day; this is a good Performance of the Condition.

As if a Lease be made of a House, on Condition that the Lessee shall not disturb the Lessor in the taking away of his Goods out of the House, and when the Party comes or sends to fetch them, the Lessee only forbids them: This is no Breach of the Condition; and it was agreed in this Case that Words without some Deeds, as shutting the Door against them, forcible Resistance, or laying of Hands upon them, or the like, are no Breach of such Condition. *Perk. §. 796. 8 Co. 90.*

And if a Lease be made, on Condition that the Lessor shall be four Times a Year in the House demised without being ousted by the Lessee, and the Lessee seeing him coming shuts the Doors or Windows against him: This has been thought to be no Breach of the Condition. 3 H. 4. 8.

If a Lease be made, on Condition that the Lessee shall pay yearly to the Lessor during the Term 10 l. in this Case if he fails of paying once, the Condition is broken and the Estate forfeited.

So if one makes Feoffment in Fee of Land, on Condition to pay 10 l. yearly to J. S. if he fails once, the Condition is broken. *Dy. 33.*

If a Lease be made of a Manor in which are divers Copyholders, on Condition that the Lessee shall not molest, vex or put out any Copyholder paying his Duties and Services; in this Case if the Lessee enters upon and puts out any one Copyholder, this is a Breach of the Condition.

But if he enters *vi & armis* upon a Copyholder's Tenements, and there beat him only, or the like: This is no Breach of the Condition. *Shep. Touch. 147.*

If there be a Condition to pay Rent, and the Lessee lets Part of the Land to other Under-Tenants, or lets all the Land to another for Part of the Time, and he undertakes the Rent still, and fails of Payment; in this Case the Condition is broken, and the Estate forfeited.

But if there be any Covin and Practice in the Case between the first Lessor and the Lessee, the Under-Tenants may perhaps have Relief in Equity. *Crompt. Jur. 147.*

If a Lease be made rendring Rent, on Condition that if the Rent be not paid within twenty Days the Lessor shall re-enter, and the Rent is not paid; in this Case the Condition is broken, but the Lessor cannot enter until he has made a legal Demand, and if he dies before he does it, his Heir shall never take Advantage of that Breach, but it is discharged for ever. *Doct. & Stud. 35. 13 H. 4. 17.*

If one makes a Lease for Years of Land, and then also makes a Feoffment in Fee of the Lands, on Condition that if the Lessee be disturbed in his Term that he shall have the Fee-simple, and he is disturbed by the Feoffor, or his Means; in this Case the Condition is broken, and the Lessee shall have the Fee-simple.

But if the Disturbance be by a Stranger, and not by the Feoffor, or by his Means or Consent; this is no Breach of the Condition. 8 Co. 90.

If a Lease be made, on Condition that the Lessee shall be outlawed, and he is outlawed without Proclamation; it seems this is no Breach of the Condition, because the Outlawry is not good. *Shep. Touch. 148.*

If a Condition possible at the Time of Creation becomes afterwards impossible in Part by the Act of God, and the Party does not perform that which is possible, the Condition is broken. *Lit. §. 352. 2 Co. 59.*

If a Man makes a Lease for Years on Condition, and the Lessee does not know of it, and after the Lessor by Will gives the Land to the Lessee without Condition, and the Lessee does such an Act as is a Breach of the Condition; in this Case the Condition is not broken, for the Lessee must have Notice of the Condition before he can break it. 8 Co. 92.

To give Advice.

If one grants an Annuity *pro consilio impenso & impendendo*, and the Grantor requires Advice, and the Grantee refuses or neglects to give it: This is a Breach of the Condition, and a Forfeiture of the Estate.

And if the Deed be, that he shall go to such a Place to give Counsel, and he requires him to go thither, and he refuses it; this is a Forfeiture of the Estate.

But if he refuses to go with him to another Place, or give Counsel to his Adversary, being not required to give Counsel to him: This is no Breach of the Condition, nor Forfeiture of his Annuity. 21 Ed. 3. 7. 8 H. 6. 24. Dy. 369.

And if one has heretofore devised his Land to be sold by his Executors, and to have been distributed for his Soul, and the Executors had not sold it in convenient Time, or had taken the Profits to their own Use: This had been a Breach of the Condition. Lit. §. 383.

When a Condition in Law shall be said to be broken or not.

Every particular Estate has a Condition in Law annexed to it, and therefore if Tenant for Life in Dower by the Curtesy, or after Possibility of Issue extinct, Lessee for Years, Tenant by Statute Merchant, *Elegit*, or the like, makes any absolute or conditional Estate of the Lands they hold in Fee-simple, Fee-tail, or for Life, and give Livery of Seisin thereupon, or levy a Fine *Sur consance de droit*, or suffer a Recovery of the Land, or the like: This is a Breach of the Condition in Law, and a Forfeiture of his Estate.

And if any such Tenant (except Tenant in Tail after Possibility of Issue extinct) commits Waste in the Lands they do so hold: This is a Breach of the Condition in Law, and a Forfeiture of the Estate in so much as the Waste is committed.

But if an Infant or Feme Covert that has such an Estate shall make any such Estate, &c. This is no Breach of the Condition in Law.

And yet if such Person commits Waste: This is a Breach of the Condition in Law.

And so also if any such Person be an Officer, and do any Thing which is a Cause of Forfeiture in another: This will be a Forfeiture in him or her also. 2 Co. 15. 8 Co. 44. Co. Lit. 233.

If any Keeper of a Park without Warrant kills any Deer, fells or cuts any Wood, and converts it to his own Use, pulls down the Lodge, or any House within the Park used for Hay for the Deer, or the like: This is a Breach of the Condition in Law.

So also if a Keeper shall not look to the Game, but the Deer be killed by his Default, and Damage comes to the Lord: By this also the Condition is broken.

But the not attending upon such an Officer for two or three Days, if the Lord has no special Loss thereby, is no Cause of Forfeiture. Co. Lit. 233.

Officers that are for the Administration of Justice, or of Clerkship in any Court of Record, or concerning the King's Treasure, Revenue, Account, Alnage, Auditorship, &c. have also Conditions in Law annexed to them, and therefore if such Officers shall sell their Offices or misdemean themselves in their Offices: By this the Condition in Law may be broken, and they may forfeit them. Co. Lit. 234.

(YY) How a Condition shall be expounded.

WHEN a Condition is created in a Deed, the Law says, That it shall be taken favourably for him who is to perform it. 4 Leon. Case 161.

1. In respect of Persons.

It is a general Rule, that such Conditions annexed to Estates as go in Defeasance, and tend to the Destruction of the Estate, being odious to the Law, are taken strictly, and shall not be extended beyond their Words, unless it be in some special Cases.

And therefore if a Lease be made, on Condition that if such a Thing be not done, the Lessor (without the Words *Heirs*, *Executors*, &c.) shall re-enter and avoid it; in this Case regularly the Heir, Executor, &c. shall not take Advantage of this Condition.

So if one makes a Lease for Years of an House, on Condition that if the Lessee shall be minded to dwell in the House, and shall give Notice to the Lessor that he shall depart; in this Case, if the Lessor dies, his Heir, Executor, &c. shall not have the

the like Advantage and Power as the Lessor himself, for the Condition shall not be extended to them. *Co. Lit.* 219. 8 *Co.* 90. 27 *H.* 8. 14.

And hence it is, that if a Lease for Years be made, on Condition that the Lessee shall not alien without the Licence of the Lessor; in this Case the Restraint shall continue only during the Lives of the Lessor and the Lessee, and no longer. *Dy.* 66.

And yet this Rule has an Exception; for if a Man mortgages his Land to *W.* To pay Money upon Condition that if the Mortgagor and *J. S.* pays 20 *s.* such a Day to the Mortgagor, that then he shall re-enter, and the Mortgagor dies before the Day; in this Case *J. S.* may pay the Money, and perform the Condition.

But it is otherwise whilst the Mortgagor lives, for during his Life *J. S.* alone without him may not tender it, and if he does, this Tender is no Performance of the Condition. *Co. Lit.* 219.

And in Case where a Condition tends to create an Estate, there it shall have the most favourable Exposition that may be; and therefore in that Case altho' the Words be not satisfied, yet if the Intent be satisfied, it sufficeth. To create an Estate.

And therefore if one makes a Feoffment in Fee, on Condition that the Feoffee shall make an Estate back again in Tail to the Feoffor and his Wife before such a Day, and before that Day the Feoffor dies; in this Case the Condition shall be performed as near to the Intent as may be; and therefore if the Condition be, that he shall make the Estate to them two, *Habendum* to them and the Heirs of their two Bodies engendred, the Remainder to the right Heirs of the Feoffor, the Estate shall be made to the Wife for Life without Impeachment of Waste, the Remainder to the Heirs of the Body of the Husband begotten on the Wife.

And if *A.* enfeoffs *B.* on Condition that *B.* shall make an Estate in Frank-Marriage to *C.* with such a one, the Daughter of the Feoffor; in this Case altho' an Estate in Frank-Marriage may not be made, yet an Estate shall be made to them for their Lives. *Et sic de similibus. Conditio beneficiæ quæ statim construit benigne secundum verborum intentionem est interpretanda, odiosa autem quæ statim destruit stricte secundum verborum proprietatem est accipienda.* *Lit.* §. 352. *Co. Lit.* 219. 8 *Co.* 60.

In all Cases where a Time is set for the Doing or Performance of the Matter contained in the Condition, be it to pay Money, make an Estate, or the like, it must be done at the Time agreed upon and set down in the Condition. 2. In respect of Time.

And in Cases where it is to be done before a certain Time, it must be done before that Time, or else the Condition is broke.

But in all Cases where no Time is set for the doing of the Thing contained in the Condition, be it to pay Money, make an Estate, or the like, if the Act to be done, be to be done to the Party that makes the Estate, or to be done to him and a Stranger, and be such a Thing as is for the Benefit of him that makes the Estate, and for his Benefit only, there regularly the Party that is to do the Thing shall have Time to do it during his Life, unless the Party, Feoffor; &c. that makes the first Estate, whereunto the Condition is annexed, hastens the doing thereof by Request; for if he request the doing thereof, and sets no Time, it must be done within a convenient Time after that Request; and if he requests and prefixes a Time convenient when he desires to have it done, it must be done at that Time; and in these Cases the Condition cannot be broken without a Request, so long as he to whom the Estate upon Condition is made be living.

And therefore in this Case it is not like to a Condition made by Will, for if one devises his Land to *J. S.* so as he pays the 20 *l.* to *J. D.* which the Testator owes him, and no Time is set for the Payment thereof; in this Case he must pay it as soon as it is demanded, or he forfeits the Land, and the Heir may enter. To pay Money.

But if the Thing to be done be to be done to a Stranger, and be for the Profit and Benefit of a Stranger only; as if a Feoffment be made on Condition that the Feoffee shall marry the Daughter of the Feoffor, or on Condition that the Feoffee shall enfeoff a Stranger, and no Time is set for the doing hereof; in these Cases the Feoffee shall not have Time during his Life to do it, but he must do it in a reasonable Time, and without any Request at all, or else he breaks the Condition. To enfeoff.

And in some special Cases when the Act to be done is to be done to the Party himself, that Party shall not have Time to do it during his Life; as if one grants Land to *J. S.* on Condition that he shall grant an Advowson to the Grantor for his Life, or on Condition that he shall grant a Rent-charge to the Grantor during his Life, to be paid at *Michaelmas* and our *Lady-day*; in these Cases the Grant of the Advowson must be before the Advowson falls, and the Grant of the Rent must be before

before either of the Days of Payment comes, and that without Request, or else the Condition is broken. *Co. Lit.* 209, 208, 219. *Lit.* §. 353. 2 *Co.* 79. 6 *Co.* 31. *Plow.* 30. *Perk.* §. 155, 779, 794, 787, 793, 789, 788. 38 *Ed.* 3. 11. *Dy.* 311.

To pay Money.

And if the Condition be that if *J. S.* do such an Act, that then the Feoffee shall pay 10 *l.* to the Feoffor, or else that the Feoffor shall re-enter, and no Time is set when the Feoffee must pay this 10 *l.* in this Case the Payment must be as soon as the same Act is done, and that without any Request at all. *Perk.* §. 9, 798.

And in Case where the Feoffee, &c. or a Stranger be to do an Act, and he alone is to do it, and it does not concern the Feoffor, &c. as to go to *Rome*, or the like, there the Feoffor, &c. or Stranger, shall have Time during his Life to do the Thing, and it cannot be hastened by Request. *Co. Lit.* 209.

To pay Money, or do any Thing.

When a certain Time is set for the Payment of Money, or the doing of any other Thing in general, neither Agent nor Patient are bound to attend any other Time.

And if the Thing be to be done on a certain Day, but no Hour of the Day is set down wherein the same shall be done; in this Case they must attend such a Distance of Time before the Sun-set as may be convenient to do that work in.

And if the Condition be to pay Money at a Place certain, at any Time during Life; in this Case the Money may not be tendred at any Time in the Place, in the Absence of him that should receive it; but he that is to pay it must give Notice to the other Party before-hand what Time he will tender it, that the other may be ready to receive it.

Or if at any Time the Parties happen to meet at the Place, a Payment or Tender then at that Place is sufficient.

And the same Law is for the most part in Conditions of Obligations. *Lit.* §. 342. *Co. Lit.* 213.

To make a Lease.

If Lands be granted, on Condition that the Grantee shall make a Lease for Life of other Land to the Grantor, the Remainder to a Stranger; in this Case the Feoffee shall have all the Time of his Life to do it, if he be not hastened by Request.

But if the Condition be to make a Gift in Tail to a Stranger, the Remainder to the Feoffor; in this Case it must be done in convenient Time without Request.

If the King licence his Tenant to enfeoff *A.* and *B.* so as they give the Land again to the Feoffor and the Heirs Male of his Body, and he makes a Feoffment accordingly; in this Case it must be re-conveyed before the Death of the Feoffor, or else the Condition is broken. *Co. Lit.* 220, 222.

To enfeoff.

If *A.* enfeoffs *B.* of *Blackacre*, on Condition that if *C.* enfeoffs *B.* of *Whitacre*, *A.* shall re-enter; in this Case *C.* shall have Time to do this during his Life, if *B.* does not hasten it by Request. *Co. Lit.* 208.

To get the good Will of *J. S.*

If a Lessee grants his Estate to a Stranger, on Condition that the Grantee gets the good Will of the Lessor, and no Time is set when he shall get his good Will: He shall have Time to get his good Will during the Term, and altho' he denies it at the first, yet if he grants it afterwards, that is sufficient. *Perk.* §. 795.

3. In respect of Place.

In Cases where a Place is set down for the doing of a Thing contained in the Condition, there it must always be done at that Place, (unless by some Agreement made between the Parties afterwards another Place be appointed) otherwise the Condition is not performed, and the Parties are not bound to attend in any other Place.

But in Cases where there is no Place set down for the doing of the Thing contained in the Condition, if the Thing to be done be a corporal Service, as to pay Money, or any such like Thing, the Party that is to do it must at his Peril seek out the Person to whom it is to be done, if he be *infra regnum Angliæ*; but if he be not within the Kingdom, he is not bound to seek him, and yet the Condition is not broken.

And if the Thing to be done be either Local, *i. e.* such a Thing as must be done in or at a Place certain, as the making of a Feoffment of Land, Payment of Rent, or the like; the Thing must be done at that very Place, and a Tender of doing it in that Place is a sufficient Performance of the Condition; as for Example:

To pay Money.

If a Feoffment be made, on Condition that the Feoffee shall pay to the Feoffor 20 *l.* on *Easter Day* at *Dale*, and the Feoffee tenders the 20 *l.* the same Day at *Sale*; and altho' the Feoffor be at *Sale*, and he tenders the 20 *l.* to his Person there the same Day, yet it is no Performance of the Condition.

And if a Feoffment be made in Mortgage, on Condition for the Payment of Money at a Day, and no Place is set for the Payment thereof; in this Case the Mortgagee must seek the Mortgagee, and tender it to his Person at his Peril: And Tender of

the Money upon the Land mortgaged, is not a sufficient Performance of the Condition.

And if a Feoffment be made, on Condition that the Feoffee shall enfeoff the Feoffor of *Whiteacre* in *Dale*; in this Case the Feoffment or the Tender of it must be in *Dale*, and cannot be elsewhere, and a Tender of it there is sufficient to perform the Condition. To enfeoff.

So if the Condition be, that the Feoffee shall in *Easter Term* next acknowledge Satisfaction upon a Judgment in the King's Bench; this must be done there, and cannot be done elsewhere. To acknowledge Satisfaction on a Judgment.

So if a Feoffment in Fee be made of *Whiteacre*, rendring Rent to the Feoffor and his Heirs, on Condition that if the Rent be not paid, the Feoffment to be void, and no Place is set for the Payment of it; in this Case the Feoffee is not bound to tender his Rent any where for the saving of the Condition, but upon the Land, and a Tender there is sufficient. To pay Rent.

And if a Man makes a Feoffment in Fee, without any Reservation of Rent precedent in the Deed, on Condition that the Feoffee and his Heirs shall render a yearly Rent of 20 s. a Year to the Feoffor and his Heirs, and if they fail, that the Feoffor shall re-enter; in this Case also the Payment or Tender must be upon the Land.

But if the Condition be, that he shall tender 20 s. a Year to a Stranger and his Heirs; this is no Rent, nor in the Nature of a Rent, and therefore the Feoffee must tender it to the Person of the Stranger where he can find him at the Day, or else he breaks the Condition, and a Tender upon the Ground is not sufficient.

But in these Cases if the Nature of the Thing to be done be such as will not admit of such a Carriage from Place to Place to seek out the Person of the Feoffor, &c. there, altho' the Thing to be done be corporal or transient, and not a local Thing, yet he that is to do it shall not be bound to seek out the Person of the other; as for Example:

If an Estate be made, on Condition that the Grantee shall deliver twenty Quarters of Wheat, or twenty Loads of Wood to the Grantor at such a Time, and no Place is set for the doing thereof; in this Case the Grantee is not bound to carry the same about to seek the Feoffor or Grantor, as he is bound to carry Money; but before the Day the Grantee is to know of the Grantor where he will appoint to receive it, and there it must be tendred. To deliver Corn or Wood.

And the like Law is for the most part in Conditions of Obligations.

It is best therefore in all these Cases that the Certainty of Time and Place be set down in the Condition for the Performance of a Thing, and the more certain it is, the better it is for him who is to perform it. *Co. Lit.* 210, 211, 213. *Lit.* §. 343, 345. *Bro. Condition* 60. A Caution.

If a Lease be made, on Condition that the Lessee shall pay to the Lessor all such Sums of Money as the Lessor shall lay out in such a Business; in this Case the Lessor must first tender to the Lessee a Note of the Charges before the Lessee is bound to pay, and until this be done the Condition cannot be broken. 4. In respect of other Matters. To pay Money.

And after a Note is given also, he shall have some reasonable Time to provide the Money.

And if he tenders him a Note of more than in Truth he lays out, the Lessee, if he know it, may pay so much as is laid out, and he may refuse to pay any more.

If Lands be granted, upon Condition that *A.* shall make an Estate of Lands at the Charges of *B.* in this Case *A.* must do the first Act, viz. notify to *B.* what Assurance he will make before *B.* is bound to tender the Charges. *3 Co.* 22. To make an Estate.

If a Feoffment be made on Condition that the Feoffee shall give so much Household-Stuff to the Feoffor, or so much Money for it as it shall be rated at by two indifferent Persons to this Purpose to be chosen; in this Case the Election of the two Men must be by the Feoffee: But if the Words be *by two Persons to be indifferently chosen*, then the Election shall be by both Parties, for in the first Case the Word *indifferent* goes to the appraising, and not to the Persons.

If a Feoffment be made of a Ground, on Condition that the Feoffee shall rake the Ditches; in this Case if the Feoffee does it once it is a sufficient Performance of the Condition. To cleanse Ditches.

And yet if a Man grants a House for Life, on Condition that the Lessee shall dwell and be resident in the House during the said Term; in this Case it is not sufficient that he dwells in it once during the Term, but must do so all the Term, or else the Condition is broken. *27 H. 8. 1. Plow.* 21. To dwell in a House.

If

Annuity.

If an Annuity be granted of ten Marks *per Ann.* to a Man, on Condition, or till he be promoted to a Benefice by the Grantor, and it is not said of what Value the Benefice shall be; in this Case it shall be taken for a Benefice of as great Value and of as good an Estate as the Annuity is, otherwise the Grantee may refuse it, and yet his Annuity shall continue. *Perk. §. 804.*

To give Goods.

If a Feoffment be made on Condition that the Feoffee shall give all his Goods *Si quæ fuerint*, or give all his Pikes in his Pond *Si quæ fuerint*; in this Case the Words shall be taken in the present Tense, for the Goods and Pikes that are at the Time of the Grant.

But if a Feoffment be made on Condition that the Feoffee shall give all his Goods in London, *Si quæ fuerint*, that did belong to *J. S.* in this Case the Words shall be taken in the præterperfect Tense. *Perk. §. 742.*

Not to disturb the Lessor in taking the Wood.

If one makes a Lease of the Manor of Dale, (wherein is a Wood called Dale Wood) excepting all the Woods and Underwoods growing in Dale Wood, and all the great Trees growing elsewhere, and this is upon Condition that if the Lessee shall disturb the Lessor, to cut and sell the Wood and Underwood excepted, the Lease to be void; in this Case the Condition shall extend only to the Wood and Underwood in Dale Wood, and not to the Trees elsewhere; but if the Words of the Condition be (*shall disturb, &c. to cut, &c. the Wood and Underwood on the Premises*) contra. *Hil. 3 Car. Hayward and Fulcher's Case.*

To pay Rent.

If one grants Land, rendring Rent at the Feasts of *St. Michael* and our *Lady-day*, or within a Month after, on Condition that if it be behind after the Feasts and Days limited by the Space of eight Weeks, that the Lease shall be void; in this Case the eight Weeks shall be accounted from the Month which is the twenty-eighth Day after the Feast. *Dy. 142.*

If the Condition be made in the Copulative, and consists of divers Parts, every Part must be observed, or the Condition will not be performed.

But when it is made in the Disjunctive, if any Part of it be observed, it is a sufficient Performance of the Condition.

And therefore if a Feoffment be made on Condition to reinfieoff and pay 20 *l.* and the Feoffee reinfieoffs but does not pay the 20 *l.* in this Case the Condition is broken.

But if the Condition be to reinfieoff or pay 20 *l.* and the Feoffee does one of them, it is a good Performance of the Condition.

And when it is made in the Copulative and Disjunctive both, it shall be taken in the Disjunctive only; as if a Lease be made to *A.* and *B.* his Wife, on Condition that *A.* and *B.* or any Child between them, shall so long live; this shall be taken in this Sense, if the Husband, Wife or Child shall so long live, so that the Lease shall not be determined by the Death of the Husband or Wife alone.

If there be two Provisoes in two several Indentures of Conveyance of several Manors to *A.* and *B.* that if the Feoffor pays or tenders 20 *s.* to *A.* and *B.* or the Heirs of *A.* that the Conveyance shall be void, and *A.* dies; in this Case a Tender to *B.* is not sufficient, and it must be made to the Heir of *A.* and it must be 20 *s.* for every Proviso: But otherwise it is of a Collateral Act. *12 H. 7. 10. Co. Lit. 225. Perk. §. 746. Dy. 337, 372.*

If the Words of a Condition be thus, *that upon such a Contingent the Party shall enter and retain the Land until the Thing be done &c.* in this Case and by these Words the Estate is not determined, as it is by these Words, (*that the Estate shall be void, or that the Grantor shall re-enter, or the like*).

And in these Words there is a Difference also to be observed, for if the Words be, *that upon such a Contingent the Estate shall cease and be void*, and it be a Lease for Years to which the Condition is annexed, the Estate is *ipso facto* void without Entry or Claim, and can never be affirmed afterwards.

But if the Words of the Close of the Condition be, *that the Feoffor, Lessor, &c. shall re-enter*, without any other Words, altho' it be in a Lease for Years, yet the Lease is not void until he has made an actual Entry.

But in both Cases, if the Estate to be voided be an Estate in Fee or for Life, it is only voidable by the Breach of the Condition, and must be made void by Entry or Claim, and until this be done the Grantor can make no new Estate of the Land.

But in the first Case before the Party shall retain the Land and take the Profits of it in the Nature of a Pledge until the Thing be done which was agreed upon in the Condition, and then the other Party shall have the Land again. *Co. Lit. 203, 204. 3 Co. 64. 11 H. 7. 21. Dy. 6. 127.*

(ZZ) 112

(ZZ) *Where a Court of Equity will relieve against the Breach of a Condition.*

THE Court of Chancery relieves against some Breaches of Conditions, &c. but not against the Breach of a Condition precedent: It will relieve to prevent the devesting of an Estate, tho' not to give an Estate that never vested by reason of the Non-performance of a precedent Condition. Yet in all Cases where the Matter of a Condition lies in Compensation, be the Condition precedent or subsequent, there ought to be Relief in Equity. 2 Vern. 339. 1 Vern. 223.

On a Question, whether Relief might be given for the Breach of a Condition on Non-payment at the Day, &c. there being no Damage but what might be made up by Payment after with Damages: It was decreed that Relief should be had. And said, that it is now a general Rule of Equity, that no Advantage shall be taken of a Penalty or Forfeiture, where a Compensation may be made. 1 Chan. Ca. 144. Max. Eq. 44, 45, &c.

A. devised Lands to J. S. upon Condition to pay 20000*l.* to his Heir at Law, viz. 1000*l.* per Ann. for the first sixteen Years, and 2000*l.* per Ann. after till the Whole should be paid, and the Heir entered for Non-payment of the 1000*l.* per Ann. J. S. shall be relieved upon Payment of the 1000*l.* together with Interest from the Time it became payable, without any Deduction for Taxes; the Court declaring, that wherever they can give Satisfaction or Compensation for the Breach of a Condition they can relieve. 1 Salk. 156. 2 Vern. 594.

The Lady Anne Knowls had devised to her by the Earl of N. Newport House, and other Tenements in the County of M. to her and the Heirs of her Body begotten, upon Condition that she married with the Consent of his Wife and of certain Trustees; and if she married without their Consent, or died without Issue of her Body, then the Premises were given over to G. P. and to his Heirs for ever. The Lady Anne married without such Consent, but afterwards the Trustees assented thereto: And now a Bill was brought to be relieved against the Condition, and the Breach of it: It was held, that this was a conditional Limitation, and not relievable in Equity; nor shall the subsequent Assent supply the want of Consent precedent, for after the Marriage Consent signifies no more in this Case.

The Lord Keeper declared he was clear of Opinion, that Equity ought not to interpose in this Case; and was glad to see that a Parent could settle his Estate, that it might be out of the Power of a Court of Equity; and so dismissed the Bill. 1 Chan. Ca. 138, 141, 143, 144. 1 Mod. 300. 2 Chan. Rep. 26.

A Man makes a Mortgage at six per Cent. with Proviso to take five if paid within three Months after. If there is a great Arrear, the Court will not relieve. Secus if but a short Time. 1 Wil. 652.

Lands were settled by a Man on Trustees to such Uses as he by Deed or Will should appoint; and by his Will he devised his Estate to his eldest Daughter, upon Condition that she within six Months after his Death paid certain Sums to her other Sisters; and if she failed, then he gave the Lands to his second Daughter on the like Condition, &c. The Plaintiff failed in Payment of the Money within the Time limited, and was relieved; and the Court of Chancery may enlarge the Time of Payment altho' the Premises are devised over; and even in the Case of a Condition precedent. 2 Vern. 222.

E. R. devised his real Estate to his Kinsman Sir R. R. paying 1000*l.* a-piece to his two Daughters and Heirs at Law: Sir R. R. makes Default in Payment, and the Daughters bring Ejectment, and recover the Lands; then the Plaintiff claiming under Sir R. R. brought his Bill to be relieved, and obtained a Decree for that Purpose, paying what remained unpaid of the 2000*l.* with Interest and Costs. Against this Decree it was objected, that Sir R. R. claiming only as a voluntary Devisee, Equity ought not to assist him against the Breach of the Condition, whereby to establish a Disinheritance of the Heir; but that he ought at his Peril to have taken Care to have performed the same, or the Law should take Place. Sed non allocatur. 2 Vern. 366.

A. bequeathed 2000*l.* to his Daughter, but if she should marry one B. that then the Legacy should be void: The Daughter having married B. contrary to the Will, her Brother pays her 800*l.* and she releases the Legacy; but afterwards brings a Bill to set aside the Release, and have her Legacy made good to her. It was decreed by the Lord Chancellor against the Plaintiff, who said, that where a Legacy is given

to a Woman, upon Condition that she marries with the Consent of *J. S.* if the Legacy be not limited over, it is only *in terrorem*, and tho' she marries without Consent, it does not avoid the Legacy: But here in this Case the Father had revoked the Legacy, and she was only prohibited to marry with one Man by Name. *1 Vern.* 19, 20.

A. bequeathed 300 *l.* to *B.* her Daughter, but if she married under twenty-one without Consent of the Executors, or major Part of them, the Legacy should go to the Children of her Sister, the Wife of *C.* and made *C.* and two others Executors; *B.* being at the House of *C.* there marries his Son by a former Wife, with his Privy, being under twenty-one; *B.* and her Husband bring a Bill for the Legacy; *C.* in Favour of his other Children, insists that the Legacy is forfeited. The other Executors confessed they had Notice of the Courtship, and did not contradict or disprove of it; and the 300 *l.* was decreed the Plaintiff's, there being at least a tacit Consent. *2 Vern.* 580.

A. devised to his Daughter *M.* 100 *l.* to be paid by his Executors upon her Day of Marriage, or Age of twenty-five, which should first happen, upon Condition that she should marry with the Consent of such and such Persons; and if she marry without their Consent, then to have 50 *l.* only, and no more, and gave the Residue of his personal Estate to *N.* *M.* married without such Consent before twenty; and it was held by the Master of the Rolls, that this was more than a Clause *in terrorem*, and that the Devise of the Surplus of the personal Estate was a Devise over of the 50 *l.* on *M.*'s Disobedience. *Abr. Ca. Eq.* 112.

A. devised to *B.* who was his Heir at Law, all his Lands, &c. except, &c. charged with a Sum of Money payable to his Daughter at her Age of twenty Years, or Marriage, and devised the excepted Lands in Trust to be sold for Payment of Debts; provided that if his Daughter should marry in the Life-time of her Mother, without her Consent first had in Writing, then 500 *l.* Part of the said Sum charged should cease, and should be applied towards Payment of his Debts charged on the said excepted Lands, and appoints his Wife Guardian of his Daughter, and makes her Executrix, and dies. The Daughter attains her Age of twenty-one, and without the Consent of her Mother intermarries with the Plaintiff. *Per Lord Keeper*, This is a Portion to be raised out of Lands, and therefore to be considered as Land; and tho' it be to go towards Payment of Debts on Breach of the Condition, and there appear one hundred and twenty Creditors concerned, yet none that are in Danger of losing their Debts; and it is then to be considered as it stands upon the Condition itself, and therefore the Plaintiff must have her whole Portion, for the Testator has appointed two Periods of Time to intitle her, *viz.* Marriage, or the Age of twenty-one; and as she has attained that Age, it becomes a vested and settled Interest in her, not to be divested by the Marriage without the Consent of the Mother, for that Consent cannot in any Reason be carried farther than during her Minority. *Abr. Ca. Eq.* 112, 113.

Where there is a Condition that a Feme shall marry with the Consent of two Executors, and one without Reason is against the Match, the Court will dispense with his Consent. *2 Wil.* 628.

If the Father devises Lands in Trust to permit his Daughter to receive the Rents until her Marriage or Death, and in Case she marries with the Consent of Trustees, then to convey the Premises to her and her Heirs; but if she died before Marriage, or married without such Consent, then to convey to other Persons. The Daughter afterwards marries with the Consent of her Father, who settles Part of the Lands on her and her Husband, and dies; this Settlement shall be no Revocation of the Will, as to the Devise of the other Lands to her; and by the Father's consenting in his Life-time, the Condition is dispensed with. *2 Vern.* 720.

Lands were settled in Trust for raising Portions for Daughters, payable upon their Marriages, with the Consent of Trustees; but if they married without such Consent, then to remain over to another, &c. The Daughters were old, and never intended to marry, but to lay out their Portions in a Purchase of Annuities for their Lives; and it was held that they should have their Portions immediately, upon giving Security to indemnify against the Persons to whom the Portions were delivered over. *Nich. Chan. Rep.* 62.—And in *2 Vern.* 452. the same Point was decreed upon giving Security to refund, if the Condition should be broken, though no Mention made that the Daughters did not intend to marry.

A. by Will gave his Grandaughter 200*l.* on Condition that she should continue with his Executors till she should be twenty-one; but if she should be taken from them by her Father, (who was a Papist) or be married against the Consent of his Executors, then he gave her but 10*l.* The Daughter was placed by the Executors with a Clergyman, who, before she was twenty-one, with the Consent of one of the Executors, permitted her to make a Visit to her Father; and he took that Opportunity to marry her to a Papist, and she was decreed the Legacy at the *Rolls*; but upon a Re-hearing, the Lord Keeper held that she should have but the 10*l.* only: And he said, that in this Case there was no Difference between a Condition that she shall not marry without Consent, and that she shall not marry against Consent. 2 *Vern.* 572. Q. Whether there was any Limitation over? *Vide the next Paragraph but two.*

If by Lease 9000*l.* is secured for a Feme Sole, in Case she does not marry contrary to the Liking of *A.* and if she does, then for such Person as *A.* shall nominate; and for want of such Nomination for *A.* and she marries without the Consent of *A.* yet he cannot dispose of the Lease otherwise than for her Benefit. 1 *Chan. Ca.* 58. This Case is cited in 2 *Vern.* 575. where it is said, that there may be a Difference between a Condition that she shall not marry without Consent, and where it is that she shall not marry against Consent.

If a Portion of 8000*l.* be given to a Woman, provided she does not marry without the Consent of *A.* and if she does she shall have but 100*l.* per Ann. Yet if she marries without his Consent she shall be relieved, for the Proviso is *in terrorem* only. 1 *Chan. Ca.* 22. 2 *Chan. Rep.* 23. 1 *Vern.* 20. *Nel. Chan. Rep.* 145. 2 *Vern.* 293.

But it was said, that if the Portion upon such Marriage had been limited over to another, it had been otherwise. 1 *Chan. Ca.* 22. 2 *Chan. Rep.* 95. 2 *Vern.* 357.

By the Law of *England*, a Devise upon Condition not to marry at all, or not to marry a Person of such a Profession or Calling, is void, whether there be a Limitation over or not; but if it be upon Condition not to marry a Papist, or a certain Person by Name, it may be good. 1 *Vern.* 20.

But by the Civil Law, a Gift or Devise upon Condition not to marry without Consent is void, tho' there be a Limitation over, for it is a Maxim there that *Matrimonium esse liberum*.

A. devised his Lands to Trustees for three Years, and if within the three Years there happened a Marriage between *G.* who was a distant Relation, and of the same Blood, and *W.* his Niece and Heir at Law, then to *W.* for Life, Remainder to her first Son, &c. in Tail Male by *G.* to be begotten: But if the Marriage should not take Effect within the three Years, or if the Marriage should be before the Years of Consent, and not ratified when of competent Age, then to *F.* in Tail, who was likewise a remote Relation of the Testator, but not of the same Blood. The Marriage between *G.* and *W.* did not take Effect within the three Years, tho' several Proposals were within the Time made by her Friends to his Guardians, but not accepted by them; and tho' she herself had pressed the Match as far as the Modesty of her Sex would permit. She afterwards married *B.* and by her Bill prayed the Benefit of the Devise, the Condition being answered by her as far as she was capable, having married a Person, as was alledged, equal in Circumstances, &c. to *G.* But by the Advice of *Holt* and *Treby* Chief Justices, her Bill was dismissed. Between *Bertie* and Lord *Faulkland*, 3 *Chan. Ca.* 129.—In 1 *Salk.* 231. it is said, that the Decree in this Case was reversed in the House of Lords. And in 2 *Vern.* 333. it is said, that the Matter was ended by Compromise.

A. devised to each of his Daughters 20000*l.* payable at twenty-five, but if they or either of them should marry before sixteen, or if the Marriage should be without the Consent of their Mother and Trustees, then they should lose 10000*l.* of the Portion, which should go to his other Children; one of them married before the Age of sixteen, and tho' it was with the Consent of all the Parties, yet it was held, that both the Terms of the Condition ought to have been observed. Lord *Salisbury's* Case, 2 *Vent.* 365. But in 2 *Vern.* 223. it is said, that the Father treated with the Lord *Salisbury* about the Marriage, tho' he died before it was solemnized; and there the Decree is quite contrary: And *Skin. Rep.* 285. agrees with this last Resolution.

If the Father makes a voluntary Settlement on his Eldest Son in Tail Male, Remainder to a second Son, &c. in which there is a Proviso, that if the Eldest did not pay the second 600*l.* at his Age of twenty-one Years, that then the Estate of the Eldest

Eldest should in Law and Equity cease; and the Father afterwards marries a second Wife, and by Deed, taking Notice of the former Settlement, and that the Son had not paid the Money, conveys the same Lands to the Use of his Children by his last Wife; the Eldest Son shall not be relieved, the Conveyance being partly voluntary, and the Condition special, that his Estate should cease in Law and Equity, and the Son's Bill dismissed accordingly; and the rather, because the Son had set up a Lease against his Father, which was obtained by Surprize; and the Deed in Law was defective, and amounted only to a Declaration of Trust. 1 Vern. 156.

A Man being seised in Fee of Lands of the Value of 10000*l.* settles it so, that in Case his Eldest Daughter, within six Months after his Death, should pay 6000*l.* to the Use of his other four Daughters, then the Eldest to have the Land; but if she failed in Payment, then the second to have the like Privilege; the six Months past without Payment, and the Eldest Daughter having assigned over her Interest to one to whom she was indebted, by which the Estate was to go out of the Family, contrary to the Intention of the Donor; the Court took Time to consider, whether they could retrieve in this Case or not. 2 Vern. 166. This seems to be the same Case as in 2 Vern. 222. which see before, but differently stated.

If *A.* conveys Lands to *B.* &c. and their Heirs, upon Trust that if *C.* the Son of *A.* within six Months after the Death of *A.* should secure to Trustees 500*l.* for the Younger Children of *C.* then after such Security given, to convey to *C.* and his Heirs, and until the Time for giving such Security, in Trust for the Eldest Son of *C.* and in Default of such Security, to convey to such Eldest Son and his Heirs, if *C.* dies before any such Security given; yet this Condition precedent being only in Nature of a Penalty, the Intent of the Trust shall be regarded, which was to secure 500*l.* to the Younger Children. 1 Chan. Ca. 89. 2 Mod. 307.

A. devised his Estate to *B.* in Trust for the Use and Benefit of *P.* but declared his Will to be, that *P.* should have no Benefit of the Devise, unless *P.*'s Father should settle on *P.* two full Thirds of the Estate settled on the Father on his Marriage; and in Default thereof the Estate should go to *B.* The Father made no Settlement on *P.* but devised all his Estate to him for Life, but subject to the Payment of Debts. It was adjudged that this Estate was executed in *P.* by the Statute of Uses, and consequently that this is a Condition subsequent; yet the Court declared, that tho' Conditions subsequent, which are to divest an Estate, need not be literally performed; yet even in such Case if the Party cannot be compensated in Damages, it would be against Conscience to relieve; and therefore the Master was ordered to examine the Value of the Estate devised, and the Amount of the Debts wherewith that Estate was charged, and to report to the Court, whether after Debts paid there would be two full Thirds of the Father's Estate which was settled on him in Marriage, left to *P.* and upon a Re-hearing would not vary the former Order; declaring that the Difference was, whether this Case lay in Compensation, or not; and if a Compensation was made, he would relieve against the Breach of the Condition; but in Case a sufficient Compensation was not made, the Court would then consider further of it. 1 Vern. 79, 167. — In 2 Vern. 222 & 338 the same Case is cited as a Case wherein there was Relief.

If a Feme Covert, having Power by Will to devise Lands, devises them to Executors to pay 500*l.* out of them to her Son; provided that if the Father does not give a sufficient Release of certain Goods to her Executors, that then the Devise of the 500*l.* should be void, and go to the Executors; and after her Death a Release is tendred to the Father, and he refuses; yet upon making the Release afterwards, the Money shall be paid to the Son; for it was said to be the standing Rule of the Court, that a Forfeiture should not bind where a Thing may be done after, or a Compensation made for it, as where the Condition is to pay Money, &c. and tho' it is generally binding where there is a Devise over, yet here it being to go to the Executors, it is no more than the Law implies. 2 Vent. 352.

S E C T. VII.

Of the Warranty.(A) *Warranty what, and Warrantor and Warrantee who.*

A Warranty is a Covenant real annexed to Lands or Tenements whereby the Covenantor (whether he be Feoffor, Grantor, Lessor, &c.) and his Heirs are bound to warrant and secure the same to the Covenantee and his Heirs, and that they shall quietly hold and enjoy the same, and either upon Voucher, or by Judgment in a Writ of *Warrantia Chartæ*, to yield other Lands and Tenements to the Value of those that shall be evicted by a former Title. *Co. Lit. 365. a.*

And he who makes his Warranty is called the Warrantor, and he to whom it is made is called the Warrantee.

(B) *Kinds of Warranties.*

Warranties are either *general*, viz. by one and his Heirs to another and his Heirs; or *particular*, and restrained to a certain Person. General or particular.

And there are two Kinds of Warranties annexed to Freeholds and Inheritances.

First, A Warranty in Deed, or an express Warranty, which is when a Fine or Feoffment in Fee, or a Lease for Life is made by Deed, which has an express Clause of Warranty contained in it, as when a Conusor, Feoffor or Lessor, covenants to warrant the Land to the Conusee, Feoffee or Lessee. In Deed.

Secondly, A Warranty in Law, or an implied Warranty, which is when it is not expressed by the Party, but *tacite* made and implied by the Law. In Law.

A Warranty in Deed is either lineal or collateral.

A lineal Warranty is a Covenant real annexed to the Land by him which either was Owner or might have inherited the Land, and from whom his Heir lineal or collateral might by Possibility have claimed the Land as Heir from him that made the Warranty. Lineal.

A collateral Warranty is made by him that had no Right or Possibility of Right to the Land, and is collateral to the Title of the Land. Collateral.

Also there is a Warranty which commences by Disseisin or Wrong.

Note, That all these Things here are to be applied to Warranties of Lands and concerning Freeholds and Inheritances, for there is a Warranty of Goods and Chattels in Contracts. By Disseisin or Wrong.

(C) *What Words and Clauses in a Deed will make a Warranty.*

THE Words *Dedi & Concessi*, or *Dedi* only in a Feoffment make a Warranty, when an Estate in Fee or Inheritance passes by the Deed.

But the Word *Concessi* only, or *Demisi & Concessi*, do not make such a Warranty.

And by Force of the Statutes of *Bigamis*, Chap. 6. *Dedi* is made an express Warranty during the Life of the Feoffor. *Co. Lit. 383, 384. 4 Co. 81.*

The Word *Warrantizo*, or *Warrant*, is the only apt and effectual Word to make an express Warranty, or a Warranty in Deed, and therefore this Word only is used in Fines.

And the Words *Defendo*, or *Acquitto*, altho' they are commonly used in Deeds, yet of themselves without the other will not make a Warranty. *Lit. §. 733. 5 Co. 17, 18.*

If a Man by Deed warrants Land to *J. S.* and his Heirs, and the Warrantor does not bind his Heirs to the Warrantee; or does not warrant to *J. S.* and his Heirs, but to *J. S.* only; or warrants to *J. S.* and his Assigns, and not to *J. S.* and his Heirs; or binds himself and his Heirs to warrant the Land, but does not say how long, nor against whom; these are good Warranties. *Dy. 42. Co. Lit. 383.*

The Warranty is usually put before the Rest of the Covenants. *See several Forms in the Second Part.*

(D) *What shall be said a good Warranty in Deed, or not; and how it shall bar and bind.*

TO every good Warranty in Deed that must bar and bind, these Things are requisite:

First, That the Person that warrants, be a Person able; for if an Infant makes a Feoffment in Fee of Land, and thereby binds him and his Heirs to warrant the Land, in this Case altho' the Feoffment be only voidable, yet the Warranty is void.

Secondly, That the Warranty be made by Deed in Writing; for if a Man makes a Feoffment by Word, and by Word binds him and his Heirs to warrant the Land; this is not a good Warranty.

So if a Man gives Lands to another by his last Will, and thereby binds him and his Heirs to warrant it; this Warranty, altho' the Will be in Writing, is void. *Co. Lit. 367, 386. Lit. §. 703.*

Thirdly, That there be some Estate to which the Warranty is annexed that may support it; for if one covenants to warrant Land to another, and makes him no Estate, or makes him an Estate that is not good, and covenants to warrant the Thing granted; in these Cases the Warranty is void. *10 Co. 96. Co. Lit. 384.*

Fourthly, That the Estate to which the Warranty is annexed, be such an Estate as is able to support it, and therefore that it be a Lease for Life at the least; for if one makes a Lease for Years of Land, and binds himself and his Heirs to warrant the Land; this is no good Warranty, neither will it have the Effect of a Warranty; but this may amount to Covenant, on which an Action of Covenant may be brought. *Co. Lit. 378. 26 H. 8. 9.*

Fifthly, That the Warranty descends upon him that is Heir of the whole Blood by the Common Law to him that made the Warranty, and not upon another; for if Tenant in Tail in *Borough English* discontinues the Tail, and has Issue two Sons, and the Uncle releases to the Discontinuee with Warranty, and dies; this is no good Warranty to bind the Son.

So if in this Case Tenant in Tail discontinues the Tail with Warranty, &c. having two Sons, and dies seised of other Lands in the same Borough in Fee-simple, to the Value of the Land in Tail; the Younger Son is not barred by this Warranty. *Co. Lit. 12. Lit. §. 735.*

So if one gives his Land to the Eldest Son, and the Heirs Male of his Body, the Remainder to the second Son, &c. and the Eldest Son aliens with Warranty, having Issue a Daughter, and dies; this is not a good Warranty to bar the second Son. *Lit. §. 161.*

So if Tenant in Tail has Issue two Daughters by divers Venters, and dies, and they enter, and a Stranger disseises them, and one of them releases all her Right, and binds her and her Heirs to warrant it; in this Case the Warranty is not good to bar the Sister: But if they had been by one Venter, *contra. Lit. §. 737.*

So if two Brothers be by Demi-Venters, and the Eldest releases with Warranty to the Disseisor of the Uncle, and dies without Issue, and the Younger dies; this is no good Warranty to bar the Younger Brother, for a Warranty must evermore descend upon him that is Heir at the Common Law to him that made it. *Co. Lit. §. 387. Lit. §. 718.*

Sixthly, That he that is Heir do continue to be so, and that neither the Descent of the Title nor the Warranty be interrupted, for if one binds him and his Heirs to Warranty, and after is attainted of Treason or Felony, and dies; this Warranty does not bind his Heir.

So if Tenant in Tail be disseised, and after releases to the Disseisor with Warranty, and after the Tenant in Tail is attainted of Felony, and has Issue, and dies; this Warranty will not bind the Issue. *Lit. §. 745, 746.*

Seventhly, That the Estate of Freehold that is to be barred be put to a Right before or at the Time of the Warranty made, and that he to whom the Warranty does descend have then but a Right to the Land; for a Warranty will not bar an Estate of Freehold or Inheritance *in esse*, in Possession, in Reversion or Remainder, that is not displaced and put to a Right before or at the Time of the Warranty made, tho' after at the Time of the Descent of the Warranty, the Estate of Freehold or Inheritance be displaced and divested.

And therefore if there be Father and Son, and the Son has a Rent-service, Suit to a Mill, Rent-charge, Rent-seck, Common of Pasture, or other Profit Appreder out of Land of the Father, and the Father makes a Feoffment in Fee with Warranty, and dies; this shall not bar the Son of the Rent, Common, &c.

And altho' the Son after the Feoffment with Warranty, and before the Death of the Father had been disseised, and so being out of Possession, the Warranty has descended upon him, yet this Warranty should not bind him.

So if my Collateral Ancestor releases to my Tenant for Life with Warranty, and dies, and this Warranty descends upon me; this shall not bind my Reversion or Remainder.

But if in the Case before the Son be disseised of the Rent, &c. and affirms himself to be disseised by the bringing of an Assise, (for otherwise he shall not be said to be out of Possession of a Rent, or the like) and after the Father releases with Warranty, and dies; in this Case the Collateral Warranty shall bar and bind the Son of his Rent, &c.

And if in the last Case my Tenant for Life be disseised, and my Ancestor releases to the Disseisor with Warranty, and dies; this is a good Warranty to bind and bar me. 10 Co. 96, 97. Co. Lit. 388.

Eighthly, That the Warranty does take Effect in the Life-time of the Ancestor, and that he be bound by it; for the Heir shall never be bound by an express Warranty, but where the Ancestor was bound by the same Warranty, and therefore a Warranty made by Will is void. Lit. §. 734.

Ninthly, That the Heir claim in the same Right that the Ancestor does; for if one be a Successor only in Case of Corporation, he shall not be bound by the Warranty of a natural Ancestor. Co. Lit. 370.

Tenthly, That the Heir that is to be barred by the Warranty be of full Age at the Time of the fall of the Warranty; for if my Ancestor makes a Feoffment, or a Release with Warranty, and at this Time I am within Age, and after he dies, and the Warranty descends upon me within Age; this Warranty shall not bind me: But if I become of Age after the Warranty of my Ancestor, and before his Death; in this Case the Warranty may bar me.

And in the first Case it will bar me also whilst it is in Force; but I may by my Entry avoid it.

And the same Law is of a Woman Covert.

And yet if the Entry of an Infant or Woman Covert be not lawful when the Warranty descends; the Warranty shall bind them as well as any other, for such a Warranty cannot be avoided but by Entry and avoiding the Estate.

And where the Husband is within Age at the Time of the Descent of a Warranty to his Wife, and the Entry of the Wife is taken away, there the Warranty shall bind the Wife. Lit. §. 726. 1 Co. 67, 140. Co. Lit. 380.

If Lands be given to A. for Life, and after to the next Heir Male of A. and the Heirs Male of the Body of that Heir Male, and A. having Issue B. makes a Feoffment of the Land with Warranty to J. S. this is a good Warranty, and a Bar to the Issue, for a Man may be barred of his Right by a Warranty which he could never avoid; as where Lessee for Life is disseised, and a Collateral Ancestor of the Lessor does release to the Disseisor with Warranty, and dies, and this does descend upon the Lessor; by this he is barred. 1 Co. 66. 44 Ed. 3. 30. 44 Aff. pl. 35.

A Warranty made for Life or in Tail is good, and shall bind for so long Time; as if Tenant in Tail of Land lets it for Life, the Remainder to another in Fee, and a Collateral Ancestor confirms the Estate of the Tenant for Life, and dies, and the Tenant in Tail has Issue; this is a Bar of the Issue during the Life of the Tenant for Life; and in this Case upon a Voucher the Recovery in Value shall be put for Life only. Lit. §. 738. Co. Lit. 387.

If one makes a Gift in Tail, and grants to warrant the Land given according to the Gift; this Warranty is good no longer than the Estate lasts.

And no Warranty that a Donor can make in this Case can bar him of the Land, if the Donee dies without Issue, and the Estate determines. 10 Co. 96.

And where a Warranty bars, it is Entry, and extends to all the Land, and to all Persons upon whom it descends, and is a Bar of all the Right that every one of them has in the Land, so that if they have all Right jointly or severally, or one only has all the Right, and the Rest none, he that has the Right is barred.

And

And therefore, if Lands be given to *A.* and the Heirs of his Body, and for want of such Issue to *E.* his Sister and the Heirs of her Body, and *A.* makes a Feoffment with Warranty, and dies without Issue, having two Sisters *E.* and *S.* this is a Bar to *E.* for the Whole, altho' the Warranty descends on her and another. 8 Co. 52. Co. Lit. 373.

If there be Tenant for Life, the Remainder to his Son and Heir apparent in Tail, and the Father makes a Feoffment in Fee with Warranty, and dies; in this Case this is a good Warranty, and will not bar the Son, altho' it be made on Purpose to bar him.

But if by Agreement and Covin between him and *A.* and *B.* he makes a Lease to *A.* who makes a Feoffment in Fee to *B.* to whom the Father releases with Warranty, thinking by a Collateral Warranty to bar his Son; this is no Bar, for this Warranty began by Disseisin: And if in the first Case the Son enters in the Life-time of the Father upon the Land, he avoids the Warranty. 5 Co. 79.

If the Father be Tenant for Life, the Remainder to the next Heir Male of the Father, and to the Heirs Male of the Body of such next Heir Male, and the Father makes a Feoffment to *J. S.* with Warranty, and dies; it seems this is a good Warranty to bar the Heir; and in this Case the Heir cannot enter in the Life-time of his Father, for he cannot be Heir Male to his Father until his Father's Death. 1 Co. 66.

If Tenant for Life makes a Feoffment with Warranty, or be disseised, and a Release with Warranty, and he in Reversion being Heir to the Tenant, and does not enter in his Life-time, but suffers the Lessee for Life to die, and thereby the Warranty to fall and descend upon him; in this Case the Warranty generally is a Bar without any Assets.

But if he that does so alien, &c. be Tenant by the Curtesy, this is no Bar to the Heir without Assets in Fee-simple from the Tenant by the Curtesy, and then it is a Bar for so much.

And if the Heir for want of such Assets at the Time does recover the Land from his Mother, and after Assets does descend from the Father; in this Case the Tenant shall recover the same Land of the Mother again.

And if she who so aliens, &c. to be Tenant for Life of Inheritance or Purchase of her deceased Husband, or given unto her by any of the Ancestors of her Husband, or by any other Person seised to the Use of her Husband, or of any of his Ancestors; in this Case her Alienation, Release or Confirmation with Warranty, shall not bind the Heir whether he has Assets or not.

But if a Man conveys Lands to the Use of himself, *B.* his Wife, and the Heirs of his Body, and they have Issue *C.* and the Father dies, and *C.* disseises his Mother, or gets a Feoffment from a Disseisor, and then suffers a Recovery with a single Voucher, and after the Wife releases to the Recoverer with Warranty; in this Case the Warranty is a Bar to the Issue, and not void by the Statute of 11 H. 7.—Co. Lit. 366, 367. 1 Co. 67. Stat. Glouc. c. 1. §. 6. Lit. §. 724, 725. Stat. 11 H. 7. c. 20. 3 Co. 58.

If the Husband that is seised of Lands in the Right of his Wife levies a Fine, or makes a Feoffment in Fee with Warranty, and the Wife dies, and then the Husband dies; this Warranty shall not bind the Heir of the Wife without Assets of other Land in Fee-simple from the Father, altho' he be not Tenant by the Curtesy, but it is before her Death that he makes the Estate and the Warranty.

But a Fine levied by the Husband and Wife, in this Case is a good Bar to the Heir. Co. Lit. 366, 381. Stat. Glouc. c. 6. Lit. §. 332.

If Tenant in Tail that is in of another Estate, *i. e.* either by Disseisin, or by the Feoffment of a Disseisor, suffers a Common Recovery, and a Collateral Ancestor of the Tenant in Tail releases with Warranty to the Recoverer, and after the Recoverer makes a Feoffment to Uses executed by the Statute of 27 H. 8. and after the Collateral Ancestor dies; in this Case altho' the Estate of the Land be transferred *in the Post* before the Descent of the Warranty, yet it shall bind.

So if he to whom the Warranty is made suffers a Common Recovery, and after the Ancestor dies.

But if Tenant in Dower enfeoffs a Villain with Warranty, and the Lord of the Villain enters into the Land before the Descent of the Warranty, and after the Woman dies; this Warranty shall not bind the Right of the Heir.

So if a Collateral Warranty be made to a Bastard and his Heirs, and living the Ancestor, the Bastard dies without Issue, and the Lord by Escheat enters, and after the

the Ancestor dies; this Warranty does not bind. 3 Co. 62. 22 Aff. pl. 73. 29 Aff. pl. 34.

A Collateral Warranty may descend upon an Issue in Tail before the Right descend, and yet be good, with this Difference, that the Right be *in esse* in some of the Ancestors of the Heir at the Time of the Descent of the Warranty; as,

If a Tenant in Tail discontinues the Tail in Fee, and the Discontinuee is disseised, and the Brother of the Tenant in Tail releases all his Right, &c. to the Disseisor with Warranty, and dies without Issue, and the Tenant in Tail has Issue, and dies; in this Case the Issue is barred: But it is otherwise where the Right is not *in esse* in the Heir, or any of his Ancestors at the Time of the Fall of the Warranty, as if there be Lord and Tenant, and the Tenant makes a Feoffment in Fee with Warranty, and after the Feoffee purchases the Seignory, and after the Tenant ceases; in this Case the Lord shall have a *Cessavit*, for a Warranty never bars any Right that commences after the Warranty. Co. Lit. 388.

(E) *What shall be a good Warranty in Law, and how it shall bar and bind.*

A Warranty in Law may be good in its Creation, altho' it be made without Deed; for if a Man by his last Will and Testament devises Lands to another Man for Life, or in Tail, rendring Rent; to this Estate there is a Warranty in Law annexed. Co. Lit. 384, 386.

The Words *Dedi & Concessi*, or *Dedi* only in a Feoffment, make a good Warranty in Law.

But the Word *Concessi* only in Fine or Feoffment, does not make a Warranty in Law.

And altho' there be an exprefs Warranty in the Deed, yet this does not take away the implied Warranty of the Law.

And this Warranty in Law by *Dedi & Concessi*, or by *Dedi* only, is a general Warranty during the Life of the Feoffor. Co. Lit. 384. F. N. B. 134. 4 Co. 80.

Every Partition and Exchange implies in it, and has annexed to it a special Warranty in Law. Co. Lit. 102, 384.

Every Tenure by Homage Ancestrel, where a Tenant and his Ancestors have held Land of a Lord and his Ancestors Time out of Mind, by Homage, has a Warranty in Law annexed to it, by which the Lord is bound to warrant to the Tenant and his Heirs. 4 Co. 80.

If one makes a Gift in Tail, or Lease for Life of Land by Deed or without Deed, reserving a Rent, or of a Rent-service by Deed; in these Cases there is annexed an implied Warranty against the Donor or Lessor, his Heirs and Assigns. Co. Lit. 334.

When Dower is assigned to a Woman, there is a Warranty in Law included, which is that the Tenant in Dower being impleaded, shall vouch and recover in Value a third Part of the two Parts whereof she is dowable. Co. Lit. 384.

And this Warranty in Law is of the Nature of a lineal Warranty, and shall bind as a lineal Warranty only, for it never bars any collateral Title.

And hence it is, that this Warranty and Assets in some Cases is a good Bar; as if a Tenant in Tail exchanges for other Lands which are descended to the Issue, and he has accepted of them, or if not, that other Lands are descended to him.

But if Tenant in Tail of Lands makes a Gift in Tail, or Lease for Life, rendring Rent, and dies; this is no Bar.

And yet if other Assets in Fee-simple descend, this Warranty in Law and Assets is a good Bar. Co. Lit. 384.

(F) *What shall be said a lineal Warranty, and how such Warranty will bar.*

If the Case be so that if no such Warranty had been made by the Father or other Ancestor, the Right of the Lands or Tenements so warranted had or might have descended or come from the same Ancestor, and that from and by him that made the same Warranty, such a Warranty is a lineal Warranty. Lit. §. 703, 711.

As if a Man be seised in Fee of Land, and makes a Feoffment of it to another, and binds him and his Heirs to warrant the Land, and has Issue, and dies, and the Warranty descends upon the Issue; this is a lineal Warranty, for if none such had been, the

the Right of the Land had descended to him as Heir to his Father, and he must have made his Descent by him.

And if there be a Grandfather, Father and Son, and the Grandfather be disseised, and the Father releases to the Disseisor being in Possession with Warranty, &c. and dies, and after the Grandfather dies; this is a lineal Warranty to the Son, and altho' in this Case the Warranty descends before the Right, yet it is a good Bar. *Co. Lit. 371.*

And if there be two Brothers, and the Father is disseised, and the Eldest Brother releases with Warranty, and dies without Issue, and after the Father dies, and the Warranty descends to the Younger Son; this is a lineal Warranty to him. *Lit. §. 707.*

And if Lands be given to A. for Life, the Remainder to the right Heirs, and he makes a Feoffment with Warranty, and dies; this is but a lineal Warranty: And if there be two Parceners, and the Eldest enters into all the Land to her own Use, and then makes a Feoffment with Warranty, and dies without Issue; this as to her own Part is a lineal Warranty, but as to her Sister's Part it is a collateral Warranty. *1 Co. 66, 67.*

And in every Case where one demands an Estate-tail, if any Ancestor of the Issue in Tail, whether he had Possession of the Land or not, has made a Warranty, and if the Issue, that was to bring a Writ of *Formedon*, may or might have by Possibility, by some Matter that might have been done, conveyed to himself a Title by Force of the Gift by him that made the Warranty; this is a lineal Warranty.

As if a Man be seised of Land of an Estate-tail to him and the Heirs of his Body begotten, and makes a Feoffment of it, and binds him and his Heirs to warrant it, and has Issue, and dies; this Warranty descending upon the Issue is a lineal Warranty. *8 Co. 12. Terms de la Ley, Tit. Warranty.*

And if Lands be given to one and the Heirs Male of his Body, and for want of such Issue to the Heirs Female of his Body, and the Donee makes a Feoffment with Warranty, and has Issue a Son and a Daughter, and dies; this Warranty is lineal to the Son, and if the Son dies without Issue Male, it is a lineal Warranty from the Father to the Daughter.

But if the Brother in his Life-time releases to the Discontinuee, &c. with Warranty, &c. and after dies without Issue; this is a collateral Warranty to the Daughter. *Lit. §. 719.*

If Lands be given to the Husband and Wife and the Heirs of their two Bodies engendred, and they have Issue, and the Husband discontinues, and dies, and after the Wife releases with Warranty, and dies; this is a lineal Warranty. *Lit. §. 714.*

And if Lands be given to a Man and a Woman unmarried, and the Heirs of their two Bodies, and they intermarry, and are disseised, and the Husband releases with Warranty, and dies, and after the Wife dies; this is a lineal Warranty to the Issue for all the Land. *Co. Lit. 375.*

And if Tenant in Tail has Issue three Sons, and discontinues, and the Middle Brother releases with Warranty, and dies without Issue, and after the Father dies, and after the Eldest Brother dies without Issue, so that the Warranty descends to the Younger Brother; this is a lineal Warranty to him. *Lit. §. 718.*

And if a Father gives Land to his Eldest Son and the Heirs Male of his Body, &c. the Remainder to the second Son, &c. if the Eldest Son aliens in Fee with Warranty, &c. and has Issue Female, and dies without Issue Male; this is a lineal Warranty to the second. *Ibid.*

And in all these Cases of a lineal Warranty, if the Right of the Estate to be barred be the Right of an Estate in Fee-simple, it is a Bar without any Affets.

For the Rule is, that as to him that demands a Fee-simple by any of his Ancestors, he shall be barred and bound by a lineal Warranty that descends upon him, unless he be restrained by some Statute.

But it does not bind the Right of an Estate in Fee and Tail without Affets.

For in that Case the Rule is, that as to him that demandeth Fee-tail by Writ of *Formedon* in the Descender, he shall not be barred by a lineal Warranty, unless he has Affets by Descent in Fee-simple of other Land from the Ancestor that made the Warranty; and then it is a bar for so much only as descends to him, and no more. *Lit. §. 711, 712. Doct. & Stud. 152. 7 Co. 153. 8 Co. 52.*

And yet if the Issue in Tail aliens the Affets descended, and dies; the Issue of that Issue is not barred by this Warranty and Affets. *Co. Lit. 393.*

But if the Issue to whom the Warranty descends brings his Writ of *Formedon*, and is barred by Judgment by reason of the Warranty and Affets; in this Case altho' he aliens the Affets afterwards, yet the Estate-tail is barred for ever. *Ibid.*

(G) *What shall be said a collateral Warranty, and how such a Warranty shall bar.*

IF Tenant for Life aliens in Fee with Warranty, or be disseised and releases to the Disseisor with Warranty, and dies, and the Warranty descends on him in Reversion or Remainder; this is a collateral Warranty.

So if the Lessee for Life be disseised, and a collateral Ancestor of him in Reversion releases with Warranty, and dies, and the Warranty descends on him in Reversion; this is a collateral Warranty, for that is collateral which is collateral to the Title of the Land. 2 Co. 67. 21 H. 7. 10. Lit. §. 725.

And if a Man seised of Lands in Fee has Issue two Sons, and the Father dies, and the Younger Son enters, and aliens the Land with Warranty, and dies without Issue; this is no collateral Warranty that is descended on the Elder Brother. Lit. §. 707. Doct. & Stud. 152.

And if a Son be disseised of his own Land, and brings an Assise, and after the Father releases to the Disseisor with Warranty, and dies; this Warranty that descends to the Son is a collateral Warranty. 21 H. 7. 10.

And if a Father disseises his Son of the Land he has of his own Purchase, without any Intent to alien afterwards and to bar his Son, and after he makes a Feoffment with Warranty, and dies before the Entry of his Son, so that the Warranty descends; this is a collateral Warranty. Lit. §. 707.

If there be Father and two Sons, and the Father is disseised, and the Younger Son releases Warranty to the Disseisor, and dies without Issue, and then the Father dies; in this Case the Warranty now descended is a collateral Warranty.

If a Lease be made for Life to the Father, the Remainder to his next Heir, and the Father is disseised, and releases with Warranty, and dies; this is a collateral Warranty to the Heir.

And if the Husband discontinues the Right of his Wife, and an Ancestor collateral to the Wife to whom she is Heir releases with Warranty, and dies, and after the Husband dies; this is a collateral Warranty, and a Bar to her. Co. Lit. 388.

And in every Case where a Man demands an Estate-tail by a Writ of *Formedon*, if an Ancestor of the Issue in Tail, which has or has not Possession, makes a Warranty, and the Issue that is Demandant cannot by any Possibility that may be done convey to him a Title by Force of the Gift, from and by him that made the Warranty; this is a collateral Warranty; as if Tenant in Tail discontinues the Tail, and dies, having Issue, and the Uncle of the Issue releases with Warranty to the Discontinuee, and dies without Issue, so that the Warranty descends on the Issue in Tail; this is a collateral Warranty.

So if such a Discontinuee makes a Feoffment in Fee, or be disseised, and the Uncle releases with Warranty to the Disseisor or Feoffee, and dies without Issue, and the Warranty descends on the Issue; this is a collateral Warranty. Lit. §. 709. Plow. 234. 10 Co. 96. Kelw. 78.

If a Tenant in Tail has three Sons, and discontinues the Tail in Fee, and the middle Brother releases to the Discontinuee with Warranty, and after the Tenant in Tail dies; this is a collateral Warranty to the Elder Brother. Lit. §. 708.

If one has Issue three Sons, and gives Land to the Eldest and the Heirs of his Body, and for want of such Issue to the Middle and the Heirs of his Body, the Remainder to the Third and the Heirs of his Body, and the Eldest discontinues the Tail in Fee with Warranty, and dies without Issue; this is collateral to the Middle Son.

In the same Manner it is in Case where the Middle Son has the same Land by Force of the same Remainder, because his Elder Brother made no Discontinuance, but died without Issue of his Body, and after the Middle Brother makes a Discontinuance with Warranty, &c. and dies without Issue; this is a collateral Warranty to the Youngest Son.

And in this Case if any of the Sons be disseised, and the Father that made the Gift, &c. releases to the Disseisor all his Right with Warranty; this is a collateral Warranty to that Son upon whom the Warranty does descend. Lit. §. 716.

If Lands be given to A. and the Heirs of his Body, and for want of such Issue to E. his Sister and the Heirs of her Body, and A. makes a Feoffment with Warranty, and

and dies without Issue, having two Sisters *E.* and *S.* this is a collateral Warranty to *E.* 8 Co. 52. *Lit.* §. 713.

If Lands be given to a Man and the Heirs of his Body begotten, who takes a Wife and has Issue a Son by her, and the Husband discontinues the Tail in Fee, and dies, and after the Wife releases to the Discontinuee with Warranty, and dies, and the Warranty descends to the Son; this is collateral to him.

If Tenant in Tail discontinues the Tail in Fee, and the Discontinuee is disseised, and the Brother of the Tenant in Tail releases to the Disseisor with Warranty in Fee, and dies without Issue, and the Tenant in Tail has Issue, and dies; this is collateral as to the Issue.

If Tenant in Tail has Issue two Daughters, and dies, and the Elder enters into all to her own Use, and therefore makes a Feoffment in Fee with Warranty, and dies without Issue; this Warranty as to the other Sister's Part is collateral, but not as to her own. *Lit.* §. 701.

If the Husband and Wife, Tenant in special Tail, have Issue a Daughter, and the Wife dies, and the Husband by a second Wife has Issue another Daughter; and discontinues in Fee, and dies, and a collateral Ancestor of the Daughter's releases to the Discontinuee with Warranty, and dies, and the Warranty descends upon both the Daughters; this is a collateral Warranty to them.

If Lands be given to one and the Heirs Male of his Body, and for want of such Issue to the Heirs Female of his Body, and the Father dies, and the Brother releases with Warranty, and dies without Issue; this is collateral to the Daughter. Co. *Lit.* 373.

If Tenant in Tail makes a Lease for Life, the Remainder to another in Fee, and a collateral Ancestor confirms the Estate of Tenant for Life with Warranty, and dies, and after the Tenant in Tail dies having Issue; this is a good binding collateral Warranty during the Estate for Life. *Lit.* §. 738.

And in all these and such like Cases of a collateral Warranty, whether the Right be the Right of an Estate-tail, or the Right of an Estate in Fee-simple that is to be barred, it is a Bar without any Assets; for in this Case the Rule is, that a collateral Warranty is a Bar to him that demands Fee-simple, and also to him that demands Fee-tail, without any other Descent of Lands in Fee-simple, so that the Heir on whom the same Warranty is descended can never have the Land so warranted whilst the Warranty continues in Force, but is bound thereby, except it be in some special Cases restrained by Act of Parliament; as where the Husband alone during his Wife's Life, or after her Death, being Tenant by the Curtesy, makes a Feoffment by Fine or Deed of his Wife's Land which she has by Descent or Purchase, with Warranty; this will not bar her Heir without Assets of other Lands in Fee-simple descended from the same Ancestor that made the Warranty.

Or where a Wife after her Husband's Death shall alone, or with her succeeding Husband, alien, release, confirm or discontinue with Warranty, the Land she holdeth in Dower, or in Tail, of the Gift of her former Husband, or any of his Ancestors; this Warranty is voidable, and will not bind with Assets. *Lit.* §. 712, 738. Co. *Lit.* 374, 365. *Stat. Glouc. c. 3.* *Stat. 11 H. 7. c. 20.* 10 Co. 66.

Thus the Common Law is as to collateral Warranties; but by *Stat. 4 & 5 Ann. c. 16. §. 21.* All Warranties which shall be made after the first Day of Trinity Term 1705. by any Tenant for Life, of any Lands, Tenements or Hereditaments, the same descending or coming to any Person in Reversion or Remainder, shall be void and of no Effect; and likewise all collateral Warranties which shall be made after the said Trinity Term, of any Lands, Tenements or Hereditaments, by any Ancestor who has no Estate of Inheritance in Possession in the same, shall be void against his Heir.

(H) *What shall be said a Warranty that begins by Disseisin, Abatement or Intrusion, and what is the Effect thereof.*

IF the Son purchases Land, &c. and after lets it to his Father, or any other Ancestor, for Years, or at Will, and he by his Deed enfeoffs a Stranger, and that with Warranty, and after dies, whereby the Warranty descends upon the Heir; this Warranty commences by Disseisin.

So if Tenant by *Elegit*, Statute-Merchant, Guardian in Chivalry, or Socage, or because of Nurture, makes a Feoffment with Warranty, and this Warranty descends on his Heir; it does not commence by Disseisin.

So if one who has no Right at all enters into my Land, and makes a Feoffment to another with Warranty.

So if one Coparcener enters into the whole Land, and makes a Feoffment in Fee with Warranty; this Warranty as to the one Moiety begins by Disseisin.

So if Father and Son purchase Lands to them jointly, &c. and the Father aliens the Whole to another with Warranty, &c. and after the Father dies; this Warranty as to the one Moiety begins by Disseisin.

But if the Purchase be to them two and the Heirs of the Son, it is otherwise; for if the Son enters in the Life-time of the Father, the Warranty is avowed for all, but if he does not enter, then as to the Father's Moiety it is a collateral Warranty.

And if the Purchase be to the Father and Son and the Heirs of the Father, and the Father aliens with Warranty, &c. in this Case the Warranty is good for the Whole. *Lit. §. 699, 700, 701, 702. Finch 82. Co. Lit. 367.*

If the Father be Tenant for Life, the Remainder to his Son and Heir in Fee, and the Father by Covin and Consent, on Purpose to bar the Heir by a collateral Warranty, makes a Lease for Years, to the End that the Lessee should make a Feoffment in Fee, that the Father may release to the Feoffee with Warranty; and all this is done accordingly, and the Father dies, and the Warranty descends to the Son; in this Case the Warranty shall be said to begin by Disseisin.

But if the Father in this Case makes a Feoffment in Fee with Warranty, and dies; this is a good Warranty to bind the Son altho' it be done on Purpose to bar him.

So if one Brother makes a Gift in Tail to another, and the Uncle disseises the Donee, and enfeoffs another with Warranty, the Uncle dies, and the Warranty descends on the Donor, and then the Donee dies without Issue; this Warranty begins by Disseisin.

So if the Father and Son and a third Person be Jointenants in Fee, and the Father makes a Feoffment in Fee of the Whole with Warranty, and dies, and then the Son dies; in this Case, as to the Part of the third Person, and to the Part of the Son, the Warranty shall be said to begin by Disseisin.

But Releases at this Day by a Tenant for Life, to a Disseisor or any other without Covin, altho' it be to the Intent to bar him in Reversion, shall bar him; for Intent without Covin and Disseisin shall not avoid a Warranty.

Warranties which begin by Disseisin have these Qualities:

First, For the most part the Disseisin is done immediately to the Heir that is bound by the Warranty.

Secondly, The Warranty and Disseisin are *simul* and *semel*.

And yet if a Man disseise another with Intent to make a Feoffment with Warranty, altho' the Feoffment be made twenty Years after the Disseisin, yet it shall be said to be a Warranty that begins by Disseisin.

But in all these Cases of Warranties that begin by Disseisin, this is the Rule, that they are altogether void and without Force as to all others but to the Parties themselves that make them, and therefore they do not bar or bind any others at all of their Right that have any.

And the same Law is of a Warranty that begins by Abatement or Intrusion; that is, when an Abatement or Intrusion is made on Purpose to make a Feoffment in Fee with Warranty.

And so also it is where the Tenant dies without Heir, and an Ancestor of the Lord enters before the Entry of the Lord, and makes a Feoffment in Fee with Warranty; in this Case this shall not bind the Lord, because it begins by Wrong. *5 Co. 80. Co. Lit. 366, 367.*

(1) *To what Things a Warranty may be annexed and extended, and to what not, and how.*

A Warranty in Deed may be annexed to Estates of Inheritance or Freehold, and that not only of corporeal Things which pass by Livery, as Houses, Lands, or the like, but also of incorporeal Things which lie in Grant, as Advowsons, Rents, Commons, Estovers, and the like, which issue out of Lands or Tenements, and that

not only to Inheritances *in esse*, but also to such as are newly created, as a Man (some say) may grant a Rent, &c. *de novo*, out of the Land for Life, in Tail, or in Fee with Warranty.

So a Warranty in Law may extend to a Rent newly created, and therefore if such a Rent be granted in Exchange for an Acre of Land; this Exchange and Warranty thereunto annexed is good.

But a Warranty may not be annexed to an Estate or Lease for Years, altho' it be a Lease of one thousand Years, nor to any other Chattel; and therefore in all Actions in which Lessee for Years may have, as Trespass, &c. a Warranty cannot be pleaded in Bar. *Co. Lit.* 366, 389.

A Warranty may be made upon any Kind of Conveyance, as upon Fines, Feoffments, Gifts, &c. also a Warranty may be made by and upon Releases and Confirmations made to the Tenant of the Land, altho' he that makes the Release or Confirmation has no Right to the Land, &c. and yet some say, that by a Release or Confirmation where there is no Estate created, or Transmutation of the Possession, a Warranty cannot be made to the Assignee.

But if *A.* be seised of Land in Fee, and *B.* releases to him, or confirms his Estate in Fee with Warranty to him, his Heirs and Assigns; in this Case the Warranty is good; and so it is in the Case last before, and both the Party himself and the Assignee may vouch. *Co. Lit.* 372, 385. *Lit.* §. 738, 745, 706.

(K) *The Fruit and Effect of a Warranty in Deed, and what Use may be made of it.*

THE Fruit and Effect of a Warranty in Deed is, that it always concludes and bars the Warrantor himself of the Land so warranted for ever; so that all his present and future Rights that he has or may have therein are hereby extinct.

And therefore if the Father be disseised, and the Son in his Life-time release all his Right to the Land to the Disseisor, and makes a Warranty of the Land in the Deed, and then the Father dies, and the Right of the Land descends to the Son; in this Case altho' the Release does not bar the Son, yet the Warranty bars him.

And for the most part also it concludes and bars the Heirs of him that made the Warranty, to whom the same Warranty descends, to demand the same Land against the Warranty, for if it be a lineal Warranty, it is a Bar of an Estate in Fee-simple without any Assets, *i. e.* without any other Land descended to him in Fee-simple from the same Ancestor that made the Warranty: And with Assets it is a Bar of an Estate in Tail.

And if it be a collateral Warranty, it is with or without Assets a Bar of an Estate in Fee-simple or Fee-tail, and all Possibility of Right thereunto; and yet so as it does not pass any Estate or Right, but only binds the Right so long as the Warranty is in Force, for if the Warranty be avoided, the Right may be revived. *Co. Lit.* 265, 372, 365, 384. 4 *Co.* 121. 10 *Co.* 97.

But neither the lineal or collateral Warranty can enlarge an Estate, and therefore if the Lessor by Deed releases to his Lessee for Life, and warrants the Land to him and his Heir; this does not make his Estate greater, neither will it bar Titles of Entry or Action in Cases of Mortmain, Consent to a Ravisher, Mortgage or Dower; and therefore if an Ancestor of the Lord has Title to enter upon an Alienation in Mortmain, and he releases and makes a Feoffment with Warranty; this Warranty will neither bar him nor his Heir.

So if a collateral Ancestor will make a Warranty which afterwards descends upon one that has Title of Entry upon a Condition broken; this will not bar his Entry, &c. neither will it bar any Right that shall commence after the Warranty made.

And the Warranty that commences by Disseisin does not bind or bar any Estate with or without Assets. *Co. Lit.* 389, &c.

And in Cases where the lineal or collateral Warranty is a Bar, there if the Party be impleaded by him or his Heirs that made the Warranty, the Party impleaded, who is Tenant of the Land, may plead and shew forth his Warranty against him, and demand Judgment whether he contrary to his own Warranty shall be suffered or received to demand the Thing warranted; and this in Pleading is called a

Rebutter,
quid.

And if he be impleaded or sued by another for the Land, then he to whom the Warranty is made, or his Heirs, may vouch, *i. e.* call in the Warrantor or Heirs to warrant the Land. Voucher, *quid.*

And this is an Interpleader in the Nature of an Action brought by the Warrantor against the Warrantee, wherein he that vouches (who is called the Voucher) is Demandant, and he that is vouched (who is called the Vouchee) is made Tenant or Defendant to the Action, and the Voucher is as it were out of the Suit. Interpleader.
Voucher.
Vouchee.

And this second Tenant the Vouchee is called the Tenant by the Warranty. Tenant by
Warranty.

And hereupon a Writ issues to the Sheriff to summon the Vouchee to appear, called a *Summons ad Warrantizandum*. Summons *ad*
Warrantizandum.

And if the Vouchee appears, he must plead to the Voucher; and if he shews Cause why he should not warrant, that must be tried; and this shewing of Cause is called a Counterplea to the Voucher. Counterplea
to the Voucher.

But if he pleads in Avoidance of the Warranty, it is called a Counterplea to the Warranty: And if he cannot defend himself against the Warranty, the Stranger shall recover the Land demanded against the Voucher, and he shall recover as much other Land against the Vouchee of the Lands he has or had at the Time of the Voucher. Counterplea
to the War-
ranty.
Recovery.

And this Recovery of other Land is called a Recovery in Value. In Value.

And if the Vouchee at the Time of the Voucher and Recovery has no Lands descended to him to answer the Warrantee, but has afterwards Lands happening to him by Descent from that Ancestor, then he may have a Re-summons, and recover the Land that afterwards happens.

But if the Sheriff returns upon the Summons, that the Vouchee is summoned, and he makes Default, then he shall have a *Magnum Cape ad valentiam*, when if he makes Default again, the Judgment shall be given against the Voucher, and he shall recover over the Value against the Vouchee, and if the Vouchee appears, and then makes Default, the Voucher shall have a *Parvum Cape ad valentiam*, and then if he makes Default, Judgment shall be given as before.

But if the Sheriff upon the Summons returns that *he has nothing whereby he may be summoned*, then the Vouchee may have a Writ called *Sequatur sub suo periculo*, whereupon shall issue an *Alias* and *Phuries*, and if the like Return be made, the Demandant shall have Judgment against the first Tenant, but he cannot recover in Value against the Vouchee. *Sequatur sub*
suo periculo.

And if the Vouchee had a Warranty from some other for the Land, he may *derraingn*, *i. e.* maintain the Warranty over, and shall recover in Value over also against his Voucher in the same Manner as before. *Co. Lit.* 101, 265. 10 *Co.* 98, 99. *Dyer* 42. *Derraignment*
del Garrant.

Or the Warrantee to whom the Warranty is made, or his Heirs, may at any Time before they be impleaded for the Land, if they will bring a *Warrantia Chartæ* upon the Warranty in the Deed against the Warrantor or his Heirs, and hereby all the Land the Heir of the Warrantor has by Descent from the Ancestor, who made the Warranty at the Time of this Writ brought, shall be bound and charged with the Warranty into whose Hands soever it goes afterwards; so if the Land warranted be after recovered from the Warrantee, he shall have so much Land over again of the other Land of the Heir of the Warrantor, or of the Warrantor himself, if he be living. *Warrantia*
Chartæ.

And altho' the Warrantee or his Heirs recovers in this Writ, yet upon Occasion he may afterwards vouch the Warrantor or his Heirs notwithstanding.

And herein observe it is good Policy if a Man suspect any Thing to bring this Writ of *Warrantia Chartæ* betimes, because it binds all the Land of the Warrantor from the Time of the Writ brought, and not any of his other Lands he had before that Time that are now aliened. *F. N. B.* 134. *Co. Lit.* 102.

No Fine nor Warranty shall bar any Estate in Possession, Reversion or Remainder, which is not devested and put to a Right; for he who has the Estate or Interest in him, cannot be put to his Action, Entry or Claim; for he has that already which Entry, Action or Claim can give him. 9 *Co.* 106. a. 10 *Co.* 95. b. 96. a. 1 *Sid.* 59. 2 *Inst.* 517. *Cro. Jac.* 60. 5 *Co.* 124. 1 *Vent.* 81.

Nota; Where the Entry is gone, and only a Right of Action left, there a Warranty shall bind; but it shall not bind where there is a Right of Entry.

(I.) *Who may take Advantage of a Warranty, and how and against whom it may be taken.*

ALL those that are Parties to the Warranty, *i. e.* such as are named in the Deed regularly, shall take Advantage of the Warranty; as if one warrants Land to another, his Heirs and Assigns; in this Case both the Heirs and the Assigns may take Advantage of it, and they both may vouch or rebut, or have a *Warrantia Chartæ*, so as they come in Privy of Estate; for otherwise the Heir or Assigns cannot vouch, or have a *Warrantia Chartæ*, and yet he may rebut notwithstanding in divers Cases.

But those who are not named for the most part shall not take Advantage of the Warranty; and therefore if Land be warranted to *J. S.* and not to him and his Heirs, or to him and his Assigns, or to him, his Heirs and Assigns; in these Cases neither the Heir nor the Assignee may vouch or have a *Warrantia Chartæ*; and yet in some Cases where it is so, the Assignee or Tenant of the Land may rebut. *Co. Lit. 365. 5 Co. 17.*

The Warranty annexed to an Exchange or Partition by *Dedi*, and by Homage Ancestrel, always goes in Privy, and therefore an Assignee in these Cases can take no Advantage of it.

And yet in the Cases of Exchange and *Dedi*, an Assignee may rebut. But the Assignee of a Lessee for Life may take Advantage of the Warranty in Law annexed to his Estate. *Co. Lit. 384.*

If one grants to warrant Land to another, his Heirs and Assigns; in this Case the Heirs or Assigns, Heir of the Assignee, or Assignee of the Heirs of the Feoffee, or Assignees of Assignees *in infinitum*, shall take Advantage of the Warranty; and therefore, if one enfeoffs *J. S.* to have and to hold to him, his Heirs and Assigns, and warrants the Land to him, his Heirs and Assigns, and *A.* enfeoffs *B.* and his Heirs, and *B.* dies; in this Case the Heir of *B.* shall vouch as Assignee to *A.*

And if one enfeoffs *A.* and *B.* *Habendum* to them and their Heirs, and warrants the Land to them, their Heirs and Assigns, and *A.* dies, and *B.* survives, and dies, and his Heir enfeoffs *C.* in this Case *C.* shall take Advantage of this Warranty as Assignee.

If one enfeoffs *A.* with Warranty to him, his Heirs and Assigns, and *A.* enfeoffs *B.* and *B.* reinfeoffs *A.* in this Case neither *A.* or his Assigns shall ever take any Advantage of this Warranty.

And yet if *B.* enfeoffs the Heir of *A.* he may take Advantage of the Warranty. *5 Co. 17. Co. Lit. 384, 385.*

If one makes a Feoffment by Deed with Warranty to the Feoffee, his Heirs and Assigns, and the Feoffee makes a Feoffment over to another by Word without Deed; in this Case the second Feoffee shall have all the Advantage of this Warranty, for an Assignee by Word shall have the same Advantage that an Assignee by Deed shall have. *Ibid.*

If a Feoffment be made with Warranty to a Man and his Heirs and Assigns, and he makes a Gift in Tail, the Remainder in Fee, and the Donee makes a Feoffment in Fee; this Feoffee shall not vouch as Assignee, but he must vouch his Donor upon the Warranty in Law, and yet he may rebut. *Ibid.*

If Lands be given to two Brethren in Fee-simple, with Warranty to the Eldest and his Heirs, and the Eldest dies without Issue; in this Case, altho' the other Brother be his Heir, yet he shall have no Advantage at all by the Warranty, because he comes in above the Warranty. *Ibid.*

But generally all that claim under the Warranty shall take Advantage thereof by way of Rebutter, altho' they can take no other Advantage by it. *Ibid.*

If one makes a Feoffment to two, their Heirs and Assigns, and one of them makes a Feoffment in Fee; this Feoffee in this Case shall not take Advantage as Assignee. *Ibid.*

An Assignee of Part of the Land shall take Advantage of a Warranty; as,

If a Man makes a Feoffment of two Acres with Warranty to him, his Heirs and Assigns, and the Feoffee makes a Feoffment of one Acre of it to another; in this Case the second Feoffee shall take Advantage of the Warranty as Assignee. *Co. Lit. 385.*

And therefore herein there is a Difference between the whole Estate in Part, and Part of the Estate in the Whole or in any Part; for if a Man has a Warranty to him, his Heirs and Assigns, and he makes a Lease for Life, or Gift in Tail; in these Cases the Lessee or Donee shall not take Advantage of the Warranty as Assignee, but they may vouch the Lessor or Donor upon the Warranty in Law. *Co. Lit. 385.*

But if a Lease for Life be made, the Remainder in Fee; such a Lessee may vouch as Assignee upon the first Warranty. *Co. Lit. 384.*

If the Father has a Feoffment made to him and his Heirs with Warranty, and he makes a Feoffment to his Son and Heir with Warranty; in this Case the Son may take Advantage of the first Warranty after his Father's Death. *Ibid.*

If a Man enfeoffs a Woman with Warranty, and they intermarry and are impleaded, and upon the Default of the Husband the Wife is received; in this Case she may vouch her Husband, *Et sic e converso*. If a Woman enfeoffs a Man with Warranty, and they intermarry and are impleaded; the Husband in this Case shall vouch himself and the Wife. *Co. Lit. 390.*

He that comes into the Land merely by Act of Law *in the Post*, as the Lord by Escheat, or the like, shall never take Advantage of a Warranty; and therefore if Tenant in Dower enfeoffs a Villain with Warranty, and the Lord of the Villain enters; or a Feoffment be to a Bastard with Warranty, and he dies without Issue, and the Lord enters by Escheat; the Lord shall never take Advantage of these Warranties.

But it is otherwise where a Man comes to the Land by Limitation of Use, or a common Recovery, which is by the Act of the Party; for if Tenant in Tail being in of another Estate, *i. e.* by Disseisin, or Feoffment of a Disseisor, suffers a common Recovery, and a collateral Ancestor of the Tenant in Tail releases with Warranty to the Recoveror, and after the Recoveror makes a Feoffment to Uses, which are executed by the Statute of 27 H. 8. and after the collateral Ancestor dies; in this Case the Tertenants may take Advantage of the Warranty by way of Rebutter, altho' the Estate be transferred *in the Post*.

So if he to whom the Warranty is made suffers a common Recovery, and after the Ancestor dies; the Recoverer may take Advantage of the Warranty by way of Rebutter, for any Man that has the Possession of Land, altho' he has no Deed to shew how he came by the Possession of it, or how he is Assignee, may rebut the Demandant, and so bar him, and defend his own Possession.

And therefore the Tenant by the Curtesy, Donee in Tail that is in another Estate, an Assignee by Force of a Warranty made to a Man and his Heirs, Feoffee of a Donee in Tail may rebut and bar the Demandant by the Warranty. 26 H. 8. 3. *2 Aff. pl. 37. 29 Aff. 34. 3 Co. 62, 63.*

If one enfeoffs another of an Acre of Ground with Warranty, and has Issue two Sons, and dies seised of another Acre of Land of the Nature of *Borough English*; in this Case, altho' the Warranty descends upon the Eldest Son only, yet both the Sons may be vouched.

And so also it is of Heirs in Gavelkind, the Eldest shall be vouched as Heir to the Warranty, and the Rest in Respect to the Inheritance.

And in like Manner of the Heir at the Common Law, the Heir of the Part of the Mother shall be vouched, or the Heir at the Common Law may be vouched alone at the Election of the Tenant.

And in like Manner the Heir at Common Law shall be vouched with the Heir in *Borough English*.

And so also a Bastard shall be vouched with a *Mulier*.

And if a Man dies seised of certain Lands in Fee, having Issue a Son and a daughter by one Venter, and a Son by another, and the Eldest Son enters, and dies, and the Land descends to the Sister; in this Case the Warranty descends on the Son, and he may be vouched as Heir, and the Sister also may be vouched as Heir to the Land. *Co. Lit. 376. 1 Ed. 3. 13. 5 H. 7. 2.*

If two make a Feoffment with Warranty, and one of them dies, the Survivor shall not be charged alone with the Warranty, but the Heir of him that is dead shall be charged also.

And if two be bound to warrant Land, and both of them die, the Heirs of both of them ought to be vouched, and shall be equally charged.

And if the Heir be vouched in the Award of three several Persons, the one of them only shall not be charged, but they shall be charged equally. 3 Co. 14. Co. Lit. 386. 16 H. 7. 13. 48 Ed. 3. 5.

If a Woman an Heiress of the Disseisor enfeoffs me with Warranty, and after she is married to the Dissee; in this Case I may take Advantage of this Warranty against the Dissee, and rebut him upon it, if he sues me for the Land.

So if the Husband and Wife sues me for the Land of his Wife, and I have a Warranty of a collateral Ancestor of the Husband's descended to him; I may make Use of this to bar the Husband and Wife. Co. Lit. 365.

(M) *When a Warranty shall be said to be defeated, determined or avoided, and how or not.*

A Warranty lineal or collateral may be defeated, determined or avoided in all or in Part; and this is sometimes by Matter in Law, and sometimes by Matter in Deed. Co. Lit. 392, 393.

If the Estate to which the Warranty is annexed be gone, the Warranty annexed thereunto is gone also.

And therefore if an Estate-tail to which a Warranty is annexed be spent, the Warranty is determined.

And if a Man makes a Gift in Tail with Warranty, and after the Donee makes a Feoffment, and dies without Issue, the Warranty is gone.

So if Tenant in Tail discontinues the Tail, and the Discontinuee be disseised, or makes a Feoffment on Condition, and a collateral Ancestor of the Issue releases to the Disseisor or Feoffee, on Condition, with Warranty, and after the Discontinuee enters upon the Disseisor, or on the Feoffee, for the Condition broken; in these Cases the Warranty made by the collateral Ancestor is gone.

So if a Seignior be granted with Warranty, and the Tenancy escheat, so that the Seignior is extinct; hereby also the Warranty is defeated.

So if a collateral Ancestor heretofore had released with Warranty, and then had entered into Religion; this Warranty had bound, but if after he had been dearraigned, the Warranty had been defeated. 10 Co. 96. 1 Co. 2, 3, 62. Lit. §. 741. Co. Lit. 392.

If the Father makes a Feoffment to his Son and Heir apparent with Warranty, and dies, so that the Warranty descends upon the Son; hereby the Warranty is gone.

And yet if a Feoffment be made to a Man and his Heirs, and he dies, leaving Issue Daughters; in this Case the Warranty shall be divided, and is not determined. Co. Lit. 384. Bro. Garranty 27.

If Tenant in Tail makes a Feoffment to his Uncle, and after the Uncle makes a Feoffment in Fee with Warranty, &c. to another, and after the Feoffee of the Uncle re infeoffs again the Uncle, and after the Uncle enfeoffs a Stranger in Fee without Warranty, and dies without Issue, and the Tenant in Tail dies; hereby the Warranty made to the first Feoffee is defeated.

So if the Uncle makes the Warranty to the Feoffee, his Heirs and Assigns, and takes back an Estate in Fee, and after enfeoffs another.

But if one makes a Feoffment with Warranty to the Feoffee, his Heirs and Assigns, and the Feoffee re infeoffs the Feoffor and his Wife, or the Feoffor and a Stranger; in these Cases the Warranty is not defeated, but continues still.

So if two make a Feoffment with Warranty to one, his Heirs and Assigns, and the Feoffee re infeoffs one of the Feoffors; in this Case the Warranty is not gone.

And if in the first Case the Feoffee makes an Estate to his Uncle in Tail or for Life saving the Reversion, or a Release for Life, the Remainder over, &c. in this Case the Warranty is only suspended. Lit. §. 743, 744. Co. Lit. 390.

If one makes a Feoffment or Release with Warranty, and after is attainted of Treason or Felony; hereby the Warranty is gone; and altho' he afterwards obtains his Pardon, yet the Warranty is not revived. Co. Lit. 391.

If a Feoffment with Warranty be made to two or more, and they being Jointenants afterwards by Deed make Partition; by this the Warranty is determined.

So if there be two Jointenants, and one of them disseises the other, and he that is disseised recovers in an Assise, and has Judgment to hold in Severalty; hereby the Warranty is determined. 6 Co. 12.

So if *A.* and *B.* be Jointenants of *Whiteacre* for Life, and *A.* by Fine grants to *B.* *totum & quicquid habet in tenementis*; hereby the Warranty is gone.

But if a Partition be made by Judgment upon a Writ by Force of the Statute of 13 H. 8. this does not defeat the Warranty fallen to them, but it shall be divided between them, and they shall all of them take Advantage of it. *Eustace and Shole's Case*, adjudged H. 22 Jac. B. R.

If one enfeoffs three with Warranty to them and their Heirs, and one of them releases to one of the other two; hereby the Warranty is gone for that Part. But if one of them releases to the other two; in this Case the Warranty is not gone but continues, and they may vouch upon it. *Co. Lit.* 385.

If one enfeoffs two Men and their Heirs, and one of them makes a Feoffment in Fee; hereby the Warranty is not determined, but the other may take Advantage of it notwithstanding. *Co. Lit.* 385.

If the Party that has the Warranty, or the Estate to which the Warranty is annexed, releases to him that is bound to warrant all Warranties, or all Covenants real, or all Demands; by either of these Releases the Warranty is gone.

So also if in a Defeasance made between the Parties it be agreed the Warranty shall be void, by this Defeasance the Warranty may be void also.

Or if it be so agreed that the Warrantee or his Heirs, &c. shall not vouch, or have a *Warrantia Chartæ*; by this the Warranty is avoided in Part. *Co. Lit.* 392, 393. *Lit.* § 748.

If Tenant in Tail enfeoffs his Uncle who enfeoffs another in Fee with Warranty, and the Feoffee releases the Warranty to his Uncle; thereby the Warranty is extinct.

But if a Gift in Tail be made with Warranty, in this Case a Release made by the Tenant in Tail of the Warranty will not extinguish it. *Co. Lit.* 291.

If the Parties, between whom the Warranty is, intermarry, hereby the Warranty is suspended during the Coverture in some Cases. *Co. Lit.* 390.

If Tenant in Tail makes a Feoffment in Fee with Warranty, and disseises the Continuee, and dies seised; this suspends the Warranty. *Co. Lit.* 330.

If two make a Feoffment in Fee, and warrant the Land to the Feoffee and his Heirs, and the Feoffee releases the Warranty to one of the Feoffors; this does not determine the Warranty of the other as to the Moiety.

So if one enfeoffs two with Warranty, and one of them releases the Warranty; this does not extinguish the Warranty for the other Moiety, but it continues still. *Co. Lit.* 393.

A Warranty also may lose its Force by taking Benefit or making Use thereof; for after a Man has once taken Advantage thereof in some Cases, he can make no further Use of it. *Ibid.*

In a *Præcipe* the Tenant vouches, and at the *Sequatur sub suo periculo* the Tenant and the Vouchee make Default, whereupon the Demandant has Judgment against the Tenant; and afterwards the Demandant brings a *Scire Facias* against the Tenant to have Execution; in this Case the Tenant may have a *Warrantia Chartæ*. *Ibid.*

And if in that Case a Stranger had brought a *Præcipe* against the Tenant, the Warranty lost not its Force; but if the Tenant had Judgment to recover in Value against the Vouchee, he should never vouch again by Reason of that Warranty, because he had taken Advantage of the Warranty. *Ibid.*

And it is to be observed, that upon the *Summoneas ad Warrantizandum* if the Sheriff returns the Vouchee summoned, and he makes Default, the Tenant shall have a *Capias ad valentiam*; but if he returns that the Vouchee has nothing, then after the *Sicut alias & pluries*, a *Sequatur sub suo periculo* shall issue, and there if the Vouchee makes Default, the Tenant shall not have Judgment to recover in Value, for he was never summoned, and it appears of Record that he has nothing, but in the *Capias ad valentiam* it appears that he had Assets, and he had been summoned before. *Ibid.*

But in some special Cases there shall be two Recoveries in Value upon one Warranty; as,

If a Disseisor gives Lands to the Husband and Wife, and to the Heirs of the Husband, the Husband aliens in Fee with Warranty, and dies, the Wife brings a *Cui in vita*, the Tenant vouches and recovers in Value, if after the Death of the Wife the Disseisee brings a *Præcipe* against the Alienee, he shall vouch and recover in Value again. *Co. Lit.* 393. a.

So it is where the Wife brings a Writ of Dower against the Alienee, he shall recover in Value again upon the same Warranty. *Ibid.*

And

And it is in the same Manner if a Man be seised of a Rent by a defeasible Title, and releases to the Tenant of the Land all his Right in the Land, and warrants the Land to him and his Heirs; if he be impleaded for the Rent, he shall vouch and recover in Value for the Rent, and if he be impleaded for the Land, he shall vouch and recover in Value again for the Land. *Ibid.*

But in these and the like Cases, the Reason is in Respect of the several Estates recovered, but for one and the same Estate he shall never recover but once in Value; and tho' the Land recovered in Value be evicted, yet he shall never take Benefit of that Warranty after. *Ibid.*

And as Warranties may be defeated in the Whole, so they may be defeated as to Part of the Benefit that may be taken of the same; as,

He who has a Warranty may make a Defeasance not to take any Benefit by way of Voucher: In the like Manner that he shall take no Advantage by way of *Warrantia Chartæ*, or by way of Rebutter. *Co. Lit. 393. a.*

(N) *How a Warranty shall be expounded.*

ALL Warranties in general are favourably taken in Law, because they are Part of Mens Assurances.

Every Warranty in Law is taken for and has the Effect of a lineal Warranty.

The Warranty that is made by *Dedi & Concessi*, or *Dedi* only in a Feoffment, is and shall be taken for a general Warranty against all Persons to the Feoffee and his Heirs during the Life of the Feoffor only, altho' there be no Service reserved by the Deed nor Heir named; but it shall not extend to the Assignee of the Feoffee.

And if there be any Service reserved on the Deed, then it shall extend against the Heir also. *4 Co. 81. 5 Co. 17.*

A Warranty in Law that is made upon Gift in Tail, or Lease for Life, rendering Rent, is a special Warranty against the Donor and Lessor, his Heirs and Assigns; so that the Donee or Lessee may vouch the Grantor after the Grant of the Reversion, or the Grantee of the Reversion after the Attornment of the Tenant at his Election. *4 Co. 81. Co. Lit. 384.*

A Warranty in Law that is made upon an Exchange, is special in divers Respects, for it extends reciprocally to and against the Heirs of both Parties, and it extends only to the same Land that is given in Exchange, and no other; and no Use can be made of it but by Voucher, for no *Warrantia Chartæ* lies upon it.

So also the Warranty that is made in Dower, is taken to extend only to the other two Parts of the Land. *4 Co. 121. Co. Lit. 384.*

A Warranty in Law that is made upon the Tenure of Homage Ancestral, extends reciprocally to the Heirs, and against the Heirs of both Parties. *Co. Lit. 384.*

If a Feoffment be made of Land to three jointly, and the Feoffors warrant the Land to the Feoffees, and every of them; this Warranty shall be joint and not several.

But if the Estate be several, as if one grants *Whiteacre* to *A.* and *Blackacre* to *B.* and grants to warrant the Land to them, and either of them; in this Case the Warranty shall be several. *5 Co. 59.*

If a Man of full Age and an Infant join in a Feoffment with Warranty; this shall be taken for a good Warranty as to the Whole for him that is of full Age, and void for the Infant, and not void in Part and good in Part. *Co. Lit. 367.*

If a Man makes a Feoffment in Fee, and binds his Heirs but not himself to Warranty; by this his Heirs shall not be bound, and it seems also that it will not bind the Warrantor himself. *Co. Lit. 386.*

But if a Man binds himself to warrant, and not his Heirs, by Feoffment; the Feoffor himself is bound to the Warranty, but not his Heirs; for it is a Maxim of Law, that the Heir shall never be bound to any express Warranty but where the Ancestor was bound by the same Warranty.

If one makes a Feoffment to *B.* and his Heirs, and thereby grants to warrant the Land, and does not say to *B.* and his Heirs; yet this Warranty shall be taken to extend to them.

But if the Feoffor grants to warrant the Land to *B.* and does not say to his Heirs, this shall not extend to his Heirs.

And

And if in this Case the Warranty be to *B.* and his Assigns, it shall not extend to his Heirs, neither shall the Assignees take Advantage of it after the Death of *B.* and if the Warranty be to *B.* and his Heirs, and not to his Assigns also, this shall not extend to his Assignees.

If one makes a Feoffment to *A. Habendum* to him and his Heirs, and binds himself and his Heirs to warrant the Land *in forma prædicta*; in this Case the Warranty shall extend to the Feoffee and his Heirs. *Co. Lit.* 47, 385. *Dyer* 42. *Kelw.* 108. 6 Co. 69.

If one grants to warrant Land to another and his Heirs, and does not say against what Persons; this shall be taken for a general Warranty against all Men. 1 Co. 1.

If one makes an Estate and grants to warrant the Land, but does not say how long; this shall be taken for so long as the Estate to which the Warranty is annexed does last. *Ibid.*

If a Warranty be made against any special Persons, it shall extend to them and no further; and it shall extend in all Cases for and to all Titles and Entries upon Title, and it shall not in any such Cases extend to tortious and unlawful Entries. *Dy.* 328.

If a Man be seised of a Rent-sock issuing out of the Manor of *Dale*, and he takes a Wife, and the Husband releases to the Tertenant, and warrants *Tenementa prædicta*, and dies, this Warranty shall extend to the Rent as well as to the Land, and therefore if the Wife sues for her Thirds of the Rent, the Tertenant may vouch the Heir

And regularly the Warranty extends to all Things issuing out of the Land, *viz.* to warrant it in the same Manner and Plight as it was in the Hands of the Feoffor, and he shall vouch as of Lands discharged.

And therefore if a Grantee of a Rent grants it to the Tenant of the Land on Condition, and the Tenant makes a Feoffment of the Land with Warranty; in this Case the Warranty shall not extend to the Rent, altho' the Feoffment be made of the Land discharged of the Rent.

And if a Woman has a Rent-charge in Fee, and she intermarries with the Tenant of the Land, and a Stranger releases to the Tenant of the Land with Warranty; this Warranty shall not extend to bar an Action to be brought after the Death of the Wife for the Rent.

But if in this Case the Tenant makes a Feoffment in Fee with Warranty, and dies, the Feoffee in a *Cui in vita* brought by the Wife shall vouch as of Lands discharged at the Time of the Warranty made.

So if Tenant in Tail of a Rent-charge purchases the Land and makes a Feoffment with Warranty, and the Issue brings a *Formedon* of the Rent, the Tenant shall not vouch, &c. *Co. Lit.* 366, 388, 389.

S E C T. VIII.

Of the Covenants.

(A) *Covenant what, Covenantor and Covenantee who.*

A Covenant is the Agreement or Consent of two or more by Deed in Writing sealed and delivered, whereby either of the said Parties promises to the other that something is already done, or shall be done hereafter. *Terms de la Ley*, Tit. Covenant. *Plow.* 308.

He who makes a Covenant is called the Covenantor, and he to whom it is made is called the Covenantee. Covenantor.
Covenantee.

A Covenant properly is a Specialty, but by Custom, *Conventio ore tenus facta* is binding in *Bristol*.

The Plaintiff declared in *Bristol* of a Covenant made by Word by the Testator of the Defendant with the Plaintiff in *Bristol*, and declared also within the said City: There is a Custom that *Conventio ore tenus facta* shall bind the Covenantor as strongly as if it were made in Writing. Custom of
Bristol, *Con-*
ventio ore te-
nus facta,

Per Cur', This Custom does not warrant this Action, for the Covenant binds the Covenantor by Custom, but does not extend to his Executors, but shall be taken strictly. 1 *Leen.* 2. to be taken
strictly.

Where a Covenant terminates in itself, or to a present Act, no Covenant properly.

A Covenant to do a present Act is not properly a Covenant, as a Covenant to stand seised. *T. Raym.* 26. *1 Sid.* 48. It is no Action properly, but an Action on the Case.

When a Covenant is to pay Money, it is a single Bill; but if it be to pay Money upon the Delivery of any Thing, Accord is a good Plea. *1 Keb.* 155. in *Margine.*

(B) *How a Covenant differs from a Defeasance, Condition, Warranty, an Exception, &c.*

WHERE a Covenant terminates in itself, it is not properly a Covenant but a Defeasance. *Plow.* 138. a.

Defeasance and not a Covenant.

As a Covenant that the Demise shall be void, it shall determine the Lease; and it cannot enure to other Effect, for the Lessee cannot have an Action upon this Covenant, for such Action does not lie but where the Thing for which the Covenant is made is to be done in Time after. *T. Raym.* 26.

But in an Action of Covenant in Nature of a Defeasance of a Recognizance, that upon Payment the Recognizance shall be delivered up to be vacated and caused to be cancelled by the Defendant: This Covenant does not terminate in itself, but is for a collateral Act, and engages the Party to such Act, and not only that it should be void. *1 Keb.* 103, 118. *1 Sid.* 48.

Covenant quasi a Defeasance.

In Debt on a single Bill of 68 l. with Covenant to pay it when such Bills be stated and appear due for the Costs of the Defendant Testator, and produced to two Attornies, &c. indifferently to be chosen between them, &c. The Covenant being in the same Deed, it works as a Defeasance or Acquittance, and not as a distinct Deed, &c. *Keb.* 624.

Covenant in Nature of a Condition precedent.

Sometimes a Covenant is in Nature of a Condition precedent, as in 3 Leon. 219. where the Lord of a Manor covenanted to assure the Freehold to one of his Copyholders and to his Heirs, and the Copyholder, in Consideration of the same Covenant performed, promised to pay a certain Sum of Money: The Copyholder is not bound to pay the Money unless the Lord first performs his Covenant; otherwise if the Covenant on the Part of the Copyholder had been in Consideration of the Covenant to be performed. 2 Sand. 156.

Covenant and not Warranty, or Warranty and not Covenant.

A Feoffment by *Dedi & Concessi* in Action against the Feoffor does not warrant an Action of Covenant on Eviction of the Inheritance, but it must be deduced in the real Lien by Warranty; but in Case of a Freehold only, it is a Ground for Covenant. *1 Keb.* 821. But in *Yelv.* 139. *Hob.* 3. If a Man makes a Deed by Feoffment with Warranty, and a Stranger extends a Recognizance of the Feoffor on the Lands of the Feoffee, an Action of Covenant lies.

Difference between a Lease and an Inheritance as to Words of Warranty.

Upon express real Covenants which extend to Freehold or Inheritance, as *warrant defend*; a Man cannot have an Action unless he be ousted by one who has Title. *Brownl.* 165.

And if a Man makes a Feoffment with Warranty, *Non feoffavit* is a good Plea; for if the Feoffment be avoided, the Warranty is also avoided, for that depends upon the Feoffment. *Ibid.*

But if a Man makes a Lease for Years, and covenants that he will warrant and defend the Land to the Lessee; if the Lessee be ousted by one that has Title, or is without Title, he may have an Action of Covenant, for the Lessor has the Evidences, and ought to defend the Possession of his Lessee, and the Right also and Damages are only to be recovered: And this is the Difference between a Lease and Inheritance tho' the Words of the Covenant be all one.

Covenant and not an Exception.

If a Lease for Years be made by Indenture, provided always and it is agreed between the Parties, *Quod licitum foret & esset* to the Lessor and his Heirs, at any and every Time during the Term, to fell, cut down and sell all the Woods and Trees upon the Premises. *Per Cur.* It is not an Exception of the Trees, but only a Covenant, and so an Action of Waste lies by the Plaintiff. *Cro. Eliz.* 690.

Covenant and a Grant also.

If a Bond be conditioned for Performance of Articles, by which the Defendant grants and agrees with the Plaintiff, his Heirs and Assigns, *Quod licitum foret illi* at all Times to have and use a Way by and over the Close of the Defendant, in Consideration whereof the Plaintiff agrees to pay the Defendant 20 s. 6 d. *per An.* This is a Grant of a Way, and not a Covenant only for the Enjoyment. 3 Lev. 305.

If a Lease of a Farm be made, *except the Wood*, and the Lessor covenanted with the Lessee that he shall take all Manner of Underwood, *provided always and the Lessee covenants he will not cut any Manner of Timber-Trees*: This is no Condition, but an Explanation with what Wood he should meddle, tho' in Truth it is of another Thing than is comprized in the Covenant before; as if I am seised of the Manor of D. in D. and of Blackacre in D. and so seised, I covenant with J. S. that he shall enjoy the Manor for ten Years, provided the said J. S. covenants that he shall not enjoy Blackacre: This Covenant is not a Condition, but a Declaration deduced out of my Covenant to make a plain Declaration that 'tis not my Interest that Blackacre shall pass, be it Parcel or not of the said Manor. *Popb. 117, 119.*

Not a Covenant nor a Condition, but a Declaration explanatory.

If A. lets Land to B. by Indenture, and the Words are, in Consideration of the Payment of the Rent hereafter mentioned, he leaseth, &c. and after in the same Indenture B. covenants for him and his Assigns, with A. and his Assigns, to pay 10 l. at certain Feasts yearly, &c. This shall be a Rent and not a Sum in Gros; for upon the whole Indenture this shall be a Reservation and not a Covenant, for the Words *[in Consideration of the Rent hereafter mentioned]* make it clear. *2 Roll. Abr. 449.*

Reservation and not a Covenant.

By Articles the Testator covenants and agrees with the Defendant that he shall have and enjoy such a House and Land for six Years, and in *Consideratione premissorum* the Defendant covenants and agrees to pay to the Testator, his Heirs, Executors and Assigns, the annual Rent of 90 l. during the said six Years, at the Feast of the Annunciation and St. Michael; Defendant enters, Testator dies, Rent is in Arrear; if it be a Covenant it is due to the Executor, if it be a Reservation it follows the Reversion, and so goes to the Heir. But *per Cur'*, This is merely a Rent and not a Covenant, and the Words *covenant and grant that he shall enjoy*, amount to a Lease, and is not a Sum in Gros; and he covenants to pay to him and his Heirs. *Cro. Car. 207. Owen 151. 2 Bulst. 281.*

Rent and Reservation, and not a Covenant.

A. leases a Rectory, rendring 4 l. *per Ann.* and by the same Indenture grants to the Lessee and his Assigns, *Dare & Reddere* yearly 3 s. 4 d. for Portage; the Rent reserved is 4 l. and tho' 3 s. 4 d. is to be paid to the Lessee for Portage, yet this is not any Part of the principal Rent to be retained by way of Defalcation, and by way of Covenant the Lessee is to receive 3 s. 4 d. *Telv. 42.*

Covenant and not a Rent.

J. S. being seised of Copyhold Lands for Life, executed a Deed to P. S. as a collateral Security to indemnify him for the Payment of 100 l. by which Deed, after a Recital of the Counter-Bond given to P. and the Estate which J. S. had in the Lands, he covenanted, granted and agreed for himself, his Executors, Administrators and Assigns, with the said P. that he, his Executors and Administrators, should hold these Lands from the Time of making the said Deed for seven Years, and so from the End of seven Years to seven Years, for and during the Term of forty-nine Years, if J. should so long live. The Court took this for a Lease, and so it is a Forfeiture, there being no Custom to warrant it. It is a Rule, that the Word *Covenant* will make a Lease tho' the Word *Grant* be omitted; nay, a Licence to hold Land for a Time, without either of these Words, will amount to a Lease, much more when the Words are, *To have, hold and enjoy the Lands for a Term certain.* *Hob. 35. 2 Cro. 92, 398. 1 Roll. Abr. 847. Cro. Car. 207.*

Lease not a Covenant.

And it is now settled, that an Action of Debt may be brought upon such a Covenant, but it was smartly argued on the other Side. If the construing of it to be a Lease will work a Wrong, then it is only a Covenant and an Agreement, and no Interest will vest; and therefore it shall not be intended a Lease in this Case of a Copyhold, for if it should, there would be a Wrong done to the Lessor and Lessee, for it would be a Forfeiture of the Estate in one, and a Defeating of the Security of the other; but no Judgment was given. *2 Mod. 80. 3 Keb. 638.*

In Articles of Agreement indented and sealed between A. and B. the Words were, *It is covenanted and agreed that A. doth let such Land to B. for five Years from Michaelmas next, provided that the Lessee shall pay therefore at Michaelmas and Lady-day 100 l. by equal Portions*; inasmuch as the first Words are a present Lease, the *Proviso* shall make a present Reservation of the Recovery, and not a Sum in Gros. *2 Roll. Abr. 449.*

Rent and not a Sum in Gros.

Covenant on Demise of a Coal-Mine, whereby it is recited, *that before sealing of the Indenture it was agreed that the Plaintiff should have the third Part digged, &c.* On a Demurrer to the Declaration it was excepted, that here is no Covenant to pay the third Part, but only a Recital of an Agreement to have it. But by *Hale*, Were it but a Recital *that before the Indenture they were agreed*, it is a Covenant; and so to say,

Where a Recital amounts to a Covenant.

Recital that it is agreed.

say, *Whereas it was agreed to pay 20 l. for now the Indenture itself confirms the Agreement and Intent precedent tho' it be relative to the former Act in pais*, when it is declared by Deed, it is now a Covenant by the Indenture. 3 Keb. 465.

A Covenant that doth not consist with the Recital that leads and occasions it shall not oblige.

D. covenanted by Articles, reciting that a Marriage was intended between the Defendant and one R. W. who had seven Sons; the Defendant covenanted in the said Articles, having recited that R. M. deceased, Father of the said seven Brothers, had by his Will bequeathed *Quilibet ipsorum præd' Joseph, Jacob, &c.* (only leaving out Nathaniel) the Sum of 50 l. a-piece; covenants with P. to pay to the said seven Sons, naming Nathaniel, *præd' separales legationes vel sum' 50 l.* and D. pleads further that he paid to the six Sons 50 l. a-piece, and shews a Performance of the other Articles; P. demurs, because he shews not that he paid 50 l. to Nathaniel, and he did expressly covenant to pay the said Nathaniel and the Rest the said several Legacies or Sums of 50 l. *Per Cur'*, In the Recital of the said Will nothing is mentioned to have been bequeathed to Nathaniel as well as the Rest; tho' he covenants to pay to Nathaniel as well as the Rest, yet it is *Legationes summas præd'*, and there being no Legacy to Nathaniel, and that appearing by the Recital of the Will, his Covenant shall not oblige the Defendant to pay him any Thing. 2 Vent. 140.

Recital being considered with the Rest of the Deed is material.

A. by his Deed Poll recited, that he was possessed of certain Lands for Years of a certain Term; by good and lawful Conveyance he assigned the same to J. S. with divers Covenants, Articles and Agreements in the said Deed contained, which are or ought to be performed on his Part; the *Quære* was, If the Recital be an Article or Agreement within the Meaning of the Condition of the Bond for Performance: *Per Gaudy*, It is an Agreement; every Thing contained in the Deed is an Agreement, and not only that which I am bound to perform. It was moved, that if the Recital be within these Words of the Condition, *which are or ought to be performed on my Part*; and some were of Opinion it is not within those Words, for that extends only in *future*, but this Recital is of a Thing past, or at least present. *Per Clench*, Recital of itself is nothing but being joined and considered with the Rest of the Deed; it is material, as here, for against this Recital he cannot say that he hath not any Thing in the Term; and it was clearly resolved, that if the Party had not that Interest by a good and lawful Conveyance, the Obligation was forfeited. 1 Leon. 122.

In *Babington and Allen's Case*, these Words, *Paying the Rent*, is no Condition precedent, but rather concomitant, and is the Consideration whereupon the Party is to do the Act, and is liable to Construction, as the subject Matter is the Word *paying*, and without Construction (unless as in the Case of *Dyer* 371. it be precedent) doth not import a Condition; but clearly here it can be no Condition, being an usual Clause at the End of all Leases. 2 Keb. 9, 23.

(C) *What shall be said an Agreement, and what Agreement amounts to a Covenant.*

IF a Man lets a Manor by Indenture, except a certain Parcel of Land, and the Lessee enters into Bond to perform all the Covenants, Articles and Agreements contained in the Indenture, and after the Lessee enters into the Land excepted; yet this is not any Breach of the Condition, for the Land excepted is not leased, and is as if it had not been named, and therefore cannot be intended an Agreement to be performed on the Part of the Lessee within the Intent of the Indenture. 1 Roll. Abr. 431.

Where Agreement has a mutual Remedy.

On an Agreement made thus: *It is agreed upon by Doctor J. P. and B. C. Esq; that the said B. C. shall give to the said Doctor 500 l. for such Land and House and the Brewing Utensils. In Witness whereof we do put our Hands and Seals, mutually given as Earnest in Performance of this 5 s. the Money to be paid a Week after Midsummer 1668.* It was adjudged *per Cur'*, That the Earnest shall be intended as Part of the Sum, and the Action is well brought without Averment of the Conveyance of Land, for it shall be intended that both Parties had sealed the Specialty; and if the Plaintiff has not conveyed the Land to the Defendant, he has also an Action of Covenant against the Plaintiff upon the Agreement contained in the Deed, which amounts to a Covenant on the Plaintiff's Part to convey the Land, and so each Party has mutual Remedy against the other; otherwise if the Specialty had been the Words of the Defendant only, and not the Words of both Parties by way of Agreement, as here it is;

is; and in the Conclusion it is said that both Parties have sealed it. 1 Saund. 319.
1 Lev. 274. T. Raym. 183. 2 Keb. 569.

A. by his Deed Poll recited, that *whereas he was possessed of certain Lands for Years of a certain Term*; by good and lawful Conveyance he assigned the same to J. S. with divers Covenants, Articles and Agreements in the said Deed contained, which are or ought to be performed on his Part; the Question was, If the Recital, *that whereas he was*, be an Article or Agreement within the Meaning of the Condition of the Obligation which was given to perform, &c. Per Gawdy, It is an Agreement; for in such Case I agree I am possessed of it, for every Thing contained in the Deed is an Agreement, and not only that which I am bound to perform; as if I recite by my Deed, *that I am possessed of such an Interest in certain Lands*, and assign it over by the same Deed, and thereby covenant to perform all Agreements in the Deed; if I be not possessed of such Interest, the Covenant is broken. Per Clench, Recital of itself is nothing, but being joined and considered with the Rest of the Deed, it is material, as here, for against this Recital he cannot say he hath any Thing in the Term; and it was resolved, that if the Party had not that Interest by a good and lawful Conveyance, the Obligation was forfeited. 1 Leon. 122.

Where a Recital amounts to an Agreement.

A Condition to perform Covenants and Agreements; one was, that the Plaintiff had covenanted with the Defendant that it should be lawful for the Defendant to cut down Wood for Fire-boot and Hedge-boot, without making Waste, or cutting more than necessary; the Plaintiff assigns a Breach in that Covenant, (which is in Truth the Plaintiff's Covenant) the Exception was, that the Condition ought but to extend unto Covenants to be performed on the Part of the Lessee; *sed non allocat'*; it is the Agreement of the Lessee, tho' it is the Covenant of the Lessor. 1 Leon. 324.

Agreement of the Lessee and Covenant of the Lessor.

Agreement in Articles with Covenant on the Plaintiff's Side to settle a Jointure, and on the other Side to pay 6000 l. and it is agreed in the Articles that a Fine was intended to be levied of such Lands, &c. for securing the Payment of the 6000 l. this is a Covenant to levy a Fine. 2 Mod. 87.

What amounts to a Covenant to levy a Fine.

Where a Man is Party to a Deed, his Agreement to pay amounts to a Covenant, tho' the formal Words of Covenant, Grant, &c. are wanting. 2 Mod. 269. For the Law has not appropriated any set Form of Words as absolutely necessary for the creating a Covenant. 1 Chan. Ca. 294. 1 Leon. 324. 1 Roll. Abr. 518. 1 Brownl. 23.

(D) The Kinds of Covenants relative to their Nature.

First, In Deed or in Law.

Covenants are either *express* or in Deed, that is, where the Covenant is expressed in the Deed; Covenants in Deed.

As, where A. by Deed covenants with B. to serve him for a Year, and B. covenants with A. to pay him 10 l. for this Service.

Or they are *implied* or in Law, that is, when the Deed does not express it, but the Law doth make and supply it. Law.

As when one makes a Lease for Years by the Words *Demise* or *Grant*, without any express Covenant for quiet Enjoyment; in this Case, the Law intends and makes such a Covenant on the Part of the Lessor, which is, That the Lessee shall quietly hold and enjoy the Thing demised against all Persons, at least having Title under the Lessor, and at least during the Lessor's Life, and (as some think) during the whole Term.

And hereupon an Action of Covenant may be brought against him in the Reversion; so that if the Heir that is in by Descent puts out the Termor of his Father, the Termor may have this Action against him. Action.

Where the Covenant is created by Law, the Covenantee cannot bring an Action of Covenant, if he be not ousted by one who has a Title; but it is otherwise in Case of an express Covenant. 2 Brownl. 161, 162.

Secondly, *Real or Personal.*

Real. Covenants are also either *Real* or *Personal*.

A *Covenant Real*, is where a Man binds himself to perform a Real Thing, as Lands or Tenements; as a Covenant to levy a Fine of Land, in which Case the Land itself is to be recovered; or when it runs in the Realty so with the Land, that he who has the one has or is subject to the other, and so a Warranty is called a Real Covenant.

Personal. A *Covenant Personal* is when it runs in the Personalty and not with the Land, but some Person in particular shall have Benefit by it, or be charged with it; as when a Man covenants to do any Personal Thing, as to build or repair a House, serve him, &c. 5 Co. 10.

Note; For more relating to Covenants that run with Estates, *vide post*.

Thirdly, *Inherent or Collateral, and to stand seised to Uses.*

Also Covenants are *Inherent* or *Collateral*.

Inherent. An *Inherent Covenant* is conversant about the Land or Estate; as that the Thing demised shall be quietly enjoyed, shall be kept in Repair, shall not be aliened, or if it be to be sold that the Lessor shall have the first Refusal, to pay Rent, not to cut down Timber-Trees, or do Waste, to fence the Copices when they are new cut, to make further Assurance, &c.

Collateral. A *Collateral Covenant* is conversant about some Collateral Thing that does not at all, or not so immediately concern the Thing granted; as to pay a Sum of Money in Gross, to build a House in another Man's Ground, to make a Feoffment or Lease of other Land, to give other Security to perform the Covenants, or to pay the Rent, or that the Lessor shall distrain for the Rent in some other Land than that which is demised, or the like.

Seised to Uses. There is also a Covenant to stand seised of Land to Uses which is of late Years become a Kind of Conveyance of Land.

Nota. *Note*; These Distinctions are of very great Use, especially with Relation to Assignments.

Fourthly, *Copulative or Disjunctive.*

Assent. Covenant, that the Defendant would not take Timber without the Assent or Assignment of the Lessor or his Assigns in the Disjunctive; and in the Breach the Plaintiff charges the Defendant with cutting of Timber, without the Assent and Assignment of the Lessor or his Assigns; so he will compel the Defendant to prove more than he ought, for if he did it with their Assent only, or Assignment only, it had been sufficient; but if the Covenant had been in the Copulative, both had been necessary. 1 Leon. 251.

Where mutual Disagreement ought to be alledged. T. covenanted with T. his Son and A. S. (whom he intended to marry) to give them Meat and Drink in his House; and if any Discontent should happen between the Father and the Son, so that he and his Wife should disagree to dwell with the Father, then they should have six Beasts, Gates, &c. T. the Son died, A. disagrees to dwell with T. the Father, and married with one C. who with his said Wife brings an Action of Covenant against T. the Father: *Per Cur'*, The Declaration is not good, and the Case is grounded upon the second Covenant, which consists upon a Contingency, which Contingency is, *if there happen any Discord, &c.* the Words are joint, and they ought all to disagree; true it is in some Cases, a Conjunctive shall be taken for a Disjunctive; but this is according to the Matter and Circumstance of the Fact; but in this Case it shall not be taken disjunctively: Also it is alledged in the Declaration, *that she disagreed*; whereas a mutual Disagreement between all ought to be alledged; and Judgment was, *Quer'nil cap'*. But all agreed, the Wife might have boarded with T. the Father, but her new Husband could not. *Popb.* 204.

Declaration, that the Covenantor shall pay to the Covenantee, &c. at the Choice and Election of the Covenantee, within a Month after the Death of J. S. 30l. or twenty Kine. Defendant pleads, that the Plaintiff within the Month after the Death of J. S. did not make any Choice or Election. It is a good Plea, for the Covenantor is not bound to make a Tender of both, and the Election of the Plaintiff ought to precede the Tender of the Defendant. 1 Leon. 69, 70. *Moor* 241.

Covenant to deliver such Obligation before such a Day, or to pay him 10 l. if he requests it; if he does not request the 10 l. the Covenantor ought to deliver the Obligation, for he had not Election till Request made, but after Request made, he had Election which of them he would do. 1 Roll. Abr. 447. Election of the Covenantor or Co-venantee.

Defendant covenants to deliver to the Plaintiff before such a Feast such a Ship and Tackle; or in Default thereof, to pay at the same Feast such a Sum as J. S. shall value them to be worth. Defendant pleads before such a Feast J. S. did not value them. On Demurrer it was adjudged for the Plaintiff; for tho' the Covenantor has Election to do one or the other, yet the Covenant being for his Benefit, he ought to provide the Value; the Value shall be assessed, otherwise he is to deliver the Goods themselves. Law of Covenants 65, 66.

Covenant to pay to A. or his Heirs annually 12 l. at Michaelmas and Christmas, or to pay to him or his Heirs at any of the said Feasts 150 l. The Covenantor has Election, yet he ought to pay the 12 l. yearly, till he pays the 150 l. and because he did not alledge Payment of the one or the other, it is a Breach. Law of Covenants 66.

The Condition of a Bond on Articles was, that if the Defendant paid the Money according to the Articles of the same Date, that then the Bond should be void; or otherwise it should and might be lawful for the Plaintiff to enter into the Land covenanted in the Articles, to be settled on the Plaintiff by the Defendant. Defendant pleaded that the Plaintiff did enter into the Land. Plaintiff demurred. This is a disjunctive Condition, and in the Defendant's Election to perform either Part. Judgment for the Plaintiff. 2 Keb. 103, 117.

In Debt on Bond for the Performance of Covenants, if Defendant pleads generally the Performance of the Covenants, and the Plaintiff demurs generally upon it, without shewing Cause of Demurrer, Judgment shall be given according to the Truth of the Case, for that Default of Pleading is but Matter of Form, and is aided by Stat. 27 Eliz. But if any of the Covenants be in the Disjunctive, so as it is in the Election of the Covenantor to do the one or the other, then it ought to be specially pleaded, and the Performance of it, for otherwise the Court cannot know what Part has been performed. 1 Leon. 311.

On Bond, that if the Defendant should work out the 40 l. which he owed, &c. at the usual Prices in Packing, when the Plaintiff should have Occasion for himself or his Friends to employ him therein, or otherwise should pay the 40 l. that then, &c. Defendant pleads, that he was always ready to have wrought out the 40 l. but that the Plaintiff did never employ him. It is an ill Plea, because the Defendant did not aver that the Plaintiff had any Occasion to make use of him, and for that it was at his Election to have Work or Money; and not having employed him, but brought his Action, that is a Request in Law, and so he has determined his Election to have the Money. Judgment for the Plaintiff. 2 Mod. 304.

In Debt on Bond for Performance of Covenants, upon the Demise of a Mill by the Plaintiff's Testator to the Defendant for thirteen Years, at the yearly Rent of 8 l. The Defendant covenanted for himself, his Executors and Administrators, to leave Mill-Stones upon the said Mill at the End of the Term, as good as when he entered, or else to give Satisfaction in Money for as much as they shall be worse, according to the Discretion of the Parties that viewed the same at first: And Defendant further pleads, *Quod ipse ad finem & expirationem termini prædicti reliquit duo saxa molaria in & super molendinum prædictum quoque partes (Anglice, the Parties) quæ primo inspiciebant saxa molaria quæ fuerunt super molend' prædict' tempore intrationis ipsius Johannis in molend' illud bucusque non agreevere quantum duo saxa prædict' per ipsum ad expirationem termini prædicti ut præfertur relicta fuer' pejora quam prædict' saxa molaria in & super molendinum prædicti prædict' tempore intrationis ejusdem Johannis ad inde;* and general Performance as to the other Covenants. Replicat, Demand of the Oyer of the Indenture, wherein inter alia the said Covenant is set forth, and say, *Præcludi non,* for that at the Time of the Entry of the Defendant upon the Mill, there were two Stones of the Value of 3 l. and that at the End of the Term the Defendant did not leave so good Stones, nor give any Satisfaction in Money, *Nec dedit aliquam satisfactionem in moneta alicui persone cuicunque per tant' quant' Lapides molar' per eundem (Def') in eodem molendino relicti fuer' pejores quam prædict' Lapides molares in eod' molendino existen' tempore prædicti intrationis ipsius Defendantis. Et hoc parat', &c.* Rejoinder prout the Bar. Demurrer. Plaintiff's Counsel insisted, That it was incumbent upon the Defendant to procure the Persons who had the View of the Stones at the Time of the Defendant's Entry upon the

the Mill, to have adjusted how much the Stones of the Mill, which were left at the End of the Term, were worse than those which were there at the Time of the Defendant's Entry of the Mill, and for Default thereof he has broken his Covenant; for he does not pretend by his Plea, that he has left Stones so good as the first were. The Disjunctive Covenant is in Advantage of the Covenantor, and therefore he ought to shew the one or the other is performed, and therefore he ought to have procured an Adjustment in the Case; as if a Man obliges himself to resign a Benefice, he ought to procure the Bishop to accept his Resignation. So if a Man be bound to pay 100*l.* or so much as *J. S.* shall appoint, if he will be excused the Payment of the 100*l.* he ought to procure *J. S.* to appoint a less Sum to be paid. To which Defendant's Counsel answered, That by the Covenant, he was to leave at the End of the Term as good Stones as were in the Mill at the Time of his Entrance, or to give Satisfaction in Money for so much as they were worse, according to the Discretion of the former Viewers of them; so that the Covenant is in the Disjunctive; and if one Part of a Disjunctive Covenant becomes impossible, the Covenantor is excused to perform the other Part; and this Case is like to Submission to Arbitrament: And for this the Defendant is not bound to procure the Viewers to make any Adjustment in the Case, and they not having made any, and the Disjunctive Covenant being for his Advantage, he was entirely excused. *Per Cur.* Conditions are for the Benefit of the Obligor, if possible, but if impossible, the Obligation is absolute. There is no impossibility in this Case, if the Viewers cannot be procured to adjust the Damage, yet the Defendant might have left as good Stones at the End of the Term as were there at the Entrance of the Defendant, which is the other Part of the Covenant; and this Case is not like Submission to Arbitrament, for by it both Parties oblige themselves to stand to the Arbitrament of the Arbitrators, but none of them obliges himself to procure them to make an Award. But in this Case the Disjunctive Condition being in Advantage of the Defendant, he ought to procure the first Viewers to make Adjudication of the Damages. 1 *Lutw.* 691.

If one binds himself to pay 10*l.* or so much as *J. S.* shall appoint, if *J. S.* will not appoint any Sum to be paid, the Obligor shall pay the 10*l.* *Ibid.*

If one be bound to make a Lease to *J. S.* or pay him 100*l.* before Michaelmas, and *J. S.* dies before Michaelmas, the 100*l.* ought to be paid. *Ibid.*

A Man covenants, in Consideration of 100*l.* to make a Lease to *J. S.* for his Life before Michaelmas, or to repay the 100*l.* and *J. S.* dies before Michaelmas: Resolved that the 100*l.* should be repaid. *Ibid.*

Fifthly, Executed, Executory or Present.

Some Covenants are *Executed*, i. e. That a Thing is done already; and some are *Executory*, i. e. That a Thing shall be done hereafter; and these are good.

But if it be of a Thing present, as I covenant that my Horse is your's, it is void.

Sixthly, Affirmative or Negative.

If the Lessor covenants with the Lessee, that he shall have sufficient Hedge-boot by Assignment of the Bailiff of the Lessor; by this the Lessee is not restrained from that Liberty which the Law allows him, and therefore he may take without Assignment; but if the Words be Negative, that he shall not take without Assignment, or that he shall take by Assignment, and not otherwise, *contra.* *Dy.* 19.

P. brought an Action against *D.* on a Covenant that he shall go in such a Ship out of the River *Thames* to such a Place in *Spain*; the Words of the Covenant were, *Quod decederet, procederet & non deviet.* *D.* pleaded Performance generally; *per Cur.* The Plea is not good: And this Diversity is taken between a Negative Covenant, which is only in *Affirmance* of an Affirmative Covenant precedent, and a Negative Covenant which is additional to an Affirmative Covenant, as here; for in the first Case Performance generally is a good Plea, but in the last not; he ought to plead specially; and in this Case the Defendant might have departed, proceeded and gone to *Africa*, or to the *West-Indies*, if he had not been restrained by the Negative Covenant, *& non deviet.* 1 *Sid.* 87.

A Negative Covenant, as that *P.* shall not use a Trade, in *Consideratione inde,* *D.* promises him 100*l.* *per Ann.* during Life: This does not amount to a Condition precedent, (but is mutual) for then *P.* shall never have the 100*l.* *per Ann.* during his Life;

Life; for it is not possible for P. to perform his Covenant in his Life, for at any Time during his Life he may break it; and a Negative Covenant is not said to be performed until it becomes impossible to break it, which Impossibility may not happen but by P.'s Death. 2 Saund. 155, 156, 157. 1 Mod. 64. 2 Keb. 674.

On a Covenant that D. should not deliver up Possession to any Person but the Lessor, or such Persons as should lawfully recover; an Action of Debt on a Bond for the Performace was brought, to which D. pleaded that he did not deliver up Possession but to such Persons as lawfully recovered it: *Twisden* said, He ought to have shewn that he delivered it to J. S. per lawful Title; but on the other Side it was said, the Bar is pursuant to the Count; and *Twisden* conceived that in Affirmative Covenants pleading Performance generally is sufficient, and so on Negative; for it is sufficient for the Defendant to plead an Excuse, and the Plaintiff must assign Breach to intitle himself. *Windham ad idem*. Negative Covenants may enwrap many Particulars; as to say he did not cut down any Timber, unless to make Bars and Stiles. Judgment pro Defendant. 1 Keb. 380, 413. *Sed vide* 2 Palm. 70.

Seventhly, *Joint or Several*.

If the Merchants in a Charterparty covenant with the Owners *separatim*, That one Merchant shall pay 3 l. and another Merchant 3 l. & sic de ceteris; but the Words are *Conveniunt separatim*, and in the End there is this Clause, *Et ad performance omnium & singulorum conventionum ex parte predictorum Mercatorum perimplend' quilibet Mercatorum predictorum separatim obligat prafat' seipsum Magistro & proprietariis in double the Freight*: The Covenants are several by the Words *Conveniunt separatim*, and the last Part by which *quilibet eor' obligat seipsum*, &c. refers to the precedent Covenant, where they *Conveniunt separatim*; and so it is also several. Tho' the Covenants of the Masters and Owners were joint, yet the Covenants of the Merchants were several; therefore if any of the Seals of the Merchants be broke off, this only voids the Deed unto him. 5 Co. 22. b.

In Covenant upon a Charterparty, between B. the Owner, and L. and M. Merchants Freighters of a Ship, by which B. put to Freight to them the Ship in a Voyage to G. at 48 l. per Month; there were mutual Covenants between the Parties, *Et quemlibet eorum modo sequent', &c.*

Exception was taken to the Declaration, because the Action is brought against one of the Merchants, only upon Breach of a Covenant, omitting the other; and the Covenant is between the Parties by mutual Covenant. And the Covenant by them, *Et quemlibet*, does not make it Disjunctive between each Party of each Part, but leaves it a joint Covenant of the one Part, and several of the other, as the Duty is, which ought to be paid by both the Defendants, each having equal Benefit, *Et quemlibet eorum* shall be referred to the Plaintiff only, who is the sole Party of this Part; the Covenantor was to pay Freight, which the Defendant had not paid. *Per Cur'*, *non allocat'*] the Covenant between them, *Et quemlibet eorum*, it is joint and several of each Part. 2 Lev. 56.

In Covenant the Plaintiff declared, That the Defendant and J. S. *convenerunt pro se & quolibet eorum*, that they, or either of them, would lade such a Ship, and pay for the Freight, &c. The Defendant pleaded in Abatement, that the other Covenantor was in full Life not named, and prayed Judgment of the Writ. Holt C. J. took a Diversity between the Words, A. and B. *conveniunt & quilibet eorum convenit*, and A. and B. *conveniunt pro se & quolibet eorum*; for in the first Case, *quilibet eorum convenit* expressly serves the Lien; but *pro quolibet eorum* seems to go to the Thing to be done, that is, that they both, or either of them, would do it; but the other Justices *concorda*; and the Judgment was, that the Defendant should answer over. 1 Salk. 393.

If a Man covenants with ten, and each of them, to make the Sea-Banks in D. and does not do it, by which the Land of two of the ten is surrounded, those two may have an Action of Covenant without the others. Bro. *Jointenants*, pl. 72.

An Action of Covenant was brought by the Herald Painters, *& pro quolibet & singulis eorum*, that they should bring their Work to such a Place, and that there such Work shall be done, &c. and because one of the Covenantors did not bring his Work to the Place aforesaid, there to be worked, the others brought this Action; and the Action was adjudged to be well brought, for it is founded upon the Work not being brought to the Place appointed for it; and in this Part the Covenant is joint, and the Interest joint. *Skin*. 401.

In Indentures of Apprenticeship, the Father covenants to pay the Apprenticeship Money, the Son covenants to account for his Master's Goods, and in the Conclusion the Father and Son each bind themselves for the true Performance of all the Covenants and Agreements therein. *Per Cur'*, The End of binding the Father was to answer Wrongs done by the Son; and he must answer for any; and the Covenant that each did bind himself, &c. must be so where the Son is bound to perform the Thing for which this Covenant was made; and this Clause is usually inserted, that the Covenants may be taken distributively, *viz.* That each of the Covenantors should perform his Part, and this makes the Covenant of the Son bind the Father, who covenanted for him as well as for himself. 6 Mod. 190.

In Covenant Plaintiff declared that by Indenture *Tripartite*, made between T. of the first Part, the Defendant of the second Part, and C. the Plaintiff's Testator, of the third Part, (on Contract with the Lords Commissioners for buying all Prize Brandies which should be condemned by the Admiralty) and it was declared that all the Parties had an equal Interest in the Contract: *Et superinde quilibet eorum respectu pro se, Executoribus & Administratoribus suis, & pro ejus proprio actu sive actis, & pro tanto quant' ad ejus proprium officium (Anglice, Duty) attinebat, sed non pro actu sive officio alterius convenit & agreeavit ad & cum altero & alteris eorum respectu, & ejus & eorum respectu Executoribus & Administratoribus, &c. per eandem Indent' modo & forma sequent'*, That 600 l. Stock should be put into a Goldsmith's Hand. That all the Prize Brandies should be bought by them in Partnership upon their joint Account. That none of the Parties (during the Time of Partnership) shall sell or trade in Brandy Wines, by himself only, or in Company with any other, but only upon the same joint Account. That the Monies received by any of the Parties shall be paid in to the Goldsmith. No Advantage of Successorship, and Account to be given to the Executors, &c. And then the Plaintiff assigned for Breach,

1. That the Defendant, during the Partnership without the Assent of T. and C. sold seventy Tons of Brandy which came to his Hands, *Vertute contract' præd'*, to Persons not known to the Plaintiffs.
2. That the Defendant had merchandized and traded with 200 Tons of Brandy, *Pro computo suo proprio & non pro juncto computo pertinen' ad Indentur' præd'*, contra formam & effectum Indentur' præd'.
3. That he had received several Sums of Money, and had not paid them in to the Goldsmith.
4. That he had not given Account to the Plaintiff's Executors, &c. upon Judgment by Default, Writ of Inquiry of Damages awarded, and Damages entirely assessed. Q.

Exceptions to the Declaration upon the second Breach, because he does not shew whether the said 200 Tons of Brandy were Prize Brandy, received upon the joint Account, or others; for the Defendant might trade with Brandy Wines upon his own Account; and this ought to be shewed in particular, for if they were Prize Brandies, then Part of it is comprized within the first Breach of selling 70 Tons; and so for this Incertainty, the Damages being entirely assessed, it is ill.

2. The Covenant is joint with the Plaintiff's Testator, and with the said T. who survived him; for tho' the Covenant is joint and several in the Words, yet the Interest and Cause of Action is only joint, for it is equal Damage to C. and T. if the Covenants be broken, and so they ought to have joined in the Action; and C. being dead, the Action survives to T. as in 5 Co. 18. b. *Per Cur'*, The Declaration is ill for both Points. 1 Saund. 154, 155.

If a Conveyance of a Rectory be to two, and the Grantor covenants with them, *Et eorum altero*, that he was Legitime seised of the Rectory; they must both join in an Action, because the Interest of the Covenantors is joint. 1 Saund. 153. 5 Co. 18. b.

An Indenture *Tripartite* was made between three; A. was one of them, and he covenanted with them & quolibet eorum; and the Covenant was, That the Land which he had aliened to one of them was discharged of all Incumbrances; and he to whom the Alienation or Limitation of the Land was made, brought Covenant sole. *Per Cur'*, It ought to be brought by both.

The Covenant was with F. G. and F. W. *Et cum quolibet eorum*: These Words do not make Covenant to be several; so is Beckwith's Case, 5 Co.

One covenants with four, that he was lawfully and sole seised of the Rectory of A. and two of the four bring an Action of Covenant; it does not lie, for the other

Covenantors

Covenantees ought to have joined notwithstanding the Words, *Et ad & cum quolibet eorum*; and as to these Words, this Diversity was agreed in *Slingsby's Case*, 5 Co.

When it appears by the Covenant, that every of the Covenantees has, or is to have several Interests or Estates; these Words, *Et cum quolibet eorum*, make the Covenant several in respect of their several Interests.

As if a Man by Indenture demises to *A. Blackacre*, to *B. Whiteacre*, and to *C. Greenacre*, and covenants with them, *Et quolibet eorum*, that he is lawful Owner of all the said Acres; by the Words *Et cum quolibet eorum*, the Covenant is made several.

But if he demises the Acres to them jointly, then the Words, *Et cum quolibet eorum* are void, for a Man by his Covenant (unless in respect of several Interests) may not make this first joint, and then make it several by these or other Words.

And altho' divers Persons may bind themselves, *Et quemlibet eorum*, and so the Obligation shall be joint or several at the Election of the Obligee; yet a Man may not bind himself to three, and to every of them, to make it joint or several, at the Election of the several Persons for one and the same Cause, for the Court should be in doubt as to which of them to give Judgment. 5 Co. 18, 19. And to this Purpose and for the same Reason it is said in *Windham's Case*, 5 Co.

D. covenanted that he would not agree to take the Farm of the Excise for the County of *Tork*, without the Consent of *P.* and another. *P.* alone brought an Action of Covenant, and assigned for Breach, that he did agree to take it without his Consent; and 1000 *l.* Damages given by Verdict. *Per Cur'*, Here is no joint Interest, but that each of the Covenantees might maintain an Action for his particular Damages. *Vide 2 Mod. Rep. 82.*

Covenant for three jointly and severally to pay; Breach assigned that Defendant did not pay. *Per Doderidge*, he ought to aver, nor any of the others. *Cur' contra*, The Difference is, if the Action had been brought against all, then the Non-payment shall be alledged in all; but when the Action is brought against one only, it is sufficient to say, that he did not pay; and if any of the others paid it, it shall be properly pleaded by the Defendant. *Palm. 398. Latch 50.*

If there be three of the one Part and two of the other Part in an Indenture, in which the two covenant jointly and severally to do a certain Thing; and the three covenant also jointly and severally with the two, after the Performance of the said Thing by the two, to pay to the said two a certain Sum for every Particular, &c. and after, these general Words follow, (*viz.*) *Pro vera & reali performance omnium Articulorum & Agreementorum predictorum alternatim utraq; partium predictarum obligavit se, Heredes, Executores, Administratores & Assignatos suos in & subter penalitatem sexagint' librarum Sterlingorum.* The Question was, Whether in an Action of Debt upon the last Clause for the 60 *l.* the Action may be brought against one of the said three only? or, whether this be joint and several, as well as the Covenant? Adjudged that the Covenant was joint and not several, by three Judges, against the Opinion of *Roll. 2 Roll. Abr. 149.*

The Covenant is joint and several, in as much as the subject Matter is joint, *viz.* the Freight of the Ship, for and by them all; and the Words, *for every of them*, refer to the Words, *severally covenant*, and the first Word, *viz. themselves*, make it joint. *Law of Covenants 200.*

And *Roll* says, that upon putting the Case to divers of the Judges and Serjeants at the Table at *Serjeants-Inn* in *Fleet-Street*, they were of his Opinion. 2 *Roll. Abr. 149.*

Conventum & agreeatum est between the Parties make a joint Covenant, and they ought all to join; *aliter* where several. 1 *Bulst. 25, 26.*

A Covenant with two, *Conjunctim & Divisim*, is joint or several, according as the Case is, (*viz.* the Interest whereupon the Covenant is founded. *Moor 849. pl. 1154. Vide T. Raym. 459, 460, 461. 1 Saund. 155.*

If two Tenants in Common covenant, their Covenants are several; *contra* of Partners or Jointenants. *Per C. J. Holt* in *Coleman and Sherman, M. & W. & M.*

Eighthly, Mutual and Reciprocal.

In *Trespas Quare clausum fregit & scopos prostravit*, brought by Lessee for Years. Mutual and Defendants justified, for that *M.* seised of the Lands let them to Plaintiff, excepting reciprocal. the Trees, and Liberty to root them up, fell them and carry them away, *Cum averiis reparando scopos & implendo foveas*; and that *M.* afterwards granted the Trees and Liberty to *A.* and that he and the other Defendants, as his Servants in Prostration, &c.

Ec. used this Liberty (which is specially pleaded) and justify *Quæ est eadem fractio*. Plaintiff demurred, for that the Defendants have not alledged that they have filled up the Ditches, and amended the Fences according to the Agreement. *Per Cur.* This is not a Condition, which not being performed destroys the Agreement and avoids the Liberty; but it is a Covenant, for which the Lessee has Remedy by Action. Upon which the Chief Justice cited the following Case:

Sir G. B. covenanted with P. that he should quietly enjoy the Land demised, paying the Rent reserved; Defendant pleaded that the Plaintiff had not paid the Rent according to the Reservation. And upon a Demurrer it was adjudged, that the Word *paying* does not make the Covenant conditional, but that it was a *reciprocal Covenant* upon which the Party may bring an Action. *T. Jones 205.*

The Lord of a Manor covenanted to assure the Freehold to one of his Copyholders and to his Heirs; and the Copyholder, in Consideration of the same Covenant performed, promises to pay a certain Sum of Money; the Copyholder is not bound to pay the Money, unless the Lord first perform his Covenant. *Aliter* if the Covenant on the Part of the Copyholder had been in Consideration of the Covenant to be performed. *2 Saund. 156, 157.*

If the Covenant on the one Part be Negative, and the Affirmative Covenant of the other Part be, *in consideratione performanceis inde*; altho' the Negative Part is broken, yet the Affirmative Covenant ought to be performed. *Ibid.*

If A. by Indenture in December 22 C. 2. leases to B. a Messuage for twelve Years, and covenants with B. to repair it with all necessary Reparation, before *Midsummer* following; and B. covenants on his Part, *Quod ab E post tale tempus quale A. repararet E emendaret præd' messuag' quod tunc præd' B. sufficient' repararet præd' messuag' ad omnia tempora durante termino præd'.* A. brought an Action of Covenant against B. for Non-reparation of the House after *Midsummer*; and declared, That altho' he had performed all the Covenants on his Part to be performed (without any particular Averment) that he had repaired it before *Midsummer*, &c. yet the Defendant had not repaired after the said Feast: This is a good Declaration, for the Covenant of A. to repair it before *Midsummer* is not a Condition precedent, but only the Time divided and mutual between A. and B. viz. that A. shall repair it before *Midsummer*, and B. after, during the Term, for which each of them may have Remedy by Action against the other. *1 Roll. Abr. 416. Stile 140.* This is a *reciprocal Covenant*, and tho' one does not perform his Part, it shall not excuse the other.

Plaintiff declared, that he was possessed of a Term for eighty Years, and it was agreed between him and the Defendant, that he should assign all his Interest therein to the Defendant, who *proinde* should pay 250*l.* and that he promised, that in Consideration that the Plaintiff at his Request had promised to perform all on his Part, that he would perform all on his Part; and then sets forth, That Defendant had paid a Guinea in Part of the said 250*l.* and that he (the Plaintiff) *obtulit se* to assign the Premises to the Defendant by Indenture, which was written and sealed, and would have delivered it to him, but he refused, and assigned the Breach in the Non-payment of the Money. Defendant demurred, for that the Assignment ought to precede the Payment, and that it was not a *mutual Promise*; it is, that the Plaintiff is to assign, and the Defendant *proinde*, which is as much as to say, *pro assignatione* (*vide Dyer 16. b.*) But *per Cur.* It is a *mutual Promise*, and the Plaintiff needs not aver the Performance; and it is as reasonable that the Plaintiff should have his Money before he makes the Assignment, as that the Defendant should have the Term assigned before he pays the Money. *2 Mod. 33.*

W. was to raise 500 soldiers, and bring them to such a Port, and C. was to find Shipping, for which he sued upon the Covenant, tho' the other had not raised the Soldiers; for that can only be alledged in Mitigation of Damages, and is no Excuse for the Defendant; and it was adjudged, that this was not a Condition precedent, but *distinct* and *mutual* Covenants, upon which several Actions might be brought. *2 Mod. 75. Stile 186.*

In a Charterparty the Master of the Ship covenanted to sail with the first fair Wind to B. and that the Mariners should attend with a Boat to relade the Ship, and then to return with the first fair Wind to L. and to unlade and deliver the Goods; and the Merchants covenanted to pay so much for Freight, and so much for Demurrage every Day. The Master brought an Action for the Freight and Demurrage, and declared he failed such a Day with the first fair Wind, and upon all the other Points. And the Defendant as to the Freight pleaded, that the Ship did not return directly

to L. but went to A. and T. and made divers Deviations, and by such Delays the Goods were spoiled; and as to Demurrage, that this was occasioned by the Negligence of the Mariners in not attending with their Boat to relade the Ship. Plaintiff demurred, and had Judgment, for the Covenants are *mutual and reciprocal*, and each may have his Action against the other, but may not plead the Breach of one in Bar of the other; and perhaps the Damage on the one Side and the other are not equal, *ergo* not pleadable in Bar the one of the other; but each by his Action shall recover against the other the Damage certain for him. 3 Lev. 41.—T. Jones 216.

In Covenant upon a Charterparty, the Plaintiff declares, that it was agreed that his Ship shall be ready and provided with a sufficient Crew, Tackle, &c. for a Voyage to N. *in partibus transmarinis*, upon the 12th of August, and there should lade with Merchandizes of the Defendant, and should bring them back to T. and that Defendant covenanted to pay 3 l. 15 s. for every Tun so brought, and assigns the Breach in Non-payment of 112 l. 10 s. for 30 Tuns. To which Defendant pleads, that the Ship was not ready, &c. on the 12th of August, by which he lost the Profit of his Merchandize. Plaintiff demurs. *Per Cur'*, The Plea is not good, for these are reciprocal Covenants, & *utraque pars* has Remedy for Non-performance. Judgment for Plaintiff. T. Jones 216.

It is said, if one covenants to serve me a Year, and I covenant to pay him 10 l. for it; altho' he does not serve me, I must pay him the 10 l.

But if I covenant to pay him 10 l. if he serves me a Year, *contra*; for there I am not bound to pay the Money, unless he serves me a Year.

So if one covenants to make new Pales, so as he may have the old, he is not bound to make the new Pales, unless he may have the old ones.

So if one covenants to pay Money for Service, Counsel, or the like; or covenants to marry one's Daughter, or make an Estate, and the Covenant is penned conditionally, so as one Thing is the Cause of another, and is not set down by *mutual and reciprocal* Covenants; in all these Cases if the Cause or Condition be not observed the Covenant shall not be performed. Law of Covenants 76, 77.

In Debt on Bond to perform Articles, Plaintiff covenanted to assign over his Trade to the Defendant, and that he should not take away any of his Customers, and in Consideration of the Performance thereof, Defendant covenanted to pay Plaintiff 60 l. *per Ann.* for Life, and pleads, that after the Agreement Plaintiff before any Thing done did work for J. S. a Customer. Plaintiff demurs. Judgment for the Plaintiff. This is not a Condition precedent, but these are mutual Covenants, and the Plaintiff needs not wait for Performance, for that might be as long as he lives; but as on Bonds of Arbitrament on Breach, either Party has Remedy. 2 Keb. 674. 1 Mod. 64. 1 Sid. 464. 2 Saund. 155.

In Covenant Plaintiff declares, that by Indenture between him and the Defendant, (reciting, that there were divers Controversies, &c. for Determination whereof) the said Parties bound themselves, in Consideration of 12 d. given to each other, to observe the Arbitration of, &c. to arbitrate, &c. *de & super premissis*, and the Plaintiff and Defendant mutually covenanted to do several Matters. That the Arbitrator did thereupon make an Award, and the Defendant did covenant with Plaintiff, that in Consideration of Plaintiff's sealing and delivering (at Defendant's Request) one Part of a Lease for Years (to the Award annexed) for the Rent therein reserved, that the Defendant should pay so much Money for the Tithes: It was also awarded by the said Arbitrator, and the Defendant did covenant that he would be accountable to the Plaintiff for all such Arrears of Rent, Tithes, and Composition Money for Tithes, as should be arising and renewing upon the said Land, &c. according to such a Value *per Ann.* whereof the Defendant could not lawfully discharge himself. The Plaintiff avers, he has observed all the Covenants on his Part, &c. and assigns for Breach, that he has not accounted with him for all Arrears of Tithes and Composition Money, &c. and that he has requested him to come to account, and that he refused. Defendant pleads *actio non*, and confesses the Indenture; but says, *in eadem Indentura ulterius agreeatum fuit & provisum*, That the Plaintiff should allow and discount upon the Account all Sums of Money for Parsons Dinners at the Request of the Plaintiff, and such other Sums which he had directly laid out, and that such a Day *paratus fuit & obtulit se, & adhuc paratus est*, to account for all Arrears of Rent, if the Plaintiff would discount, &c. and the Plaintiff refused all such Sums of Money, &c. Plaintiff demurs. *Per Cur'*, It is an absolute Covenant which charges him to be accountable, and not if the Plaintiff would allow Parsons Dinners, for it is impossible

impossible the Plaintiff can make such Allowance till the Defendant has accounted; they are *mutual* and *distinct* Covenants, and they have each a Remedy upon them, and the *Provisum & Agreatum est* does not amount to a Condition, but is a Covenant. Judgment for Plaintiff. 2 Mod. 73.

There were mutual Promises and Agreements between P. and D. which P. set forth in his Declaration, and alledged generally that D. *Non performavit agreementum suum prædictum*, without shewing a particular Breach. Verdict and Judgment for P. in C. B. Error was assigned, that the Breach was too general, which being Matter of Substance, the Right of the Action could not be tried, and therefore it is not within any of the Statutes of Jeofails. But Judgment was affirmed. *Knight and Keach, Pasch. 3 W. & M. B. R.*

On an Agreement between P. and D. that P. should pull down old Walls and build a Malt-house, and that D. would pay him 8 l. *pro labore suo*; P. averred, that after the Agreement *parat' fuit & obtulit performare, &c.* he had a Verdict, without averring Performance of the Work, and for that the Premises are *mutual*, the Breach was well assigned. Judgment for Plaintiff. 4 Mod. 188.

In Debt upon a Deed Poll, concerning the Purchase of Land by the Defendant of the Plaintiff. Plaintiff declares, that by the said Deed it was agreed between him and the Defendant, that the Defendant should pay to the Plaintiff so much Money upon such a Day for the Land, which he has not done. Defendant demurs upon the Declaration, for that the Plaintiff does not aver that the Defendant enjoyed the Land; and where there is not a mutual Remedy, the Deed not being indented, there ought to be such Averment. This seems a Covenant by itself. Judgment for the Plaintiff. But the Defendant brought a Writ of Error. *T. Raym. 183. Q. for,*

In Debt on an Obligation for 70 l. in these Words, *Memorandum, that (such a Day) it is agreed between (the Plaintiff) and (Defendant), that the (Defendant) the first of October next, pay (the Plaintiff) 70 l. for (such a House); in Witnefs whereof we have hereunto mutually set our Hands and Seals.* Defendant demurred, for that the Declaration was ill, it not having averred that the Plaintiff had conveyed the House to the Defendant, and that for is a Condition precedent, and if it be not, the Defendant has no Remedy for the House; for tho' both sealed, yet it is not an Indenture of two Parts, nor like the Case in *Cro. Car. Hoe and Taylor*, where the Words, *It is agreed between the Parties, Lessee to repair, Lessor to find great Timber*, were agreed to be a mutual Covenant. To which it was answered, it ought to be intended that the House was conveyed before, for it is not to pay 70 l. for the Conveyance of the House, but for the House itself; and the Court held it a mutual Covenant; and if the House was not conveyed before, as it may be intended it was, the Defendant may have an Action of Covenant for the House, for it is to be intended, that the Plaintiff sealed to the Defendant another Part by the Words, *have mutually set their Hands and Seals.* Judgment for Plaintiff. Defendant brought a Writ of Error. Judgment affirmed. 1 Lev. 274.

Upon mutual Promises, Performance needs not be averred, and an ill Averment of that which needs not be averred, does not hurt. 1 Lev. 293. 2 Keb. 542.

Declaration upon mutual Promises of Agreement, by which Plaintiff agrees to release to Defendant his Equity of Redemption in two Clofes; in Consideration of which Defendant undertakes to pay Plaintiff 7 l. The making the Release is a Condition precedent to the Payment of the Money. *Thorpe and Thorpe, Law of Covenants 84.*

The Books vary much, where in an Action of Covenant Averment of Performance needs be alledged, and where Promise may be pleaded against Promise, and where each must bring his Action; and therefore the Point is well settled in the said Case. *Ibid.*

The Case of *Nichols and Rainbred* was agreed in *Hob. 88.* to be good Law; there, in Consideration that N. promised to deliver to Defendant a Cow, the Defendant promised to deliver to him 50 s. Adjudged, Plaintiff needs not aver the Delivery of the Cow, because there was Promise for Promise.

It is generally true, that where there are mutual Promises the Plaintiff needs not alledge Performance on his Part, but then it depends upon the Words of the Agreement, whether it shall be so or not; and certainly an Agreement may be made, so that one shall not be bound to part with his Money until he had a Consideration for it.

There is no Reason that one shall be compelled to pay Money for the Performance of an Act before the Act be done; but here observe these Differences,

1. If a Day certain be appointed for *Payment of Money*, and this Day happens before the Act can be performed for which the Money is to be paid; there, altho' the Words are, that one shall pay so much for the Performance of such an Act by the other, yet the Party may have an Action for the Money after the Day appointed for the Payment of it, and before the Act to be done; as Sir Ralph Poole's Case, cited 7 Rep. in *Ughtred's Case*: One covenants to serve the other in the Wars of France with three Esquires, and the other covenants for this to pay forty-two Marks; an Action lies before the Service performed.

So 1 Vent. 147. One promises that in Consideration the other will permit him to enjoy such Land for seven Years, that he will pay him 20*l.* *pro quolibet anno*, an Action lies after every Year; and for the same Reason (in 1 Saund. 319.) where it was agreed that C. should give P. 500*l.* for all his Land, the Money to be paid a Week after *Midsummer*, It was adjudged that an Action lies for the Money before the Land is conveyed.

2. If a certain Day be appointed by Agreement, yet if the Day happens after the Consideration is to be performed, there ought to be an Averment that the Service is to be performed. Dyer 76.

If a Contract be made between two, that for a Hawk of the one to be delivered at such a Day, the other shall have his Horse at *Christmas*; if the Hawk be not delivered at the Day, the other shall not have an Action for the Horse. Vide 1 Roll. Abr. 414, 415. 1 Bulst. 167. Cro. Eliz. 384, 433. 2 Mod. 33.

Ninthly, *Distinct and Several.*

If in Articles of Agreement made between A. on the Behalf of B. and C. in which A. covenants that B. for the Consideration expressed in the Deed, shall convey certain Lands to C. in Fee, and after C. covenants on his Part, for the Consideration aforesaid, to pay to B. 160*l.* In this Case tho' B. does not assure the Land to C. yet C. is bound to pay the Money for the Assurance of the Land. It is not a Condition precedent, but a distinct Covenant. 1 Roll. Abr. 415.

If by Charterparty G. and three others covenant with P. and C. to let to Freight a Ship wherein they are Owners to the said P. *pro usu & ex parte* of one B. for a Voyage, *modo & forma sequenti*. G. and the other three covenant with B. that the Ship shall go to L. and shall take such Freight, and then to T. and from thence to H. and thence to return to the T. And C. covenants with G. and the other three, that B. shall cause Lading to be put into the Ship at T. and H. &c. within so many Days, and covenants that the said B. shall pay to the said G. and the other three, *pro tota transfratatione* 147*l.* at such a Day; G. and the other three may have an Action of Covenant against C. for the Non-payment of the 147*l.* without Averment of the Performance of the Covenants on their Part, for this is not a Condition precedent, but a Covenant distinct of the other Part. 1 Roll. Abr. 414.

If A. upon a Marriage intended by C. his Son with D. covenants with D. to stand seised, and to make other Conveyance of Land to the Use of C. for Life, and after to B. for her Jointure for Life, and after to other Uses of their Issues, and so of other Lands, as before; and then A. covenants *modo & forma sequentibus*, (*viz.*) *Præd'* A. *pro & non obstante aliquo actu sive re per ipsum facto in contrarium tempore sigillationis & deliberationis Indenturæ præd' stabat & legitime fuit seistus ac usq; tales bonæ & sufficientes conveyanciæ & assurançiæ in Lege forent factæ & legitime executæ ut supradict' est steteret & esset seistus de præmissis sibi & Heredibus suis in feodo simplici absq; aliquo genere (Anglice, Manner, Condition, Defeasance, Mortgage, Limitation) sive potestatis revocationis mutare permutare eadem ac insuper quod dicta terra & præmissa præd' antea limitata pro junctura dictæ B. a tempore decessus præd' A. pro & durante termino vitæ dictæ B. continuarent remanerent & forent eid' B. & assignat' suis pleni & clari annui valoris 200*l.* ultra & præter omnia onera solution' exitus & reprisas quæcunq; and that no Reversion was then in the King. Altho' this bears Semblance to be one Covenant, because the Words of the Covenant are but once named; and altho' it be said in the Beginning, *he covenants in Manner ensuing*; and altho' the Word *Et* couples all together, yet the last Part touching the Value is an absolute, several distinct Covenant of itself; so that if the Land limited for the Jointure is not of the Value of 200*l.* *per Ann.* altho' it is not *per* any Act of her own, yet he had forfeited his Covenant;*

Covenant; and the Words, *notwithstanding any Act*, do not refer to the said Covenant, but only to the first, and the Value is properly in the Cognisance of the Covenantor; and it is not proper to say, *that for any Thing by him, &c.* it should be of such a Value. *Cro. Car. 495. Jones 403.*

Notwith-
standing any
Thing by
him done to
the contrary.

A Testator covenanted in a Deed of Feoffment, 1. That notwithstanding any Thing by him done to the contrary, he was seised in Fee-simple or Fee-tail, without any Condition or Limitation to determine it. 2. That he had Power and Authority to sell. 3. That the Lands were free from Incumbrances. 4. And that the Feoffee shall peaceably enjoy against all Persons claiming under him, his Father and Grandfather.

The Plaintiff declared, that the Testator had not Power to sell the Land.

The Defendant pleaded, that the Testator, notwithstanding any Thing done by him, had Power to sell the Land.

Covenants
synonyma or
distinct.

Plaintiff demurred. And thereupon it was held by three Justices against North, That tho' the Covenants are distinct, yet the first two are *synonyma*, and of the same Nature; for if he is seised in Fee, he has Power to sell; and it may not be intended, that when by his first Covenant he covenanted against his own Act, that immediately by another Covenant of the same Effect he should covenant against all the World; and the two subsequent Covenants are particular and limited, and therefore the middle Covenants shall not be more indefinite and general. But North held this absolute and not limited, by Things made by him in the first Covenant, or by him, his Father or Grandfather, as in *Cro. Eliz. 106.* a Covenant that notwithstanding any Thing done by him, *he was seised in Fee*; and that no Reversion was in the Crown, and it was of the yearly Value of 300 l. each one is distinct and absolute. 3 *Lev. 46.*

Seised in Fee,
and has Power
to sell.

J. and P. enfeoff Q. of Lands, and they covenant That J. is seised of a good indefeisable Estate in Fee-simple in this Land, and that he or P. had a good Authority to sell, and that there is not any Reversion in the Crown by any Act done by J. or P. or either of them. The Question was, Whether the Words, *By any Act*, refers to all before, or to this last Part only, the two first Covenants being in the Affirmative, and the last in the Negative: *Per Cur'*, They are several Covenants. *Lit. Rep. 62, 65, 80, 185, 203. 1 Sid. 328.*

The Bargainor and his Son, for themselves and their Heirs, did covenant and grant to and with the Bargainee, &c. that they the said Bargainor and his Son, according to the true Meaning of the said Indenture, were seised of a good Estate in Fee-simple, and that the said Bargainor and his Son, or one of them, have a good Authority to sell, according to the true Intent of the said Indenture; and that there was no Reversion in the King by any Act or Acts, Thing or Things, done by him or them. *Hob.* held, that they are all one Covenant, and that the Words, *By any Act or Acts done by them*, relate to the other two precedent Sentences; for if these Words had begun the Sentence, it had been clear, and why not so now? *Hutton* and *Wimb* held, they were three several Covenants. *Hob.* agreed, they were several Covenants in Point of Fact, but not in Point of Obligation, there being not several Words of binding. Adjudged to be several Covenants, and one independant on the other. 2 *Roll. Abr. 250.*

Marriage.

In Debt on a Bond for the Performance of Covenants, Defendant pleaded Performance; the Covenants were, That T. B. Son of W. B. should marry A. M's Daughter: And in Consideration of this Marriage M. covenants to pay 300 l. W. B. covenants to assure such Lands to the said T. B. and A. for her Jointure, and there were other Covenants for quiet Enjoyment, &c. *Et (inter alia)* M. covenants that he will procure the said T. B. to be presented, admitted, instituted and inducted into such a Benefice, upon the next Avoidance of the said Church, which he did not perform. Defendant demurred upon this Assignment of the Breach, because the Covenant is against Law, being a simoniacal Agreement: But *per Cur'*, If it had appeared to have been, that in Consideration of the said Marriage, &c. he would procure him to be presented, &c. it had been a simoniacal Contract, and had avoided the Obligation; but this Covenant depends not on the former Covenants, but is a distinct Covenant by itself, and without a special Averment, or shewing, that it was a simoniacal Contract, it shall not be so intended. But it may be a Covenant upon a good Consideration. *Cro. Car. 425, 426.*

Simoniacal
Agreement.

The Assignor of a Lease for Years, covenanted that he had not made any former Grant, or any Thing by which the Lease may in any Manner be frustrate, but that the

Assignee and his Executors, by Virtue of this Grant and Assignment, may quietly enjoy the Premises during the Term, without the Disturbance of him or of any Person: The Words, but that, &c. depend upon the former Words, and are not new Matter or Sentence; and therefore the Entry of a Stranger by Eigne Title had not broken the Covenant. *Dyer* 240. pl. 43.

So if the Wife of the Lessor had recovered in Dower.

In Covenant that a Lease assigned to the Plaintiff was a sure and indefeasible Lease, and that Plaintiff should quietly enjoy without the Let, Trouble or Interruption by him; on Performance pleaded, Plaintiff assigns a Breach by the Entry of a Stranger, to which the Defendant rejoined, it was by Disseisin; the Question was, Whether this be one entire Covenant, or not. *Per Cur'*, The latter Words cannot qualify the former, they not being Sense joined together; as, on Covenant that the Land is of a certain Value, and that the Covenantee shall enjoy it notwithstanding any Act done by him; this can never be applied to the former Part of the Value. So here the Demise was made before the Assignment, and the Assignor had nothing to do with it, therefore the Saying that the Plaintiff should enjoy it without the Let of the Defendant does not effect the former Part: So was *Dr. Caldecott's Case*, who purchased Bishops Land of the Lord Salisbury, with just such a Covenant, and he had Relief in Chancery thereupon, because the Intent was only to make good his own Assignment, not the original Title. But *per Cur'*, Had the Words been, to enjoy notwithstanding any Act, that should have gone to the Whole. 2 *Keb.* 76, 201, 213. 1 *Saund.* 58.

Sid. 328.

Several Covenants or Assumpsits are always in Consideration one of another, yet being distinct, one is no Bar of another. 3 *Keb.* 352.

If a Lessee covenants that he will from Time to Time during the Term, after three Months Warning, sufficiently repair, and at the End of the Term leave it sufficiently repaired to the Lessor: The last Clause is distinct by itself, he must leave it sufficiently repaired without Notice. 2 *Keb.* 505, 543, 569. 1 *Sid.* 429. 1 *Saund.* 321.

A Covenant with two *Conjunctim & Divisim*, is joint or several, according as the Case is. *Moor* 849. pl. 1154.

A Covenant in an Indenture *Tripartite* between three, & *quilibet eorum*, if one is damnified, they must both join. 2 *Leon.* Case 60.

A Covenant with three jointly and severally that they should pay, &c. and one of the three was sued, and a Breach assigned that he has not paid: And it was demurred to, because he had not said, *Nor any of the other had not paid.* *Per Cur'*, If the Action had been brought against all, the Non-payment of all must be alledged; but when brought but against one, then it is sufficient to say, *That he has not paid*, and if either of them has paid, the Party sued ought to plead it.

So if two are jointly and severally bound in a Bond; in an Action against one, it is sufficient to say, that he has not paid it. *Latch* 50.

In a Charterparty the Covenants are several and not joint. 5 *Co.* 22. b.

Tenthly, General or Particular; and where the particular or express Covenant qualifies the general, or not.

If A. covenants that he has lawful Right to grant, &c. and that B. shall enjoy notwithstanding any Claim under A. These are two several Covenants, and the first is general, not qualified by the second; one Covenant goes to the Title, and the other to the Possession. 1 *Mod.* 101.

A Grantor covenanted that he had good Right. Plaintiff says he had no good Right. Defendant says, that the Covenant was *ulterius*, that the Son should enjoy & notwithstanding any Act done by the Father, and that he did no Act. The latter Covenant restrains the former; it is pleaded to be in the same Indenture, all the Parties whereof shall be taken together, (*vide* 4 *Co.* 81.) and the particular shall qualify the general; that Covenant being that the Covenantor *tantum modo warrantizaret.* And they need not set forth the Indenture, for it is confessed by the Defendant, and the Plaintiff desired Leave to discontinue. 1 *Keb.* 234. 1 *Lev.* 57.

If A. (in a Conveyance of Land) covenants that he is seised of a good and indefeasible Estate in Fee, and that he had good Power to convey it to B. according to the Indenture, notwithstanding any Act done by him: This last Clause and Covenant does not restrain the first Clause of the Covenant, *viz.* That he had a good and indefeasible Estate in Fee, notwithstanding any Act done by him; but this is absolute and general.

general. And the general Use of a Conveyance is to make it so, and the one Covenant independant on the other. 2 Roll. Abr. 250.

Covenant to enjoy *absque legali molestacione* of the Defendant. *Rainsford* conceived a general Entry no Breach, (for that shall be intended tortious) and the general Covenant is restrained by special Covenant against any lawful Let. 2 Keb. 717, 723.

An exprefs Covenant controuls an implied one, but he may use either of them at his Pleasure.

A special Warranty controuls a general, and the Reason is, no Man will take an exprefs special Warranty, when the Intent is that he shall have a general Warranty. *Winch* 93, 94.

D. by Indenture granted a Fee-Farm Rent to P. which he had purchased of the King's Lands, and covenanted that he was seised in Fee, and had good Right to sell. The Breach assigned, that he had not good Right. D. pleaded, that *ulterius agreeat fuit in eadem Indentura*, that the Covenants in the Indenture shall not extend to Acts further than to Acts done by the Vendor and his Heirs. P. demurred. *Per Cur'*, Tho' this is a remote Agreement at the End of the Deed, and far distant from the other Covenant, yet it has qualified the first Covenant, and restrains it to Acts done by the Covenantor himself only. 1 Lev. 57. 1 Keb. 234.

J. and V. were Jointenants of a Mill by a Lease for Years. V. assigns all his Interest in the Mill to another, without J.'s Assent or Privy, and dies. J. afterwards (reciting the said Lease, and that all came to him by Survivorship) granted the said Mill, and all his Estate, Title and Interest to P. and covenants that he shall peaceably enjoy it notwithstanding any Act done by him, and gave a Bond for the Performance of Covenants; upon which P. brought an Action of Debt. J. pleaded, that the Plaintiff had enjoyed it notwithstanding any Act done by him. P. replied, that V. Jointenant with J. assigned his Estate to J. D. who entered and expelled him. Defendant demurred; and it was adjudged against the Defendant, for the Grant was never good, for he had no Power to grant one Moiety, and yet he had expressly granted the Mill to P. And the Condition of the Obligation being to perform all Grants, the Grant being defective at the first as to a Moiety, which is the Substance of the Agreement of all the Parties; this is not qualified by the Covenant ensuing. And it is not like *Nokes's Case*, 4 Rep. for there the Grant was good for the Whole, and becomes ill by Eviction afterwards, and therefore in that Case the Covenant ensuing qualified the general Covenant. *Telv.* 175. *Cro. Jac.* 233. *Lit. Rep.* 206. 1 Bulst. 3, 4. 2 Brownl. 212.

D. let a House to P. by the Words *Demise* and *Grant*, which Words import a Covenant in Law; and the Lessor covenanted that the Lessee should enjoy the House during the Term, without Eviction by the Lessor, or any claiming under him, (which exprefs Covenant was narrower than the other) and gave a Bond for the Performance of the Covenants. The Plaintiff granted his Term over to a Stranger, and assigned for Breach, that one S. entered upon the Assignee, and recovered in Ejectment, and Debt was brought upon the Bond. *Per Cur'*, By this Covenant in Law the Assignee shall have a Writ of Covenant, and for the Breach of the Covenant in Law the Obligation was forfeited; but because the Plaintiff did not shew that S. had a Covenant-Title, (for otherwise the Covenant in Law was not broken) Judgment against the Plaintiff; and the exprefs Covenant qualifies the Generality of the Covenant in Law, and it shall not extend further than the exprefs Covenant. *Nokes's Case*, 3 Co. 63. a.

Eleventhly, Obligatory or Declaratory.

Covenants Obligatory, as to enjoy, free from Incumbrances, shall never be construed to raise an Use, because they have another Effect. 1 Sid. 27.

Covenants Declaratory serve to limit and direct Uses. *Ibid.*

(E) What Words will create or amount to an exprefs Covenant, or not.

THERE is no need of the Word *Covenant* to make a Covenant, but any Thing under the Hand and Seal of the Parties, which imports an Agreement, will amount to a Covenant. 1 Roll. Abr. 518.

A. made a Bill of Debt against *B.* for the Payment of 20*l.* at four Days, and in the End of the Deed covenanted and granted with *B.* his Executors and Administrators, that if he made Default in any of the said Payments, that then he will pay the Residue that then shall be unpaid; and afterwards *A.* fails in the first Payment, and before the second Day *B.* brought Action of Debt for the whole 20*l.* It was moved, if *B.* will sue *A.* before the last Day, it ought to be by way of Covenant, and not by Debt. But per Cur⁹, The Action lies; for if one covenants to pay me 100*l.* at such a Day, an Action of Debt lies, a fortiori when the Words of the Deed are covenant and grant; for the Word Covenant sometimes founds in Covenant, sometimes in Contract, secundum subjectam materiam. 1 Leon. 208.

The Word Covenant sometimes founds in Covenant, sometimes in Contract.

An Action of Covenant was brought upon these Words, (*viz.*) *I oblige myself to pay so much Money at such a Day, and so much at such a Day.* Per Cur⁹, Action of Covenant lies, especially if both Days are not passed; but the Chief Baron Bridgman doubted how the Law would have been if the Words were *Teneri & firmiter obligari*, for that those Words found in Debt and not Covenant. And per Cur⁹, The Words *Quod teneat conventionem & de conventionem fracta*, are all one. Hardr. 178.

Covenant on what Words. Oblige. *Teneri & firmiter.*

It is a general Rule that the Word Covenant makes a Lease tho' the Word Grant be omitted, much more when the Words are *To hold, enjoy, &c.* 2 Mod. Rep. 80.

Where the Word Covenant will make a Lease.

But if one covenants to grant, and suffer one to enjoy such Lands; this will not amount to a Condition, for the Intent of the Parties is only to make it a Covenant.

In Covenant on a Feoffment and Grant of Bishops Lands, Breach was assigned that the Defendant had no good Title. On Demurrer the Court conceived that this will not make any express Covenant, but *Dedi* will, and so will *Reservando*. 3 Keb. 549.

Covenant does not lie against Executors of Tenants in Tail upon these Words *Demise and Grant*. 1 And. 12.

Demise and Grant.

Upon the Words *Demise and Grant*, without any other Words which comprehend Warranty in them, an Action of Covenant lies; and a Lease by Estoppel is a good Lease to ground the Action upon Eviction, and to traverse that he was not possessed by Virtue of a Lease, is no Plea against the Lease by Indenture, which is an Estoppel, without shewing a particular Cause. Cro. Jac. 73.

If the Lord grants to his Tenant that he will not distrain him in such a Part of his Land for his Rent; this shall be taken to be a good Covenant by this Word *Grant*. Perk. §. 69.

If a Man makes a Lease for Years, and warrants it to the Lessee, his Heirs and Assigns, tho' this be not a Warranty, yet it is a good Covenant in Law. Bro. Covenant 38.

Tho' the Words *Vendidit, Assignavit* and *Transfuit* do not amount to a Covenant against an Eigne Title, yet against the Covenantor it will amount to a Covenant. 3 Keb. 304.

Vendidit, Assignavit, Transfuit.

If a Lease for Years made to *A.* determinable upon the Lives of *B. C.* and *D.* *B.* dies, *A.* assigns to *E.* and *E.* reciting the Death of *B.* and the Assignment to him, assigns the Term to *F.* and covenants with him that he himself is lawfully possessed of all the Premises of a good and sufficient Estate for the Residue of the said Term, if the said *C. D.* or either of them, shall happen so long to live; and they the said *C. and D.* are yet in full Life, tho' the Words are not, and that the said *C. and D.* are yet in full Life; yet this is implied by the Words, and is as a several Covenant, or otherwise the last Part would be void and of no Effect. The Breach was, that *C.* was dead at the Time of the Assignment. 2 Roll. Abr. 249. pl. 2.

The Words *yielding and paying* make an express Covenant, and not a Covenant in Law only; as if a Man lets Land for Years, reserving a Rent, Action of Covenant lies for Non-payment of Rent, for *Reddendo* the Rent is an Agreement for the Payment of the Rent, which will make a Covenant. 1 Ventr. 10. 1 Roll. Abr. 519. pl. 10.

Yielding and paying.

These Words in a Lease for Years, that the Lessee shall repair, make a Covenant. So in the Case of Indentures of Apprenticeship there are not the formal Words of a Covenant, but only an Agreement that the Master shall do this and the Apprentice shall do that; these are Covenants, but in all these Cases there is something of an Undertaking. 1 Roll. Abr. 519.

Words of Agreement make a Covenant.

These Words in a Deed of Lease, and the Lessee shall repair the Mills (being the Thing leased) as often as Need shall require, and shall leave them sufficiently repaired at the End of the Term, make a Covenant; for it is the clear Agreement of the Parties, and otherwise the Words, *shall leave, &c.* will not have any Effect, and because of the

The Lessee shall repair.

the last Words it cannot be a Condition, and being by Indenture it is the Word of both Parties. *Poph. 136. Cro. Jac. 399. 1 Roll. Abr. 518.*

If Lessee for Years covenant to repair, &c. *provided always and it is agreed that the Lessor shall find great Timber*; this makes a Covenant on the Part of the Lessor to find great Timber by the Word *agreed*, and shall not be a Qualification of the Covenant of the Lessee.

But if the Lessee covenants to repair, *provided always that the Lessor shall find great Timber*, without the Word *agreed*; this Proviso shall not be any Covenant on the Part of the Lessor, but shall only be a Qualification of the Covenant of the Lessee. *1 Roll. Abr. 518.*

In the Indenture of Apprenticeship that the Apprentice shall be loyal, & *secreta sua velaret*, these Words imply a Covenant. *Moor 135.*

Words in the future Tense.

If a Deed be made to another in these Words, *viz. I have a Writing in my Custody in which W. stands bound to B. in 100 l. and I will be ready to produce it*; this is a Covenant, for this is a present engaging to do it. *1 Roll. Abr. 519.*

Bond to pay 40 l. when an Account shall be stated, it is a Covenant.

The Testator was indebted to the Plaintiff by Bond, which he did thereby covenant to pay when such a Bill of Costs should be stated by two Attornies, indifferently to be chosen between them; and sets forth in his Declaration, that he named one Attorney, and desired the Defendant's Executor to name another, which he refused, and so brings Action of Covenant; this is a Covenant and not a *Solvenda*, and if it should not be a Covenant but an intire Bond, then it would be in the Power of the Obligor whether ever it shall be payable, and the Plaintiff having named an Attorney, ought to recover. *2 Mod. 266.*

I am content to give to W. 10 l. at Michaelmas and 10 l. at Lady-day; an Action of Covenant lies upon it as well as Debt. *3 Leon. 119.*

If A. makes a Deed to B. in these Words, *I have in my Custody one Writing obligatory, in which Writing obligatory one W. now standeth bound to the said B. for the Payment of 400 l. such a Day, being the proper Money of B. and I will be ready at all Times when I shall be required to deliver the same Writing obligatory to the said B.* If B. after demands the Obligation of the said A. and he refuses to deliver it, B. may have an Action of Covenant upon this Deed by Force of these Words, *And I will be ready at all Times, when I shall be required, to re-deliver the same.* *11 Car. B. R.*

If there are Articles of Agreement between A. and B. by which it is agreed (upon a Marriage intended between A. and C.) that all the Stock of C. shall remain in the Hands of B. until A. shall make a certain Jointure to C. *ipso B. annuatim solvendo to A. interesse pro inde secundum ratam 8 l. per Cent. &c.* and if B. does not pay the said Interest, an Action of Covenant lies against him upon these Words, for that every Agreement by Deed is a Covenant, and otherwise A. shall not have any Remedy for the Money. *8 Car. B. R. Crofs and Northey, 1 Roll. Abr. 518. pl. 6.*

So where a Man acknowledges himself to be accountable to another for all Money by him charged upon A. to be paid to B. *1 Lev. 47.*

Covenant or Warranty according as the Eviction is.

If a Man conveys Lands to another in Fee with Warranty, and after the Land is evicted by Eigne Title for certain Years, the Grantee of the Land may have an Action of Covenant upon the said Words against the Grantor upon this Eviction, altho' the Warranty be annexed to the Freehold, for the said Words make a Covenant if a Chattel be evicted, and a Warranty, if a Freehold be demanded. *1 Roll. Rep. 25. Vide Hob. 3. Telv. 139.*

Concessi & Feoffavi.

An Action of Covenant was brought on the Words *Concessi & Feoffavi* in a Conveyance of an Inheritance, and Breach assigned in Entry on the Plaintiff: Defendant demurred, and the Question was, Whether *Concessi* makes a Warranty or Covenant in Case of Inheritance as it doth on a Term. The Court inclined it would not. *3 Keb. 188.*

(F) *What Words amount to a Covenant and not to a Condition, or to a Condition and not to a Covenant.*

IN Trespass Defendant justified, for that M. seised of Lands let them to the Plaintiff, except the Trees, and Liberty of eradicating & *asport' cum averiis reparand' fepes & implend' foveas*; and M. granted the Trees and the Liberty to A. and he and the other Defendants, as his Servants, use this Liberty, which is specially pleaded, *Que est ead' fractio.* Plaintiff demurred, and for Cause shewed, that the Defendants

Defendants have not alledged that they have filled the Ditches and amended the Hedges, according to the Agreement. *Pollexfen* for the Plaintiff shewed that this is a Condition, and not being performed destroys the Agreement, and avoids the Liberty. But *Per Cur'*, This is not a Condition but a Covenant, for which the Lessee has Remedy by Action.

It was objected that the Power and Liberty was annexed to the Reversion, which is not granted to *A. sed non alloc'*, for the Liberty is annexed to the Trees, and incident to them, and assignable with them. *T. Jones* 205.

One made a Lease for Years, Lessor covenants that the Lessee should have House-boot, Hay-boot and Plough-boot, without committing any Waste, upon Pain of Forfeiture of the Lease; the Covenant is no more than what the Law appoints, and therefore vain; and it is a Covenant on the Part of the Lessor, and so cannot be a Condition. *Cro. Eliz.* 604.

A. made a Lease of Lands to *B.* for ten Years, rendring Rent, and *B.* covenanted to repair; afterwards *A.* by his Will devised that *B.* should have the Lands for thirty Years after the ten Years, under the like Covenants as are comprised in the Lease; this makes them to be Conditions in the second Lease what were Covenants in the first, for they cannot be Covenants for want of a Deed; and if they should not be Conditions, the Heir of the Lessor were without Remedy if they are not performed. *Godb.* 98, 99. 2 *Leon.* pl. 40. *Owen* 54.

Lessee covenanted in an Indenture of Lease, that he would not alien nor assign his Term to any other but his Wife for Life, and the Residue of his Term to his Children, or one of his Youngest Brothers, upon Pain of forfeiting his Lease; the Lessee assigned it to his Brother, having a Wife: This Covenant is a Condition to defeat the Estate, for being by Indenture they are the Words of both Parties, and are sufficient to determine the Lease. *Cro. Jac.* 398. 2 *Bull.* 290.

A Lessee brought Covenant, and declared that the Lessor covenanted with him that he *paying the Rent, and performing* the Covenants on his Part to be performed, shall quietly enjoy; the Breach assigned was a Disturbance by the Lessor; Lessor pleaded the Plaintiff did enjoy quietly till such a Time, but then he cut Wood down, which was contrary to his Covenant, and then he entred: The Question was, Whether the Defendant's Covenant was conditional or not; for if it amounted to a Condition, then the Lessor's Entry is lawful; but if it be a Covenant, he ought to bring his Action. *Per Cur'*, The Covenant is not conditional, for the Words *paying and performing* signify no more than that he shall enjoy under the Rents and Covenants.

Indeed the Word *paying* may in some Cases amount to a Condition, but that is where without such Construction the Party can have no Remedy. 2 *Mod.* 35. *Vaughan* 32. 1 *Sid.* 266, 280.

A Lessor covenanted that the Lessee paying his Rent shall enjoy the Land demised during the whole Term, the Lessee did not pay the Rent, and was afterwards ejected by a Title Paramount; by two Judges against one the Covenant is conditional, and the Lessee shall not have Advantage of it if he did not perform the Condition, which is created by the Word *paying*. 4 *Leon.* 50.

One covenants that the Plaintiff shall quietly enjoy the Land demised, *paying* the Rent reserved; and it was pleaded that Plaintiff had not paid the Rent according to the Reservation. On Demurrer it was adjudged that the Word *paying* does not make the Covenant conditional, but it is a reciprocal Covenant, for which the Party may have his Action. *T. Jones* 206.

A Man lets Land by Indenture, and in it is such a Clause, and it is covenanted (or agreed) between the said Parties that the Lessee shall not do such a Thing, upon Pain of forfeiting his Estate. It is a Condition, for the Words being indifferent whether of the Lessee or Lessor, they shall be taken for the Words of the Lessor. *Roll. Abr.* 407, 408.

P. covenanted with *D.* to assign over his Trade to him, and that he should not endeavour to take away any of his Customers, and in Consideration of the Performance of this Covenant *D.* covenanted to pay *P.* 60 *l.* per Ann. during his Life; these Words *in consideratione performanceis* make it a Condition precedent, which must be averred. *Per Cur'*, *prater Twisden*, who said, How long must he stay till he be intitled to his Annuity? as long as he lives; for this Covenant may be broken at any Time. *Maledicta expositio.* 1 *Mod.* 64. 2 *Saund.* 155. 2 *Keb.* 674.

A Covenant on the Part of the Lessor, and not a Condition.

Covenants in a first Lease and Conditions in a second.

Where a Covenant is a Condition to defeat the Estate.

Paying, performing.

Where the Word paying amounts to a Condition, and where not.

What Words amount to a Condition and not to a Covenant.

In Lord *Cromwell's* Case the Words *covenanted, provided and agreed*, give an Advantage of a Condition or a Covenant.

A Condition
tho' the Words
found in Co-
venant.

Covenant not
to disturb any
Tenant of the
Manor out of
their Tene-
ments doing
their Duties.

B. R. let Lands to the Defendant; Plaintiff replies, that the said Lease was upon Condition, (*viz.*) the Lessee by the Indenture of the said Lease did covenant that he would not put out nor disturb any of the Tenants inhabiting within the said Manor out their Tenements doing their Duties, according to the Custom of the said Manor; and shewed that the Defendant had put out one *A. G.* a Tenant, &c. and that *B. R.* had re-entred for the Condition broken: *Per Cur'*, It is a Condition tho' the Words found in Covenant, and be the Words of the Lessee, yet the Lease being made by Indenture, the same is the Deed of both, and every Word in it is spoken by both Parties; and tho' he may have Action of Covenant, yet he cannot thereby overthrow the Lease, as by Entry for Condition broken; and yet by the Words it seems that the Meaning of the Indenture was, that by the Breach of this Covenant the Estate should be defeated.

So in 24 *Eliz. Hill and Lockham*, by Indenture the Lessee covenanted to grind all his Corn at the Lessor's Mill, and in the End of the Indenture the Lessee covenanted to perform all Covenants, *sub pœna forisfacturæ*; and by the Opinion of the whole Court the same was a Condition, but in the principal Case the Breach was not well assigned. It is said he had put out a Woman *unam tenentem*, &c. and perhaps she was but a Tenant at Will, and the Covenant refers only to Copyholders, and perhaps she had disseised one of the Tenants, and then the putting her out was no Breach; it is said she had done her Duty, that might be once; he ought to have said she had done her Duty always, and the Exceptions were incurable. 1 *Leon.* 245.

The Parson of *D.* covenanted with one of his Parishioners that he should pay no Tithes, for which the Parishioner covenanted to pay to the Parson an annual Sum of Money, and afterwards the Tithe not being paid, the Parson sued him in the Court *Christian*; and the other prayed a Prohibition. *Per Cur'*, It is a bare Covenant, and no Interest of the Tithes pass; and the Party who is sued for Tithes has no Remedy but by Action of Covenant. *Poph.* 140.

If Articles are made by Indenture between *A.* and *B.* by which *A.* covenants to pay 100 *l.* to *B.* at a Day, and *B.* covenants, upon Receipt of the 100 *l.* to give an Acquittance for it, and to enter into Bond to *A.* conditioned to save *A.* harmless from all Claims to certain Lands in his Possession: If *A.* tenders the 100 *l.* at the Day to *B.* it is no Breach of *B.'s* Covenant, if he refuses to receive it, and to make an Acquittance, &c. for perhaps it was the Intention of the Parties that it should be in the Election of *B.* to receive the Money, and make Acquittance, &c. or let it alone. *Stil.* 481. adjudged *Nisi. Sed Quære.*

Where a Pro-
viso shall not
make a Con-
dition.

Proviso where
it makes not
a Lease, but
only a Cove-
nant.

A Proviso coupled with other Words of Covenant and Grant shall not create a Condition, but be of the same Nature as other Words of Grant, as *Proviso semper*, and the said *A. B.* covenants and grants to and with, &c. that the said *E.* of *H.* and *L. M.* may dig for Oar. 4 *Leon.* 147. *Moor* 174.

If *A.* makes a Lease to *B.* for Life, with a Proviso that if the Lessee dies within the Term of forty Years, that then the Executors of the Lessee shall have it for so many of the Years which shall amount to the Number of forty Years, to be accounted from the Date of the Indenture of Lease; this Proviso shall not make a Lease, but only a Covenant. *Dyer* 150. 1 *Co.* 155.

Where a Pro-
viso can have
no Effect as a
Condition, but
is by way of
Agreement.

On Marriage agreed on between the Defendant and one *Mary J.* 1500 *l.* was to be paid by Articles at several Days to the Plaintiff, and he to convey several Lands and an Office to the Defendant, *Proviso that the Defendant out of the first three Years Profits should pay 500 *l.* to the Plaintiff.* Plaintiff brings Debt on this Proviso, averring Profits above the Value received, and that the Marriage took Effect. Defendant demurs, because this Proviso is in Nature of a Defeasance or Condition. *Per Cur'*: This Proviso can never have any Effect as a Condition; *Moyle* was to surrender to bring the other in, but could not re-enjoy it on Breach of Condition: There are no Words that refer or direct to any Proviso to be in the future Grant, nor would the Matter bear it, being an Office of Justice, and therefore it could not be reduced on Breach of the Condition, it must be construed by Agreement of the Parties to be a Covenant. 1 *Keb.* 842, 860, 892. This Proviso is not by way of Defeasance but Agreement. 1 *Lev.* 155. *Per tot' Cur'*, It amounts but to a Covenant by Articles.

It is covenanted and agreed between the Parties, that *J. H.* doth let the said Lands for and during five Years, to begin, &c. *Provided always* [that the said Defendant] shall pay to Plaintiff yearly at such Feast-Days, by equal Portions, &c. during the Term; and the said Parties agree that the Lease shall be made pursuant. *Per Cur.* 1. This is an immediate Lease because of the Words *he doth let.* 2. This Proviso is a good Reservation of the Rent, it being by Articles whereunto either of them were Parties. *Per Popham*, It is a Reservation and a Condition also; Proviso joined with the Words of Covenant make it a Condition and a Covenant also. *Cro. Eliz.* 486. *Moor* 459. *Noy* 57.

Articles amounting to an immediate Lease.

Where Proviso makes a Covenant and a Condition also.

If a Man by Indenture lets Lands for Years, provided always and it is covenanted and agreed between the said Parties that the Lessee should not alien; and it was adjudged that this was a Condition by Force of the Proviso, and a Covenant by Force of the other Words. *Co. Lit.* 203. b.

A Grant was made by the Earl of P. of the Lieutenantcy or Deputyship of the West-Part of the Forest of *Selwood*, to Sir M. B. and the Heirs Male of his Body, *Provided always*, and the said Sir M. covenanted and granted, &c. with the said Earl, his, &c. that it shall be lawful for the said Earl, his Heirs and Assigns, to have all the Pre-eminence and Commandment of the said Game and Hunting there as if the Grant had not been made; *Provided also*, and the said Sir M. covenanted for, &c. to and with the said Earl, his, &c. that the said Sir M. and the Heirs Male of his Body, would preserve the Game, as it had been used, and that they should not cut any Wood, &c. Sir H. B. Son of Sir M. cut down four Timber-Trees: Now the *Quere* was, whether this is a Condition, and so gives Entry to the Earl on a Covenant, or not? *Per Cur.* The first Proviso is not a Condition but a Covenant, either because by this he is not to do more than he may do by his superior Custody, in which Case he ought to do it by his own Authority; or if it be taken, that he may kill the Game at Pleasure, it is void, because against his Office. The second Proviso is but a bare Covenant, it shall be intirely the Words of the Grantee himself as the Covenant is, and without the Words of the Grantor a Condition cannot be; and therefore suppose it had been on the other Part; *Provided always*, and the Grantor covenants that the Grantee shall have the Refuse of the Browse, &c. this is a meer Covenant. *Poph.* 116. *Vide Moor* 706. *Cro. Eliz.* 384, 560. where this Case is differently reported.

Where a Proviso amounts to a Condition, or a Covenant.

Provided also, and it is covenanted, granted and agreed, where it is a Covenant, and where a Condition.

Where a Proviso is a bare Covenant, and why.

Provided always, and it is covenanted, granted and agreed between the Parties, that if the Lessee sells or aliens the Term, that the Lessor shall have the Preferment; this is a good Condition, because of the Words of the Lessor as well as the Lessee. *Poph.* 117.

P. made a Lease for Years to H. of a Farm, except the Wood, and covenanted with the Lessee that he should take all Manner of Underwood; *Provided always*, and the Lessee covenants, that he will not cut any Manner of Timber-Trees; this was adjudged no Condition. *Poph.* 117.

If by Articles of Agreement made by Indenture between A. and B. A. agrees that B. shall have a House in a Street of London for certain Years; *Provided and upon Condition* that B. shall receive and pay the Rents of the other Houses in the same Street of A. mentioned in a Schedule; and it is further agreed that B. for his Labour in collecting the said Rent, shall have the Overplus of the Rents beyond such a Sum; this is not any Covenant on the Part of B. to bind him to receive and pay the Rents mentioned in the Schedule, but the Proviso will make the Estate of B. void in the House (this being a Lease, and will not make a Covenant). *Cro. Car.* 128. Yet see 1 *Lev.* 47.

If there be Articles of Agreement made by Indenture between A. and B. in which A. agrees, that B. shall have a House in a Street in London for certain Years; provided and upon Condition that B. shall receive and pay the Rents of the other Houses of A. in the same Street, mentioned in a Schedule annexed to the Indenture; and it is further agreed that B. for his Labour in the Collection of the said Rents, shall have the Overplus of the Rents over and above such a certain Sum: This is not any Covenant on the Part of B. to bind him to pay and receive the Rents mentioned in the Schedule; but the Proviso and Condition only will make the Estate of B. void in the House, (this being a Lease) and will not make a Covenant. 1 *Roll.* 518.

Recoverors to an Use before the Statute 27 H. 8. made a Lease for ninety-nine Years by Indenture at 10 l. Rent; Lessee by the same Indenture covenanted that he would pay the Rent to *Cestuy que Use*, his Heirs and Assigns, *proviso semper* if the said

Proviso abridging a Covenant.

said *Cestuy que Use* did not make his Heir Male his Assignee, that then he should pay the Rent to the Recoverors, their Heirs and Assigns. Afterwards *Cestuy que Use* died, and did not make his Heir Male his Assignee, Lessee did not pay the Rent to the Recoverors: The Question was, if this Estate was forfeited, and if this Proviso makes his Estate conditional: *Per Cur'*, It is no Condition that went to the Estate, but only abridged the Covenant. *Cro. Eliz.* 73. 2 *Leon.* 128.

(G) *What Words of Covenant or Agreement amount to a Grant, Lease, &c. and what to a Covenant only.*

Covenant to permit one to enjoy, &c. is a Covenant and no Lease.

IF a Man covenants to permit and suffer another to have, hold and enjoy certain Lands *a die dat'* for Life; this is a Covenant and no Lease, and the Law will not expect any Livery, and for this he shall not be Tenant at Will. 1 *Roll.* *Abr.* 859.

Where Covenant shall amount to a Grant.

Covenant in some Cases shall amount to a Grant; as where one covenants *Quod licitum foret* for the Lessee to take necessary Fire-boot and House-boot, to be expended, and for the Reparation of the Premises. *Cro. Jac.* 291.

Covenant and grant that one shall enjoy the Lands, &c. amounts to a Lease.

The Words *Covenant* and *Grant* that he shall enjoy the Lands for six Years amounts to a Lease, and shall bind the Heirs.

And the Words of the Covenant and Grant of the Lessee that he shall pay such a Rent yearly, amounts to a Reservation. *Cro. Jac.* 207.

Mortgage and not a Lease.

G. H. being seised of Land in Fee, covenanted with *M. W.* to convey it by Fine or other Assurance to *M. W.* and his Heirs before, &c. which should be to the Use of him and his Heirs, with a Proviso that if he paid to *M. W.* 100 *l.* at the End of thirteen Years, that then he might re-enter, and that all Assurances should be to the Conisor; and covenanted and granted for him and his Heirs with the said *M. W.* and his Heirs, that he and his Heirs should enjoy the said Land until the End of the said thirteen Years, and after for ever, if the said 100 *l.* was unpaid; and *M. W.* covenanted to pay yearly two Capons, and that he would not commit any Waste. *Per Cur'*, This is not a Lease, for the Intent of the Parties was that it should be a Mortgage, which is but a Covenant that he shall enjoy during the Time of the Mortgage, and not a Lease; and the Covenant for quiet Enjoyment shews as much. *Cro. Jac.* 172.

Covenant and Grant that one shall have and hold the Land, &c. is a Lease.

If one covenants and grants with another that he shall have and hold his Lands for so many Years, it is a good and absolute Lease; but if he covenants and grants that he shall enjoy his Lands for ten Years, it is not a Lease, because it sounds only in Covenant. *Cro. Jac.* 172.

If *A.* covenants with *B.* that *C.* shall have his Land for so many Years, rendring such a Rent, here is not any Lease, and therefore no Rent.

But if *A.* had covenanted with *C.* himself, it had been otherwise, because between the said Parties. 1 *Leon.* 136, 118, 119.

Agreement between Strangers not to amount to a Lease.

An Agreement or Covenant made between *J. S.* and *J. N.* that *J. D.* shall have such Lands for Years; this being made between Strangers cannot amount to a Lease.

So if *J. S.* covenants with *J. D.* that his Executors shall have such Land for twenty-one Years; this cannot amount to a Lease, for they are in this Degree as Strangers. *Cro. Eliz.* 173. 1 *Leon.* 136.

In an Indenture of Articles the Plaintiff covenants that *E.* Brother of the Defendant, should enjoy such Lands until the Feast of St. *Michael* next following, rendring such a Rent at the End of the said Term, and that *E.* should pay such Rent. The Defendant pleaded that his said Brother paid to the Plaintiff before the said Feast of St. *Michael*, in full Satisfaction of the said Rent, 3 *s.* The Plea is good, and upon the Matter the Covenant is well performed, for there is not any Rent in this Case, for here is not any Lease; for if *A.* covenants with *B.* that *C.* shall have his Land for so many Years, rendring such a Rent, here is not any Lease, and so no Rent; otherwise if *A.* had covenanted with *C.* himself. 1 *Leon.* 136.

Concessit makes a Lease.

Where *J. S.* covenants & *Concessit* to *J. N.* that he shall have twenty Acres of Land for twenty-one Years; it is a good Lease, for this Word *Concessit* is as good as *Dimisit*. 1 *Leon.* 118, 119.

By Articles between *H.* and *W.* it is covenanted and agreed between the Parties that the said *H.* doth let the said Lands for and during five Years, to begin at *Michaelmas* next ensuing, provided that the said Defendant shall pay to the Plaintiff annually during the Term, at the Feasts of *St. Michael* and the *Annunciation*, 120 l. by equal Portions: And the said Parties do covenant that a Lease shall be made and sealed, according to the Effect of these Articles, before, &c. the Feast of *All Saints*. *Per Cur.*, 1. It is an immediate Lease, because of the Words, *it is agreed that he doth let*, being in the present Tense, and that which followed is in Reference to further Assurance, and the rather for that it is to be made after the Beginning of the Term, so he ought to have the Term presently at *Michaelmas*. 2. This Proviso is a good Reservation of the Rent. *Cro. Eliz.* 486. *Moor* 459.

Articles make an immediate Lease tho' there is a Covenant therein that a Lease shall be made and sealed.

The Word *Agreement* being only in the Stile, and not in the Article itself, a Covenant and Promise alone will not amount to a Lease of a Freehold. *Per Tyrrell*, The Reason of *Hob.* 3. was because the Word *Convenit* was joined with *Agreeavit*, and a Covenant to enjoy has been held no Lease. 2 *Keb.* 268.

(H) *How a Covenant in Law may be created, and the Operation and Consequences upon it.*

IF a Man leases for Years, and ousts the Termor, he shall have Covenant against him tho' there be no express Covenant in the Deed. 1 *Roll. Abr.* 519. Action of Covenant.

But it is held to be otherwise where a Stranger ousts him; for when Covenant is brought upon the Word *Demise*, the Plaintiff shall not recover Damages, but the Term itself, which he cannot against a Stranger. 2 *Leon.* 104. *Cro. Eliz.* 214.

Yet *Quere*, for the Books don't seem to admit of this Diversity where the Ouster by the Stranger is with Title.

If a Man makes a Lease for Years of Land, by the Words *Concessi* or *Demise*, they import a Covenant; and if the Lessee or his Assignee are evicted, they may bring an Action thereupon. 5 *Co.* 17. a. 18. a. *Concessi, Demise.*

But *D.* let to *P.* a House in *London* by the Words *Demise, Grant, &c.* and the Lessor covenants that the Lessee shall enjoy the House during the Term without Eviction by the Lessor, or any claiming under him; and the Lessor was obliged to perform all Covenants, Grants and Articles in the Indenture. *P.* grants his Term over to a Stranger: In Debt, upon this Obligation, *D.* pleads Performance of all Covenants; *P.* assigns a Breach, that one *Savery* entered upon the Assignee, and made a Lease for seven Years to one *D.* if he should so long live, who brings Ejectment against the Assignee, and recovered. *D.* demurs in Law: The Court was against *P.* and resolved,

1. That by this Covenant in Law upon the Words *Demise* and *Grant*, the Assignee shall have a Writ of Covenant. *Dyer* 257. Assignee shall have a Writ of Covenant on the Words *Demise* and *Grant*.

2. That by this Breach of Covenant the Obligation in Law was forfeited, for he was bound to perform all Covenants, Grants, &c. which extends as well to Covenants in Law as to Covenants in Fact.

3. Altho' that the Recovery was by Verdict, yet *P.* ought to have shewed that *Savery* had elder Title, for otherwise the Covenant in Law was not broken; and because he did not shew it, for this Cause they resolved against *P.*

4. The said express Covenant qualifies the Generality of the Covenant in Law, and restrains it by the mutual Consent of both Parties, that this shall not extend further than the express Covenant. Pleading Entry by a Stranger he must shew he had Eigne Title.

And it is but Reason that the particular Covenant subsequent should qualify the general Force of the Word *Demise*, for otherwise the particular Covenant should be in vain, if the Force of the Word *Demise* should stand. 4 *Co.* 80. Particular Covenant subsequent qualifies the general Force of this Word [*Demise*.]

Note; when a Covenant is created by Law, the Covenantee cannot have Covenant if he be not ousted by one who hath Title; but upon express Covenant it lies tho' a Stranger enters without Title. 2 *Brownl.* 161, 162.

Now, altho' upon express Covenant to pay Rent, Covenant lies against the Lessee or Rent after Assignment; yet it seems such Action does not lie against a Lessee upon a Covenant in Law [as yielding and paying] after the Assignment. *Sid.* 447.

If *A.* and *B.* are joint Lessees of a Mill, and *B.* assigns to *C.* and dies, and after reciting the Jointenancy and Death of *B.* and that all survived to *A.* grants the said Mill to *D.* and covenants that *D.* shall enjoy it for an Act done by *A.* &c. If *C.* enters,

enters, &c. *D.* may have Covenant against *A.* for as to a Moiety the Grant was void, and *A.* had no Power to grant what before was granted by *B.* *Telv.* 175.

And if the special Covenant should qualify the general, the Grantee should not have any Remedy for the Half at all. *2 Brownl.* 214.

Demisi.

The Word *Demisi* imports a Covenant. The Plaintiff declared, that at the Time of the Lease made the Lessor was not seised of the Land, but a Stranger, and so the Covenant in Law broken; but he did not lay any actual Entry by Force of his Lease, nor any Ejection of the Stranger, nor any claiming under him, and so no Expulsion. *Per Cur.* The Action did well lie, for the Breach of Covenant was, that the Lessor had taken upon him to Demise that which he could not, and *Demisi* imports a Power of letting, as *Dedi* does of giving; and it is not reasonable to force the Lessee to enter upon the Land, and so to commit a Trespass. *Hob.* 12.

And so by the Word *Demisi* an Action of Covenant lies, tho' he never enters.

But Covenant was brought upon the Word *Demisi*, for not repairing a Pump, where the Use of the Pump is let.

It is said in *1 Sid.* 430. *1 Sand.* 321. and *1 Vent.* 26, 44. that regularly no Covenant lies upon the Word *Demisi*, unless in Case of Eviction of the Lessee, and actual Ouster or Expulsion by the Lessor, or a Stranger, as *Noke's Case* is; and so it was adjudged in the Exchequer-Chamber, that Covenant lies not. And tho' the Soil itself was excepted where the Pump stood, yet the Lessee may enter and repair the Pump.

*Demise,
Grant.*

Tenant for Life, Remainder in Fee to another; the Tenant for Life by the Words *Demise or Grant* made a Lease for Years, and died, and after he in Remainder entered, and ousted the Lessee for Years; in this Case upon this Covenant in Law he cannot charge the Executors or Administrators of the Lessor, but upon an express Covenant for quiet enjoying he may. *Dyer* 257. *pl.* 13. *Cro. Car.* 157. *1 Leon.* 179.

*Dedi, Concessi
& ad firmam
tradidi.*

*Eviction of a
Freehold.*

R. lets the Manor of *D.* to *H.* for twenty-one Years, and after by the Words *Dedi & Concessi & ad firmam tradidi*, lets the same Manor to the Plaintiff for Life, who enters and is ousted by *H.* and so he brought Covenant: If the intire Estate for Life be evicted under the Title of the Lessor, Lessee shall not have Covenant, for by this he shall recover but Damages, which are Personal, and are not a Recompence for the Loss of a Freehold, *aliter* for the Loss of Possession for a Time, and so it being but a Term evicted, the Lessee shall have Covenant upon those Words in Law. The Words in the Lease will enure to a double Warranty, *Dedi* to a Freehold, and *Demisi* to an Eviction for Years. *Hob.* 3. *Telv.* 139. *1 Roll. Rep.* 25. *Noy* 131.

*Vendit, assignavit
& transulit.*

The Words *assign, set over and transfer, vendit, assignavit & transulit*, do not amount to a Covenant against an Eigne Title, yet against the Covenantor himself it will amount to a Covenant against all claiming by, from or under me; and if I enter, Covenant lies against me upon the Wrong: So upon the Reservation of Rent to a Stranger, Debt lies not by the Stranger, he may have an Action of Covenant for Non-payment, and so may the Lessor. *3 Keb.* 304.

A Grant of an Authority to act, &c. *absque impetitione, denegatione, restrictione*, &c. amounts to a Covenant. *1 Leon.* 277.

*Covenant in
Law ought to
be fixed upon
an Estate.*

If a Man lets the Land of *J. S.* by Deed to *J. D.* *J. S.* being in Possession at the Time of the Lease, and Lessee enters upon *J. S.* who re-enters, yet *J. D.* shall not have an Action of Covenant upon this, because the Covenant in Law ought to be fixed upon an Estate; but here was not any Estate, for this was a void Lease, and the Lessee a Disseisor by his Entry. *1 Roll. Abr.* 520.

*If a Stranger
enters before
Lessee enters,
no Covenant
lies.*

And by *Fenner*, If a Man let Lands for Years, and a Stranger enters before the Lessee enter, he shall not have an Action of Covenant upon this Ouster, because he was never Lessee in Privy to have this Action. But it is said in *Stile and Herring's Case*, If a Man lets to me my own Land, whereof I am seised in Fee, or otherwise by Indenture, if I am ousted by another that had Right, I shall have a Writ of Covenant.

*No Covenant
in Law upon
Eviction of
Goods.*

If a Man leases certain Goods for Years by Indenture which are evicted within the Term, yet he shall not have a Writ of Covenant, for the Law does not create any Covenant upon such personal Things. *1 Roll. Abr.* 519. *Sed Qu.*

Goods.

So if a Man leases certain Goods to *J. D.* which are the Goods of another, and in his Possession; if he cannot enjoy them, yet he shall not have any Covenant against the Lessor, because he was never a Lessee. *Dubitatur*, *1 Roll. Abr.* 520.

A Covenant in Law shall not be extended to make a Man do more than he can. A Covenant in Law shall not be extended to make a Man do more than he can.
 F. and his Wife seised of Land in the Right of the Wife for Term of her Life, and they join in a Lease by the Words *Demise and Grant*; F. dies, his Wife enters and avoids the Lease, the Lessee is put out of Possession by Ejectment, and brings Covenant against the Executors of F. upon the Words *Demise and Grant*; and on Demurrer Judgment *pro Defendant*: The Words were, *Demise, Grant and to Farm* let for Years, if the Wife should so long live. 1 Brownl. 22.

If one by Deed grants a Water-course, and after stops it, an Action of Covenant lies against him. 1 Sand. 322.

If a Man leases to me by Indenture the Land of J. S. of which J. S. is seised at the Time, upon which I enter, and he re-enters, I shall have a Writ of Covenant upon this Indenture, tho' I was not in the Land by the Lease, but by Estoppel; for the Lessor is estopped to say, that I was not in his Lease. 1 Roll. Abr. 520.

So for the Cause aforesaid, if a Man leases to me my own Land, of which I am seised in Fee, or otherways by Indenture: If I am ousted by another that has Right, I shall have a Writ of Covenant. *Ibid.*

When a Man leases to me the Land of J. S. of which J. S. is seised at the Time, I shall have a Writ of Covenant before Entry upon J. S. and re-enter by him, for I need not alledge an Eviction, for this is a Covenant in Law, which is broke when he is not seised of the Land at the Time of the Demise, for the Word *Demise* imports a Power of Letting; and it is not reasonable to enforce the Lessee to enter into the Land, and so to commit a Trespass. *Hob. 18.*

If a Man leases Lands for Years, and a Stranger enters before the Lessee enters, he shall not have an Action of Covenant upon this Ouster, because he was never a Lessee in Privy to have the Action. *Ibid.*

If there be several Lessors, and one wrongfully enters on the Lessee, without the Assent of the others; the Covenant in Law shall not be taken to be joint, so as to charge the other Lessors with this personal Wrong of their Companion; and therefore the Action may be brought against him alone. *Carth. 97.—Show. 79. Comb. 163. Salk. 137.*

(I) By whom Covenants may be made.

AN Attorney covenants on the Behalf of another, that the Covenantee *quiete* & Attorney. *pacifice* should enjoy such Lands, &c. *Per Cur'*, These Articles amount to a Lease tho' made by a Stranger, for he acted on the Behalf of the Owner of the Land, and it shall be taken that he had his Authority to Demise. 2 Vent. 62.

When an Attorney makes a Lease as Attorney, by Virtue of a Warrant to him for that Purpose made, he must not make the Lease in his own Name, but the Name of the Person authorizing him so to do. 9 Co. 76. b. 1 Roll. Abr. 330. *Cro. Eliz. 115. Moor pl. 1106.* And there must be a particular Memorandum of the Matter indorsed on the Deed.

(K) With whom Covenants may be made.

AN Indenture of Charterparty was made between A. and others, Owners of the Ship called E. whereof B. is Master, of the one Part, and C. of the other Part, in which Indenture A. covenanted with C. and B. and C. covenanted with A. and B. and bound himself for Performance of Covenants in 600*l.* and the Conclusion of the Indenture was thus, *In Witness whereof the Parties aforesaid have put their Hands and Seals*; the said B. to the said Indenture put his Hand and Seal, and delivered it: In this Case B. is not any Party to the Indenture, so that B. may not release any Action brought upon it, for this is an Indenture reciprocal between Parties of the one Part, and Parties of the other Part; in which Case no Obligation, Covenant or Grant, may be made with any who is not Party to the Deed; but where the Deed is not reciprocal, but is without the Words *Between, &c.* as *Omnibus Christi fidelibus, &c.* there a Covenant, Grant or Obligation, may be made to divers several Persons. 2 Roll. Abr. 22.

If an Indenture of Charterparty be made between A. and B. Owners of a Ship, of the one Part, and C. and D. Merchants, of the other Part; and there are several Covenants

No Covenant or Grant to be made with any who is not Party to the Deed in Indentures; *aliter* in a Deed Poll.

Covenants of the one Part, and on the other; and *A.* only seals the Indenture of the one Part, and *C.* and *D.* on the other Part; but in all the Indenture it is not mentioned, that *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A.* and *B.* In this Case *A.* and *B.* may join in Action against *C.* and *D.* on this Indenture for Breach of Covenant, tho' *B.* never sealed the Deed, for he is Party to the Deed, and *C.* and *D.* had sealed the other Part to *B.* as well as to *A.* upon which the Action is brought. 2 Roll. Abr. 22.

Where a Deed is indented, and is not between Parties, a Covenant may be in it with a Stranger, as if it was a Deed Poll; or in the first Person; as, *Know ye that I A. B. &c. aliter* if it is between Parties. 3 Lev. 139, 140.

S. by Articles of Agreement let and set a House to *B.* for a yearly Rent payable Quarterly; and in the same Deed it was recited, *Whereas B. has agreed and taken the House aforesaid, paying the Rent Quarterly, &c. and that the said Rent may be satisfied, Be it known that I K. do covenant for myself, &c. on the Behalf of B. that B. shall pay the Rent and perform the other Covenants, reciting them particularly,* which Deed was sealed by *B.* and *K.* In Covenant on this Deed, *K.* after Oyer, demurred generally; and it was adjudged that the Action did lie; for one who is no Party to a Deed may covenant with another who is, and thereby oblige himself by his sealing the Deed. Carth. 76.—Show. 58.

(L) *The Use and Operation of a Covenant.*

The Use and Operation of a Covenant.

A Writ or Action of Covenant quid.

Use.

Lease.

Contract.

THE most frequent Use of a Covenant is to bind a Man to do something in *future*, and therefore it is for the most part executory; and if the Covenantor do not perform it, the Covenantee may have thereupon for his Relief an Action or Writ of Covenant against the Covenantor so often as there is any Breach of the Covenant.

And this Writ of Covenant is therefore defined to be a Writ lying where a Man is bound by a Covenant in a Deed, and hath broken it. And in this Case commonly the Party damnified shall recover Damages only for the Breach: And if he have a Judgment in an Action brought for one Breach, and after the Covenantor breaks the Covenant again; in this Case he may bring a new Action, and so for every Breach.

But a Covenant sometimes also makes a Transmutation of a Property and Possession of Things, as in Case of a Covenant to stand seised of Lands to Uses.

And in Case where one covenants that another shall have a Piece of Land for five Years; this is a good Lease for five Years.

And in Case where one covenants with another, that if he pays him 10*l.* such a Day, he shall have all his Cattle in *Dale*, or his Lease for Years which he has of the Manor of *Dale*; in this Case if he pays the Money at the Time he shall have the Property of the Goods and of the Lease for Years. It is said therefore that in some Cases upon the Writ of Covenant, the Party shall recover the Land itself out of which he has been ejected. Shep. Touch. 161.

(M) *What shall be said a good Covenant in Deed upon which an Action of Covenant may be had, and what not.*

1. *In Respect of the Manner of making it.*

A Covenant, as before observed (D), may be in the Affirmative, or in the Negative; and it may be executed, *i. e.* that a Thing is done already, or executory, *i. e.* that a Thing shall be done hereafter; and these are all good; but if it be of a Thing present, as if I covenant that my Horse is your's, this is void. Plow 330. 27 H. 8. 16.

And these Covenants being made by a Deed Poll, are as good and effectual as when they are made by a Deed indented, so as the Party has the Deed to shew; for otherwise a common Person cannot have an Action of Covenant, for it does not lie upon a verbal Agreement, neither can it be grounded without a Writing, except it be by a special Custom, as in *London*. F. N. B. 145. G. 3 Co. 63.

And there needs not in this Case formal and orderly Words, as *covenant, promise*, and the like, to make a Covenant on which to ground an Action of Covenant; for a Covenant may be had by any other Words, and upon any Part of an Agreement in Writing, in what Words soever it be set down for any Thing to be or not to be done;

done, the Party to or with whom the Promise or Agreement is made may have the Action upon the Breach of the Agreement.

And therefore if these Words be inserted in a Deed amongst other Covenants, *That the Lessee shall repair, provided always that the Lessor shall allow Timber; or the Lessee shall scour Ditches, provided always that the Lessor do carry the Earth;* these are good Covenants on both Sides. 2 Co. Cromwell's Case. Dyer 57, 150. 27 H. 7. 37. 40 Ed. 3. 5.

And if a Lease be made of Houses by Patent to J. S. for twenty-one Years, and therein is inserted this Clause, *And that the said J. S. and his Assigns shall repair the Houses when they shall be decayed;* this is a good Covenant.

And so also it is where these or the like Words be inserted amongst other Covenants, *And the Lessee shall pay 10 s. a Year Rent, or that the Lessee shall not alien:* These shall be said to be Covenants, unless it be in any such Cases where there is some other Means to enforce the doing of the Thing; as if in Case of the Rent there be a Clause of Distress, Re-entry or *Nomine pænæ*. Bret v. Cumberland, 14 Jac. B. R.

And in all Cases regularly where the Words that begin the Sentence are conditional, and have the Effect of a Condition, and do give another Remedy, there they shall not be construed to make a Covenant, as in the Cases of Condition before.

And yet if Words of Condition and Words of Covenant be coupled together in the same Sentence, *as provided always, and it is covenanted,* or the like; in such Cases the Words may be construed to make a Covenant and a Condition both. Bro. Covenant 21, 26. 2 Co. Cromwell's Case. Dyer 57, 150.

If a Man takes a Lease for Life by Indenture, and therein are inserted these Words, *It is provided that if the Lessee dies within sixty Years, that then his Executors and Assigns shall have the Land until the sixty Years be ended, to be accounted from the Date of the Indenture;* tho' this is not a good Lease, yet it is a good Covenant. Dyer 150. 1 Co. 155.

If a Man makes a Lease for Years, and warrants it to the Lessee, his Heirs and Assigns during the Term, or he that has Right to the Land confirms the Estate of the Lessee for Years with Warranty; this is not a Warranty, nor in the Nature of a Warranty, yet it shall be construed a good Covenant in Law for the quiet enjoying of the Thing. Bro. Covenant 38. Descent 50. 21 H. 7. 32.

If the Lord grants to his Tenant, that he will not distrain him in such a Part of his Land for his Rent; this shall be taken to be a good Covenant, by the Word Grant. Perk. §. 69.

2. In Respect of the Matter or Substance of it.

A Covenant to do any Thing that for the Substance and Matter of it is lawful; or not to do any Thing that for the Matter of it is unlawful, is good; as,

If the Grantor covenants that he is seised or possessed of a good Estate of and in the Thing which he grants, and has Power to grant it; that the Grantee shall quietly enjoy it; that it is and shall be free from Incumbrances; that he will make further Assurance, if need be; that if the Grantee be evicted, he shall pay no Rent; that the Grantee shall pay a Rent; that he shall discharge all dues, and save and keep harmless the Grantor; that he shall not alien the Thing granted, or if he do, that the Grantor shall have the first Refusal thereof; that he shall not do Waste; that he shall have House-boot and Hay-boot; that the Grantor or Grantee shall repair the old housing, or build new; that he shall pay and discharge all Rents and Payments issuing out of the Land; that he shall not fell Trees; if he does, that he shall pay to the Grantor so much in Money for every Tree; that if he fells any Underwood he shall fence it; that he shall make an Estate of Land; that he shall be quit of any Suit, Service or Payment; that he shall give sufficient Security to J. S. for 100 l. which he owes him; and all these and the like Covenants are good.

And generally where a Condition for the Matter of it is good, a Covenant comprehending the same is good also.

But if the Matter required to be, or not to be done by the Covenant, be for the Substance thereof unlawful, then is the Covenant void, and does not bind. Against Law,

And therefore if one covenants to kill or rob a Man, or the like, this Covenant is void.

So if one covenants that he will maintain another in his Suits, or that he will appear in Inquests, or that he will break the Peace, or that he will forestall Corn, or the like; these Covenants are void.

So if one be Tenant in Fee-simple of Land, and he covenant that he will not alien it, this Covenant is void. So if a Man be a Tradesmen, and he covenants that he will not use or exercise his Trade; this Restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his Trade at one Time, or in one City or Town only, this Covenant may be good.

So if a Man be by Covenant restrained to sow the Land which hath been used to be sowed, and this be either absolutely, or *sub modo*, i. e. that if he sows it he shall pay so much an Acre for it; these Covenants have been held to be void. *Sed quare* how the Law is now; for it seems the Statute of 39 *Eliz. c. 9.* is discontinued. *Q.*

If *A.* owes Money to *B.* and *B.* owes Money to *C.* and *B.* makes a Letter of Attorney to *C.* to sue *A.* at his own Charge, and *B.* covenants with *C.* that he will not release the Debt to *A.* in this Case altho' this be Maintenance in *C.* to sue at his own Charge, yet this is a good Covenant, and not against Law.

So also if a Dean and Chapter, or the like, covenant to renew a Lease contrary to the Meaning of the Statute of 18 *Eliz. c. 11.* this is a good Covenant.

Impossible.

And if the Thing covenanted to be done be in the Nature of it impossible, the Covenant is void; as if a Man covenants to go to *Rome* in three Days, or the like, the Covenant is void.

So if a Man covenants to make a Feoffment to his Wife; this Covenant is void.

But if a Man covenant to make a good Estate of Land to her in Fee-simple, or otherwise, or to find her Maintenance, or to give her so much by the Year; these are good Covenants.

And generally there where the Matter being in a Condition which makes the Condition void, because it is against Law; there it being in a Covenant will make the Covenant void.

If a Lessor covenants with his Lessee, that he shall and may have House-boot, Hay-boot, Plough-boot, &c. by the Assignment of the Bailiff of the Lessor; this is a good Covenant; and yet it does not restrain the Power that the Lessee has by the Law to take these Things without Assignment: But if the Lessee covenants that he will not cut any Timber or Fuel without the Leave, or without the Assignment of the Lessor; this is a good Covenant, and restrains him, for in this and such like Cases the Rule is, *Modus & conventio vincunt legem.* Dyer 19, 115. Shep. Touch. 163, 164.

If an Obligee covenants with the Obligor, that he will not sue him upon the Obligation until *Easter* following; this is a good Covenant, but no Release or Suspension of the Debt. *Deaux v. Jefferies*, M. 36 & 37 *Eliz. C. B.* 21 H. 7. 23.

If there be Lord and Tenant of three Acres of Land, *Whiteacre*, and two others, and the Lord grants to the Tenant by Deed that he will not distrain in *Whiteacre* for his Rent or Services; this is a good Covenant, but does not determine the Seignior. *Perk. §. 69.*

If one Man grants a Mill within his Manor, and covenants for him and his Heirs that there shall be no other Mill set up within the Manor; this is a good Covenant. *Fitz. Covenant 5.*

If one makes a Lease wherein are divers Covenants to be performed on the Part of the Lessee, and after the Lessee covenants, that if any of the Covenants be broken, the Lessor shall enter upon the Land demised, and hold it till the Lessee make him Amends for the Damage done by the Breach of the Covenant; this is a good Covenant, and that the Lessor may take Advantage thereof accordingly. *Fitz. Covenant 3.*

If a Man seised of Land in Fee covenants to stand seised of it to Uses, and no Estate arises by the Covenant; yet this may be good by way of Covenant, and give Remedy to the Covenantee in an Action of Covenant; but with this Difference, if the Covenant be future; as where one covenants with another, that in Consideration of a Marriage his Lands shall descend, remain or revert to his Son and Heir apparent, and to the Heirs of his Body on the Body of his Wife; in this Case the Covenantee may have a Writ of Covenant upon the Covenant, for if a Covenant be present, as that a Man and his Heirs shall from henceforth stand and be seised to such and such Uses, and the Uses will not arise by the Law; in this Case no Action of Covenant will lie upon this Covenant, for this Action will never lie upon any Covenant, but upon such a Covenant as is either to do a Thing hereafter, or that a Thing is or has heretofore been done, and not when it is for a Thing present; as when *A.* covenants with *B.* that his black Horse shall be for ever after the Horse of *B.* that is no good Covenant to give the Horse to *B.* or to give him an Action of Covenant for him, but *A.* may keep him still notwithstanding. *Plow. 307, 308.* 21 H. 7. 18. 27 H. 8. 16.

If one mortgages upon Condition to re-enter upon Payment of an hundred Pounds at a Day, and the Mortgagee covenants that he will not take the Profits of the Land until Default of Payment; this is a good Covenant, and the Mortgagee therefore may not meddle with the Profits until the Day of Payment come.

(N) *What shall be said a good Covenant in Law, upon which an Action of Covenant may be had, and what not.*

IF one makes a Lease for Years of Land by the Words *Demise or Grant*, and there is not contained in the Lease any express Covenant for the quiet enjoying of the Land; in this Case the Law doth supply a Covenant for the quiet enjoying of it against the Lessor, and all that come in under him by Title during the Term; and upon this the Lessee, his Executors, Administrators or Assigns, may have an Action of Covenant, if he be disturbed; but where there is an express Covenant in the Deed for the quiet enjoying of the Land, there the Law will not make this implied Covenant. *Expressum facit cessare tacitum.*

And therefore this is not like the Case, where a Man makes a Lease for Life by the Words of *Dedi & Concessi*, or makes a Lease for Life by other Words, reserving Rent, (in which Cases the Law creates a Warranty against all Men during the Life of the Lessor) for if in these Cases there be an express Warranty in the Deed, yet this does not take away nor qualify the implied Warranty; but the Lessee may make use of which of them he will, if he be ousted or evicted by one that has an elder Title. 4 Co. 80. 5 Co. 17. Warranty.

(O) *Who shall or may have Advantage of a Covenant in Deed or Law, and bring a Writ of Covenant upon the Breach of it, or not.*

ANY one who is Party to the Deed to whom a Covenant is made may take Advantage of it, but not a Stranger; for if A. covenants with B. to do an Act to C. who is no Party to the Deed, and he does it not, B. and not C. must sue him upon this Breach; but see the Statute post. Party to the Deed not a Stranger.

There are some Covenants, of which none shall have Advantage but the Party or his Heirs. 42 Ed. 3. 4. 1 Roll. Abr. 520. The Party or his Heir.

Such as are knit to the Estate; *secus* of Covenants in Gross. Palm. 558.

If a Breach be made in the Time of the Covenantee, the Action shall be brought by his Executor tho' the Covenant was with him, his Heirs and Assigns only. 1 Vent. 175, 176. 2 Lev. 26. 2 Keb. 831. Executor.

Covenants of Inheritance shall descend to the Heir. 1 And. 55. Palm. 558. Heir.

As if an Abbot covenants, and has used Time out of Mind to sing in the Manor of B. for him and his Servants, his Heirs shall have Advantage of this Covenant, if B. does not alien. 1 Roll. Abr. 520.

If an Abbot and Covent covenant to sing for the Covenantee and his Heirs in such a Chapel, his Heirs at all Times shall have a Writ of Covenant for the not doing thereof. 5 Co. 18. 1 Roll. Abr. 520.

If a Man leases for Years, and the Lessee covenants with the Lessor, his Executors and Administrators, to repair, and leave it in good Repair at the End of the Term, and the Lessor dies, &c. his Heir may have an Action upon this Covenant, for this is a Covenant that runs with the Land, and shall go to the Heir tho' he is not named; and it appears that he was intended to continue after the Death of the Lessor, inasmuch as his Executors, &c. are named. 2 Lev. 92.

If a Feoffment be made in Fee, and the Feoffor covenants to warrant the Land, or otherwise, to the Feoffee and his Heirs; in this Case the Heir of the Feoffee shall take Advantage; as if A. covenants with B. and his Heirs to enfeoff B. and his Heirs of Land, and B. dies before it be done, in this Case his Heirs shall take Advantage thereof.

And if A. B. and C. have Lands in Coparcenary, and they purchase other Lands in Fee, and they covenant each to other, his Heirs and Assigns, to make such Conveyance to the Heir of him that shall first die of a third Part, as he shall Devise; in this Case the Heir, not the Executor, shall take Advantage of the Covenant. Dy. 338.

Executors and Administrators shall take Advantage of inherent Covenants altho' they be not named; and therefore, Executors and Administrators.

If

If *A.* covenants to do a Thing to *B.* and does not name his Executors or Administrators, and if it be not done, the Executors or Administrators of *B.* may have an Action of Covenant for not doing of it; as if one covenants with *J. S.* to pay him Money at *Michaelmas*, and does not say to his Executors, &c. and he dies before the Time; in this Case his Executor or Administrator shall take Advantage of the Covenant, and may recover the Money. 5 Co. 17. *F. N. B.* 145. *H. Dyer* 112, 271.

Grantees,
Lessees.

Grantees of Reversions shall have the like Advantage against Farmers (by Action only) for any Covenant or Agreement contained in their Lease, as the Lessors, their Heirs or Successors, might.

And so also shall Lessees against Grantees of Reversions (Recoveries in Value excepted) by the Statute of 32 H. 8. c. 34. And herein a Difference is taken between Covenants that are inherent, and Covenants that are collateral; for the Covenants whereof Grantees by this Statute shall take Advantage, are inherent Covenants, i. e. such Covenants as concern the Thing granted, and tend to the Supportation of it; as where a Lessee for Life or Years covenants with his Lessor and his Heirs to keep the Houses demised in good Reparations, or the like, and after the Lessor grants away the Reversion of all or Part of the Houses to *J. S.* in this Case *J. S.* shall take Advantage for any Breach of the Covenant in his Time the Reversion was granted.

But if the Lessee covenants with his Lessor and his Heirs to pay him a Sum of Money, or make him a Feoffment, or the like, and then the Lessor doth grant the Reversion to *J. S.* in this Case *J. S.* shall take Advantage of the Covenant. *Vide* 5 Co. 18.

Assignee.

If a Man leases Land to another by Indenture, this Covenant in Law, created by the Word *Demise*, shall go to the Assignee of the Term, and he shall have Advantage of it. 1 Roll. Abr. 521.

If one by Indenture leases an House for forty Years, and the Lessee covenants with the Lessor, that he will sufficiently repair the House during the Term, and the Lessor may enter every Year to see if the Repairs are done, and if upon View of the Lessor it was repaired according to the Agreement, that then the Lessee shall hold the House for forty Years after the first Term ended, and the Lessee grants to another *Totum Interesse, Terminum & Terminos quæ tunc habuit in Tenementis*, and after the first Term ends, the Assignee shall not take Benefit of this Agreement. Adjudged in *Skern's Case*, *Trin.* 3 *Eliz.* (*Moor* 27. pl. 88.) three Judges against *Catlyn*, who held, That the Possibility was inherent to the Land and Term; but the three Judges held the contrary, and that the Words would not carry the Possibility to the Assignee; so that there was a Separation between the Term and the Possibility, and by Consequence the Possibility (*vide Moor* 159. pl. 300.) was determined, for that it could not stand in Gross: And by all the Judges, That the Want of the Word *Assigns* upon the Creation of the Covenant was immaterial, for if the Possibility was inherent, it would pass however.

If Lessee for Years covenants to leave the Houses in good Repair at the End of the Term, and the Lessor grants his Reversion to another: Tho' this Covenant is not to be performed during the Term, yet for a Breach thereof the Grantee of the Reversion may bring an Action, and there cannot be a more apt Covenant to run with the Land. And the Covenant was instantly broken upon the Determination of the Term. *Cro. Eliz.* 599, 600, 617.—*Goulf.* 175, 176.

So where the Lessor covenants to make a new Lease at the End of the Term, and the Lessor grants over his Reversion, &c. *Moor* 150. 1 *And.* 82, 83.

If *A.* leases Lands to *B.* for 200 Years, and *A.* by the same Deed covenants for himself, his Heirs and Assigns, with *B.* his Executors and Assigns, that if *B.* is disturbed for Respite of Homage, or enforced to pay any Charge of Issues lost, that he shall withhold so much of his Rent as he shall be enforced to pay; and *A.* grants his Reversion to *C.* and *B.* assigns the Term to *D.* *D.* may take Benefit of this Covenant against *C.* for it runs with the Land; and in an Action for the Rent, *D.* may plead it in Bar. *Cro. Car.* 137.

A. made a Lease for Years of Lands in *Ireland*, and the Lessee covenanted to pay the Rent in *London*. *A.* assigned his Reversion, and the Assignee brought Covenant in *London* for the Rent. The Defendant pleaded to the Jurisdiction, that the Lands lay in *Ireland*, and on Demurrer the Plea held good; for this is a local Covenant, and adheres to the Land. The Lessor could not have maintained this Action here, and the Assignee has it in the same Plight the Lessor had it. *Salk.* 80. pl. 1. 3 *Mch.* 136. *Show.* 191. *Carth.* 182.

If

If *A.* by Deed enfeoffs *B.* of certain Lands, reserving Rent, Fealty and Suit of Court, and by the same Deed grants, that if the Feoffee shall be distrained, vexed or charged for other Rents or Services, then he may enter and distrain for his Amends in other Lands: This is annexed to the Estate of the Land, and shall go with it to every Assignee. *Moor* 185. *pl.* 331.

If *A.* leases an House to *B.* for Years, who covenants to repair, and that *A.* his Heirs and Assigns, may at all Times enter, and see in what Plight the same is; and if upon such View any Default shall be found in the not repairing, and thereof Warning shall be given to *B.* his Executors, &c. then within four Months after such Warning such Default shall be amended; and after the House, in Default of *B.* becomes ruinous, and *A.* grants the Reversion to *C.* who, upon View of the House, gives Warning to *B.* of the Default, &c. If it is not repaired, *C.* may have an Action against *B.* as Assignee of *A.* tho' the House became ruinous before *C.* was intitled to the Reversion; for the Action is not founded upon the ruinous Estate of the House, but for not repairing within the Time appointed by the Covenant. *1 Leon.* 62. *Moor* 242. *pl.* 380.

But an Assignee shall not have an Action upon a Breach of Covenant before his Time. *Cro. Eliz.* 863. *3 Leon.* 51. *2 Vent.* 278.

Yet he may upon a Breach after his Time, tho' his Estate is determined. *1 Roll. Rep.* 80. *Owen* 152. *2 Bulst.* 281.

A Prior covenants with *B.* to sing in a Chapel in his Manor of *D.* for him and his Servants, (in Fee, as it seems to be intended) the Assignee of the Manor shall have Covenant for a Default, 43 *Ed.* 3. 3. *b.* 5 *Co.* 17. *b.* because it is annexed to the Manor. *2 H.* 4. 6. *b.*

But if the Covenant be to sing in the Chapel of a Stranger, the Assignee shall not have Covenant. *2 H.* 4. 6. 5 *Co.* 18. *Co. Lit.* 385. *a.*

Upon Equality of Partition, if one Coparcener covenants to acquit the other and her Heir of Suit, the Assignee of the Land shall have Benefit of this Covenant. 42 *Ed.* 3. 3. *b.* 5 *Co.* 18. *Co. Lit.* 384. *b.* 385. *a.*

If *A.* seised of Lands in Fee, conveys it by Deed indented to *B.* and covenants with *B.* his Heirs and Assigns, to make any other Assurance, upon Request, for the better Settlement of the Land, &c. and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another Assurance according to the Covenant, and he refuses, *D.* shall have an Action of Covenant in this Case against *A.* by the Common Law, as Assignee to *B.* *1 Roll. Abr.* 521.

Regularly every Assignee of the Land or Thing demised shall take Advantage of inherent Covenants; as if a Covenant be, to have Estovers to burn in the House demised, or to have Timber to repair, or if the Covenant be that the Lessor or Lessee shall repair, or the like. Assignee.

And therefore of these Assignees in Deed and in Law, Assignees of Assignees *in infinitum* shall take Advantage, and Assignees of Executors or Administrators, Tenants by Statute or *Elegit*, or after a Sale upon a *Fieri Facias*, a Husband in the Right of his Wife; any one of these and any other that shall come lawfully to a Term unto which such a Covenant is incident, altho' he be not named yet he may take Advantage of it. 5 *Co.* 17. Assignee of Assignee, and of Executors, &c. Tenants by Statute-Staple or *Elegit*, &c. Husband in Wife's Right, &c.

If a Lease for Years be made to *J. S.* by the Words *Demise or Grant*, and the Lessee assigns this over to *J. D.* in this Case *J. D.* may take Advantage of the Covenant in Law, and bring an Action against the Lessor, if he be disturbed. 4 *Co.* 80. *Dyer* 257. *Fitz. Covenant* 30.

If a Lease for Years be made of Land, and the Lessor covenants with the Lessee and his Assigns to do or not to do something; in this Case an Assignee by Word, or an Assignee by Deed, may take Advantage of this Covenant. 3 *Co.* 63. *F. N. B.* 145.

If two Coparceners make Partition of Land, and one of them covenants with the other to acquit her and her Heirs of a Suit that issued out of the Land, and the Covenantor alienates her Part to a Stranger; in this Case the Alienee shall have the same Advantage for Acquittal of the Land as the Covenantor had. Alienee.

So if *A.* be seised of the Manor of *B.* whereof a Chapel is Parcel, and a Prior, Vendee or Assignee. with the Consent of his Covent, had covenanted with *A.* and his Heirs, Lords of the Manor, to celebrate Divine Service in the Chapel; and after *A.* had sold the Manor; in this Case the Vendee or Assignee of the Manor should have had the same Advantage of the Covenant the Vendor had. But if the Lord had sold the Chapel, the

the Assignee of the Chapel should not have Advantage of the Covenant. And if the Covenant be to say Divine Service in the Chapel of a Stranger; in this Case the Assignee of the Manor in which the Chapel is shall take Advantage of the Covenant. *Co. Lit.* 385. 5 *Co.* 23, 18.

Husband and
Wife.

If a Lease be made of Land to a Husband and Wife for Years, and the Lessor enters upon the Land and puts them both out, or the one of them after the Death of the other; in this Case both of them whilst they both live, and the Survivor after the Death of one of them, may have this Action of Covenant upon the Covenant in Law.

So if a Wardship be granted to a Woman by Deed, and she takes a Husband, and dies, the Husband shall have Advantage of this Covenant in Law made by the Word Grant, if he be disturbed. So if one by the Words *Demise or Grant*, leases Land to a Woman Sole for Years, who takes a Husband, and dies; in this Case if the Husband be disturbed he shall take Advantage of this Covenant in Law. 5 *Co.* 17. *Dyer* 257. 47 *Ed.* 3. 12.

By Stat. 32 H. 8. c. 34. after reciting, *That whereas divers had leased Manors, &c. or other Hereditaments, for Life (a) or Lives, or Years, by Writing, containing certain Conditions, Covenants and Agreements, as well on the Part of the Lessees and Grantees, their Executors and Assigns, as on the Part of the Lessors and Grantors, their Heirs and Successors; and whereas by the Common Law, no Stranger to any Condition or Covenant could take Advantage thereof, by Reason whereof all Grantees of Reversions, and all Grantees and Patentees of the King of Abbey Lands, could have no Entry or Action for any Breach, &c. it is enacted, That all Persons, Bodies Politick, their Heirs, Successors and Assigns, which have or shall have any Grant of our said Lord the (b) King, of any Lordship, &c. Rents, Tithes, Portions, or other Hereditaments, or any Reversion thereof, which belonged to the Monasteries, &c. or which belonged to any other Person, &c. and also all other Persons, being (c) Grantees or (d) Assigns (e) to or by our said Lord the King, or to or by any other Person or Persons, and the Heirs, Executors, Successors and Assigns of every of them, (f) shall and may have (g) like Advantage, by Entry, for Non-payment of Rent, or for doing Waste, or (h) other Forfeiture; and the same Remedy by (i) Action only for not performing other Conditions, Covenants and Agreements contained in the said Leases, against the Lessees and Grantees, their Executors, Administrators and Assigns, as the (k) Lessors and Grantors, their Heirs or Successors, ought, should or might have had at any Time or Times, &c.*

And by the same Act it is enacted, That all Farmers, Lessees and Grantees of Lordships, &c. Rents, Tithes, Portions or other Hereditaments, for Years, Life or Lives, their Executors, Administrators and (l) Assigns, shall and may have like Action and Remedy against all Persons, Bodies Politick, their Heirs, Successors and Assigns, which by Grant of the King, or other Persons, shall have the Reversion of the same Lordships, &c. for letten, or any Part thereof, for any Condition, Covenant or Agreement contained in their Leases, as the Lessees, or any of them, might and should have had against the Lessors and Grantors, their Heirs and Successors; Recovery in Value, by reason of any Warranty in Deed or Law, only excepted.

(a) It extends not to Gifts in Tail. *Co. Lit.* 215. a. *Cro. Eliz.* 863.

(b) It extends to his Successors tho' not named. *Co. Lit.* 215. a.

(c) It extends to Grantees of Part of the Estate of the Reversion, &c. *Co. Lit.* 215. a. *Godb.* 162. 1 *Roll. Rep.* 80. *Ow.* 151, 152. 2 *Bulst.* 181. But not to Grantees, &c. of the Reversion in Part of the Land. *Co. Lit.* 215. a. *Cro. Eliz.* 833. *Moor* 98. pl. 241. Nor to Grantees by Fine till Attornment, for it must be intended of such only as have had all Ceremonies by Law requisite. *Co. Lit.* 215. a. 5 *Co.* 112, 113. *Hob.* 178. It extends to him that comes in by Limitation of an Use, tho' in *le Poſt*; for coming in by the Act and Limitation of the Party, he is a sufficient Grantee, &c. within the Statute. *Co. Lit.* 215. a. b. *Moor* 98. pl. 241. 4 *Leon.* 27. 29. But it does not extend to such as come in merely by Act in Law, as the Lord upon an Escheat, Alienation in Mortmain, &c. *Co. Lit.* 215. b. Nor to him that is in of another Estate. *Moor* 876. pl. 1228.—If a Copyholder by Licence of the Lord leases for Years, &c. and after surrenders the Reversion to the Use of another in Fee, who is admitted, yet he is not a Grantee, &c. within the Act, for he is not privy to the Lease made by the Copyholder, nor in by him, but may plead a Grant of his Estate immediately from the Lord. *Telv.* 222. *Cro. Jac.* 205. & vide *Cro. Car.* 25. 44. *Hob.*

Hob. 178. But in 3 *Lev. 326.* it is adjudged, that such Surrendree may have an Action of Covenant by this Act.

(d) Lessee for twenty Years leases for ten Years, and his Lessee covenants, &c. and the first Lessee grants his Reversion: This Grantee is a sufficient Assignee within the Statute. *Moor 525. pl. 694. Cro. Eliz. 649, 599, 617. Moor 527. pl. 695. Goulf. 175. & vide Godb. 161, 162.*

(e) Tho' after Breach and before the Action brought their Estate determines. 1 *Roll. Rep. 80. Ow. 151. 2 Bulst. 281.*

(f) Whether this does not imply that the Grantor shall not, *Dubitatur*, 3 *Lev. 155. & vide 1 Sid. 402.*

(g) But he shall not take Advantage of a Condition before he has given Notice to the Lessee. *Co. Lit. 215. 5 Co. 113. b. Secus of a Covenant. Godb. 262. Cro. Jac. 476. Bridg. 130.*

(h) *Viz.* By Force of a Condition incident to the Reversion, as Rent; or for the Benefit of the Estate, as for doing Waste, not keeping Houses in Repair, &c. and not for the Payment of any Sum in Gross, Delivery of Corn, &c. so as other Forfeiture shall be taken for other Forfeitures, like to these Examples, *viz.* Payment of Rent, and not doing Waste, which are for the Benefit of the Reversion. *Co. Lit. 215. b. & vide 5 Co. 18. Moor 159, 243. pl. 382, 876. pl. 1228. Ow. 41. 1 And. 82, 83. T. Raym. 250. 1 Sand. 159.* So if the Proviso be to enter for Non-payment of a Rent or Gross Sum by way of Fine, the Grantee of the Reversion shall not take Advantage of it, for the Condition cannot be apportioned. *Stil. 316.*

(i) The Privy of Action is transfer'd, and it may be brought in the County where the Covenant was made, tho' the Lands lie in another. 1 *Sand. 237. 1 Sid. 401. 1 Lev. 259. 1 Vent. 10. & vide 3 Mod. 338.*

(k) Therefore if the Conusee of the Reversion, before Attornment, bargains and sells to another, to whom the Lessee attorns, the Bargainee may, &c. tho' his Bargainor could not. 5 *Co. 113. a. — A. devises to B. for Years, rendring Rent, upon Condition to re-enter for Non-payment, and after devises the Reversion in Fee to another, and dies; the Devisee may take Advantage of the Condition, tho' there was never any Reversion, &c. in the Devisor. 2 Leon. 33.*

(l) But if Lessee for thirty Years leases to another for ten Years, he is no Assignee within the Statute, for he is not Tenant to the first Lessor. *Moor 93. pl. 230.*

(P) *Who shall be bound and charged by a Covenant, and against whom a Writ of Covenant lies, and where, or not.*

Regularly all those who seal and deliver the Deed, and are named and bound by the exprefs Words of the Covenant, whether the Covenant be collateral or inherent, are bound by the Covenant contained in the Deed; and therefore if Heirs, Executors, Administrators or Assigns be named in the Covenant, for the most part they are bound by the Covenant; and in Cases of inherent Covenants also, where a Man covenants for himself only, and does not name his Executors and Administrators, or either of them, they are bound and may be charged by the Covenant notwithstanding. Parties.
Heirs, Executors, Administrators, Assigns.

And in some Cases the Law is so also for collateral Covenants, and in most Cases of inherent Covenants that tend to the Support of the Thing granted; (in Respect of which it is presumed the Lessor took the Lessee for the Land) such as have the Land, altho' they be neither Executors nor Administrators, or either of them, but Assignees, &c. they shall be charged by the Covenant tho' they be not named, for these Covenants are said to run with the Land. 5 *Co. 16, 17, 18.* Assignees.

If a Man covenants for him and his Heirs to do any Thing whatsoever; hereby his Heirs are bound. Heirs.

But otherwise except the Heirs be bound by the Deed by exprefs Name, an Heir shall scarcely be bound or charged in any Case by a Deed.

And therefore it is, that if the Lessee for Years be ousted by any other but the Heir himself, no Action of Covenant will lie against the Heir, unless there be an exprefs Covenant wherein and whereby the Lessor and his Heirs are bound; but if he be ousted by the Heir himself, it seems an Action of Covenant will lie against him; and yet if he be ousted by an elder Title from the Lessor, *contra*; for in this Case the

the Heir shall not be charged. 5 Co. 17. Bro. Covenant 38. 32 H. 6. 32. Dy. 257. Fitz. Covenant 31.

Executor.

In every Case where the Testator is bound by a Covenant the Executor shall be bound by it, if it be not determined by his Death, viz. where it was to be performed by the Person of the Testator, the Executor cannot perform it. Cro. Eliz. 553. Dy. 14. pl. 69. 48 Ed. 3. 2. & vide 2 Mod. 268.

If A. be Tenant for Life, the Remainder to B. in Fee, and A. by Indenture demises, &c. to C. for fifteen Years, and after A. dies, and B. enters upon C. yet C. shall have no Action of Covenant against the Executors of A. for the Covenant was but during the Term, which determined by the Death of the Tenant for Life. 1 And. 12. adjudged. And in Dy. 257. the same Point is adjudged by three Judges against one, who differed from the others because the Lease was by Indenture, which is a Matter of Conclusion; but if it had been by Deed Poll, he agreed with the Rest. Quere diversitatem. And in 1 Brownl. 22. the same Point is adjudged.

So if Tenant in Tail demises and dies without Issue. 1 And. 12. 1 Leon. 179. Cro. Eliz. 157. & vide Lit. Rep. 334.

So if the Lessee had granted, bargained and sold all his Estate to another, admitting that by these Words a Warranty was implied, yet it determines with the Estate. Cro. Eliz. 157.

If a Man covenants that A. shall serve B. as an Apprentice for seven Years, and dies; if A. departs within the Term, a Writ of Covenant lies against the Executor of the Covenantor without naming. 1 Roll. Abr. 519.

Executors,
Administrators.

If a Man covenants for himself only to pay Money, build a House, or quiet enjoying, or the like, and he does not say in the Covenant, his Executors, Administrators, &c. yet hereby his Executors and Administrators are bound and shall be charged.

And yet if a Lessee for Years covenants for himself to repair the Houses demised, omitting other Words; he is bound to repair only during his Life, and the Executors or Administrators are not bound.

So if a Lessor covenants for himself only to discharge the Lessee of all Quit-Rents out of the Land; this Covenant is only Personal, and shall bind the Covenantor only during his Life.

But if in these Cases the Words *during the Term* be added in the Covenant, as if a Lessee covenants for himself to repair the Houses during the Term; in these Cases the Executors and Administrators also will be charged after his Death. 10 H. 7. 10. Dy. 19, 14. Bro. Covenant 50. Dy. 114.

If a Lessee be ousted by one that has Title, an Action of Covenant will lie for this Ouster against the Executor or Administrator upon the Covenant in Law, if he were put out in the Life-time of the Lessor, and not otherwise; for if Tenant for Life by the Words *Demise or Grant*, makes a Lease for Years, and dies, and after he in the Remainder enters and puts out the Lessee for Years; in this Case he cannot upon this Covenant in Law charge the Executors or Administrators of the Lessor; but upon express Covenant for quiet enjoying he may. Dy. 257.

Assignees or
Grantees.

In some Cases an Assignee shall be charged tho' he be not named, and in some Cases he shall not be charged tho' he be named, and in some Cases he shall be charged when he is named; as when the Covenant extends to a Thing *in esse*, Parcel of the Demise, there the Thing to be done is appurtenant & *quodammodo* annexed to the Thing, and shall bind the Assignee tho' he be not expressly named, as a Covenant to repair, &c. But if the Covenant be annexed to a Thing not *in esse* before, but *de novo* to be erected on the Thing, as to set up a new House, or the like; in this Case it will not bind the Assignees unless they be named in the Covenant.

And if the Covenant be to do a Thing merely collateral; in that Case it will not bind the Assignees altho' they be named expressly.

Also when a Contract is Personal only, and a Man binds himself and his Assigns; his Assigns shall not be bound hereby: As if one demises Sheep or other Stock of Cattle, or any other personal Goods for any Time, and the Lessee covenants for him and his Assigns, at the End of the Term, to deliver them in as good Plight as they were at the Time of the Demise, or such a Price for them, and the Lessee assigns them; in this Case the Covenant will not bind the Assignee, but the Executors and Administrators of the first Lessee are bound hereby.

Executors.

So if one demises a House and Land with a Stock, or Sum of Money for Years, rendering Rent, and the Lessee covenants for him and his Assigns to deliver the Money

Money at the End of the Term; in this Case an Assignee shall not be bound by this Covenant as the Executors and Administrators of the Lessee shall. 5 Co. 16.

If a Lessee covenants to repair the Houses demised, or to discharge the Lessor *De Assignees*, *omnibus oneribus circa terram*, or the like; in these Cases and such like, altho' Assignees be not named in the Covenant, yet Assignees and Assignees of Assignees *in infinitum*, and all others that shall come to the Land by the Act of Law, or by the Act of the Parties, shall be bound and charged by the Covenant. 5 Co. 17. Dyer 27. Bro. Descent 50.

If a Lessee covenants for him and his Assigns to build a new House upon the Land demised within seven Years, and the Lessee assigns it over; in this Case the Assignee is chargeable.

But if a Man covenants for him and his Assigns to make a Feoffment, Obligation, or the like; in this Case the Assignee shall not be charged altho' he be named.

And if the Lessee covenants for himself, or for himself, his Executors and Administrators only, to build a new House upon the Land demised, and the Lessee assigns over the Land; in this Case the Assignee is not bound by this Covenant. 5 Co. 17.

If a Lease be made rendring Rent, and if it be in Arrear, that the Lessee, his Executors and Assigns, shall forfeit 3 s. 4 d. *Nomine pænæ*, and the Lessee assigns the Term; in this Case the Assignee shall be charged with the *Nomine pænæ*. Thin. v. Cholmley, 36 Eliz. C. B.

If a Man leases for Years, and the Lessee covenants in this Manner: *Proviso semper* Assignee with-
 & *præd* J. the Lessee does covenant that he will repair, maintain and sustain the out namig.
 Houses upon the Premises, *Ad omnia tempora necessaria*, during all the said Term; and after the Lessee assigns over the Term: The Assignee shall be bound by this Covenant to repair the Houses during the Life of the first Lessee, tho' the Assignee be not named, because the Covenant runs with the Land, being made for the Maintenance of a Thing *in esse* at the Time of the Lease made. 1 Roll. Abr. 521. Cro. Eliz. 457, 552, 553. Moor 399. 5 Co. 24.

When a Covenant extends to a Thing *in esse*, Parcel of the Demise, it is *quasi* annexed to the Thing demised, and runs with the Land, and shall bind the Assignee, tho' not expressly named. 5 Co. 16. b. & vide Godb. 270.

But the Assignee shall not be charged in a Writ of Covenant for any Breach after the Death of the first Lessee, inasmuch as it is Personal to the Lessee himself. *Ibid.*

If A. leases for Years to B. and B. for himself, his Executors and Administrators, covenants with A. to build a Wall upon Part of the Land demised, and after B. assigns: The Assignee is not bound by this Covenant, for the Law will not annex the Covenant to a Thing not *in esse*. 5 Co. 15.

But if B. had covenanted for him and his Assigns to build the Wall, &c. this would have bound the Assignee, because it is to be done upon the Land, and the Assignee is to have the Benefit thereof. *Ibid.*

And if a Lessee covenants for him and his Assigns to build in such a Time, and after the Time expired he assigns, it shall not bind the Assignee, because broke before the Assignment; *aliter* if broke after. Salk. 199. pl. 6.

But tho' the Covenant be for him and his Assigns, yet if the Thing to be done be merely collateral, and no way concerns the Thing demised, the Covenant shall not bind the Assignee, as if it be to build an House upon other Land of the Lessor, or to pay a collateral Sum. 5 Co. 15. Cro. Jac. 438.

But if a Man demises Sheep, or other personal Things, for a certain Time, and the Lessee covenants for him and his Assigns, at the End of the Term, to deliver such Sheep, &c. or the Price of them, and the Lessee assigns them over; the Assignee shall not be bound by the Covenant, for it is but a personal Contract; and there is not such Privy as between Lessor and Lessee of Land and his Assigns. 5 Co. 16. b. 17. a.

So if a Man leases Land for Years, with a Stock of Cattle, and the Lessee for him and his Assigns covenants to deliver the Stock at the End of the Term. 5 Co. 17. a.

If Lessee for Years, for himself, his Executors and Administrators, covenants with his Lessor to leave fifteen Acres every Year for Pasture, *absque Cultura*, and after the Lessee assigns: The Assignee, tho' not named, must perform the Covenant, because it is for the Benefit of the Estate, according to the Nature of the Soil; but a collateral Covenant, as to build *de novo*, &c. shall not bind him unless named. Cro. Jac. 125.

Where Cove-
nant lies a-
gainst the As-
signee.

If *A.* demises to *B.* several Parcels of Land, and the Lessee covenants for him and his Assigns to repair, &c. and after the Lessee assigns to *D.* all his Estate, in Parcel of the Land demised; and after *D.* does not repair that to him assigned: The Lessor may have an Action of Covenant against the Assignee. 1 *Roll. Abr.* 522. Because this Covenant is divisible, and follows the Land with which the Defendant is chargeable by the Common or Statute Law. *Cro. Car.* 221, 222. 1 *Jones* 245.

So if the Lessor had granted the Reversion of Part to one and of other Part to another, they might have brought an Action of Covenant. 1 *Lev.* 109. 1 *Sid.* 157. *T. Raym.* 80. Against Assignee of Lessee for Years, who was Administrator, and held good. *Salk.* 309.

If a Man leases for Years, and the Lessee covenants for him and his Assigns to pay the Rent so long as he and they shall have the Possession of the Thing let; and the Lessee assigns, the Term expires, and the Assignee continues the Possession afterwards: An Action of Covenant will lie against him for Rent behind after the Expiration of the Term; for tho' he is not an Assignee strictly according to the Rules of Law, yet he shall be accounted such an Assignee as is to perform the Covenants. *Stil.* 407.

If a Man leases for Years, rendring Rent, and the Lessee covenants for him and his Assigns to repair the House during the Term, and after the Lessee assigns over the Term, and the Lessor accepts the Rent from the Assignee, and after the Covenant is broke: Notwithstanding the Acceptance of the Rent from the Assignee, yet an Action of Covenant lies against the first Lessee, for the Lessee has covenanted expressly for him and his Assigns; and this personal Covenant cannot be transferred by the Acceptance of the Rent. 1 *Roll. Abr.* 522.

If a Lessee covenants that he and his Assigns will repair the House demised, and the Lessee grants over his Term, and the Assignee does not repair it: An Action of Covenant lies either against the Assignee at Common Law, because this Covenant runs with the Land, or it lies against the Lessee at the Election of the Lessor. *Ibid.* 1 *Jones* 223.

He may charge both, but Execution shall be only against one of them; for if he takes both in Execution, he who is last taken may have an *Audita Querela*. *Cro. Jac.* 523.

If *A.* leases to *B.* rendring Rent, and *B.* covenants to pay it, and after *B.* assigns to *C.* and *A.* grants the Reversion to *D.* and *D.* after accepts Rent from *C.* yet for Non-payment at another Day, *D.* may have an Action against *B.* it being upon an express Covenant. 3 *Lev.* 233.

And in all the Cases before where a Covenant is broken, an Action of Covenant may be brought. But herein Note, that howsoever Assignees are chargeable upon a Covenant, yet the Lessee himself is not hereby discharged; but the Lessor or Grantee of the Reversion hath Election to charge which of them he will.

Election.

And therefore if a Lessee covenant for him and his Assigns to repair, and the Lessee assign; in this Case the Lessor may have his Action of Covenant against either of them.

And if a Lessee covenants for him, his Executors, Administrators and Assigns, to repair the Houses devised, and he in Reversion grants away his Reversion, and the Lessee assigns his Estate: In this Case altho' the Grantee of the Reversion has accepted the Rent of the Assignee of the Term, yet he may still have an Action of Covenant against the Executor of the Lessee upon this Covenant.

So if a Patentee covenants for him and his Assigns to repair, and he assigns, the King may have his Action against either of them. *Bret v. Cumberland*, *H. 16 Jac. B. R.*

If *A.* and *B.* covenant for themselves jointly, without more Words; the Covenant is joint, and one of them cannot be charged without the other; but if they covenant for themselves severally, the Covenant is several, and they may be sued apart; and if they covenant jointly and severally, then the Covenant is joint and several, and they may be sued either way at the Election of the Covenantor. 5 *Co.* 23.

Husband and
Wife.

If a Feoffment or Lease be made to two, or to a Man and his Wife, and there are divers Covenants in the Deed to be performed on the Part of the Feoffees or Lessees, and one of them does not seal, or the Wife does, or does not seal during the Coverture, and he, or she that does not seal, notwithstanding accepts of the Estate, and occupies the Lands conveyed or demised: In these Cases as touching all inherent Covenants, as for Payment of Rent, and the Accessories thereof, as Clauses of Distress, of Re-entry, of *Nomine pænæ*, Reparations, and the like, they are bound by these Covenants as much as if they do seal the Deed.

So if a Lease be made to *A.* for Years or Life, the Remainder to *J. S.* in Fee, and Grantees. there is a Rent reserved; or there be divers Covenants on the Part of the Grantees, and *J. S.* never seals the Deed or Counterpart; yet if in this Case he accepts the Estate after the Death of *A.* he must pay the Rent, and perform all the Covenants that are inherent.

So also if there be Covenants in the King's Patent to be performed on the Part of Patentees; the Patentee; as if there be this Clause in the Patent, *And that J. S. (the Patentee) shall repair the House when it is decayed;* the Patentee is bound by this Covenant, and all such like Covenants. But *Quere* of collateral Covenants in the first Cases, for therein it seems the Feoffee or Lessee is not bound.

And yet it is said, that if an Indenture be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and therein there is a Lease made by *A.* to *B.* and *C.* on certain Conditions, and *B.* and *C.* are bound to *A.* by the Indenture in 201. to perform the Conditions, and *B.* only seals the Deed and not *C.* yet in this Case if *C.* accepts of the Estate, he is bound by the Covenants, and one of them cannot be sued without the other whilst they are both living. *Qui sentit commodum sentire debet & onus. Et transit terra cum onere.* Co. Lit. 231. Dy. 13. Bro. Covenant 6. Det. 80. & *Bret and Cumberland's Case*, Pas. 14 Jac. B. R.

Infant shall not be bound by his Covenant, unless for Necessaries; or by Covenants in Indenture of Apprenticeship.

Now Infant shall be bound by his Contract for Necessaries, viz. Diet, Apparel, Learning and necessary Physick; therefore it was adjudged in *Dole* and *Copping's* Case, the Covenant of an Infant to pay Money for the curing him of the Falling-sickness, is good.

How and in what Cases an Infant shall be bound by his Covenant, or not.

In 2 Roll. Rep. 271. If Infant have Houses, it is necessary for him to have them in repair, and yet Contract to repair does not bind him; no Contract binds him but what concerns his own Person.

If Infant promises another, that if he will find him Meat and Drink, and pay for his Learning, that he will pay him 7 l. per Ann. an Action lies on this Promise; and altho' it is not mentioned what Learning it is, yet it shall be intended that that is fit for him, until it be shewed to the contrary of the other Part. 1 Roll. Abr. 729.

Learning, tho' it be not necessary *de esse*, yet it is so *de bene esse*; *& omne quod est utile est aliquando necessarium.* Co. Lit. 172. Palm. 528.

But a Contract for dancing is not binding.

It was a Question in *Whittingham* and *Hill's Case*, Whether an Infant buying of Necessaries to maintain his Trade were binding, or not? Error of Judgment was brought in *Shrewsbury* in *Assumpsit*, to pay such a Sum for Wares sold. Defendant pleads he was within Age at the Time of the Wares being sold. Plaintiff *protestando*, that he was not within Age, *Pro placito* saith he bought them *pro necessario victu & apparatu*, *& ad mantenentiam familie sue*. Defendant rejoins, that he kept a Mercer's Shop at *Salop*, and bought those Wares to sell again, and traverses that he bought them *pro necessario victu & apparatu*. Plaintiff demurs, for whom it was adjudged. Error was assigned in Point of Law, that such buying shall not bind an Infant: And *per Cur'*, His buying to maintain his Trade, tho' he gets his Livelihood by it, shall not bind him. Cro. Jac. 494.

But if an Infant is House-keeper, and buys Necessaries for his Household, it shall bind him. 3 Keb. 387.

It was said by *Coke*, *arguendo* in *Stone* and *Withypool's Case*, 1 Leon. 113. in Debt against Infant on Contract for Necessaries, the Plaintiff ought to declare specially, so as the whole Certainty may appear; upon which the Court must judge if the Expenses were necessary or convenient, or not, and also upon the Reasonableness of the Price. But in *Russel* and *Lucy's Case*, 1 Keb. 382. & 1 Lev. 86. the Particulars are needless to be set forth. It must be averred in the Declaration, that the Clothes were for his own Wearing, and that they were convenient and necessary.

An Infant and another of full Age covenant one against the other; the Covenant of the Person who is of full Age shall bind him. 1 Sid. 446.

In Covenant to instruct an Apprentice, or cause him to be instructed in the Trade of a Sadler, and to find him Meat, Drink and Lodging during the Term. The Plaintiff shewed the Testator's Death, and that such a Day he was turned out of Doors by the Defendant, *& si conventionem fregit in hoc, (viz.)* in not instructing him, &c. Defendant demurs, because it is a personal Covenant, and discharged by Death,

Death, and cannot be assigned: But all the Court inclined, had it been only to instruct, it had been discharged, but being complex to instruct and find Meat, it is not; and if it were, yet the Breach is sufficiently assigned, if either Part be true, as here in turning him out. Judgment *pro Quer'*. 1 Keb. 820.

(Q) *What shall be accounted real Covenants that run with the Land, or shall affect the Assets only.*

A Covenant to repair the Copyhold Estate runs with the Land assigned by Common Law; and Assignees of the Reversion of Copyhold Lands shall be within the Statute of 32 H. 8. c. 34. Vide 3 Lev. 326.

See before Letter (D), for Covenants real and personal.

A Bill in the Exchequer was brought to subject the Defendant's Lands to the Payment of a Fee-Farm Rent; for that the Duke of N. who had in his Hands both the Plaintiff's and Defendant's Lands, subject (*inter alia*) to the Payment of this Rent, had granted the Plaintiff's Lands unto one under whom the Plaintiff claims, and covenanted that these Lands should be discharged of the Rent; upon which Covenant the Plaintiff sought Relief, and would have it to be as a real Covenant running with the Land, and charge the other Land with the whole Rent: But *per Cur'*, It is no more than an ordinary and personal Covenant, which must charge the Heir only in Respect of Assets, and not otherwise. And the Bill was dismissed. Hard. 87.

Where by the Grant or Devise of the Reversion the Rent reserved upon a Lease for Years is well transferred to the Grantee, the Law also transfers the Covenant of the Lessee to him for the Payment of it, as incident to the Rent. 2 Sand. 371.

Upon a real Covenant there is but Remedy four Ways: 1. By Rebutter. 2. By Voucher. 3. By *Warrantia Chartae*. 4. By Aid-Prior.

Feoffee with Warranty makes a Lease, Lessee may not vouch; so he that comes in the Post shall not vouch; *aliter* in Covenants personal. 1 Roll. Rep. 26, 81. 5 Rep. *Spencer's Case*.

Covenant for quiet Enjoyment. The Assignee shall have Action of Covenant without shewing the Deed of the first Assignment, for it is a Covenant that runs with the Estate. Cro. Eliz. 436. And the Executors of the Husband, who is Assignee in Law, shall have the Benefit of such a Covenant.

If I covenant with J. S. and his Heirs to make a Conveyance to one and his Heirs, his Heirs may not have Covenant, because it is a Sum in Gros; but otherwise when such a Covenant is in another Conveyance, and goes with the Estate. As if I covenant with A. and his Heirs to convey Land to him and his Heirs; there the Feoffment shall be to the Heir, for the Heir shall have the Covenant. Palm. 558.

Declaration, That the Defendant enfeoffed his Testator in certain Lands, and that he covenanted for him and his Heirs, that he was seised of a good Estate in Fee, and he alledges the Breach. *Per Cur'*, The Covenant being made with the Heir, the Executor shall not have the Action, for the Covenant is annexed to the Land. Winch 19.

Tenant *per Statute* Merchant, Staple, *Elegit* of a Term, and he to whom a Lease for Years is sold by Force of any Execution, shall have Action of Covenant in such Case as a Thing annexed to the Land, altho' they come to it by Act in Law. 5 Co. 17. as,

If a Man grants to a Lessee, that he shall have so much Estovers as shall serve to repair his House, or shall burn within his House, and the like, during the Term: This is appurtenant to the Land, and shall run with it as a Thing appurtenant, in whose Hands soever it shall come. *Ibid*.

Lessee of two Houses in London covenants for him and his Assigns to repair the Houses; Lessee assigns one of the Houses and Parcel of the Land to J. S. and the first Lessor, for not repairing the House assigned to J. S. brings Action of Covenant against J. S. the Action lies, for this Covenant runs with the Land. W. Jones 245.

A Covenant which runs with the Land lies against an Assignee tho' not named; and so against an Executor, except it is personal. Cro. Eliz. 553. pl. 3. 1 Lev. 129. 1 Roll. Abr. 521. Cro. Eliz. 457. Moor 399. 5 Co. 24. 1 Sid. 157. Raym. 82. Moor 399. Cro. Eliz. 383. Moor 357. pl. 486. Goldsb. 129. 5 Co. 77. Carth. 519.

Altho'

Altho' the Lessee has not covenanted for him and his Assigns, yet Covenant lies for what is for the Support of the Thing demised, because it is appurtenant to, and runs with the Land. 5 Co. 24. b. 1 Lev. 109.

A Lessor made a Lease of an House, except two Rooms and a free Passage to them; the Lessee assigned the Term, and the Lessor brought Covenant against the Assignee for disturbing him in his Passage to those Rooms: Adjudged that the Action lies; for the Covenant goes with the Tenement. 1 Salk. 196. Carth. 232. 1 Show. 388. Vide Moor 553. Cro. Eliz. 657.

A Covenant with the Lessor, his Executors and Administrators, to repair; this is a Covenant which runs with the Land, and the Heir, tho' not named, shall have it. 2 Lev. 92. Skin. 305. S C. Lucas 158.

Where a Covenant is to a Man, his Heirs and Assigns, yet the Executors, tho' not named, who are the Representatives of the Testator, may bring the Action. 2 Lev. 26. 1 Vent. 175.

(R) *Where Covenants are placed in a Deed, and in what Form written.*

Covenants may be placed in any Part of the Deed, but the most proper Place is after the Condition or after the Warranty (where there is one) which is a Covenant real.

The following Form will serve for the Beginning of Covenants in most Cases.

And the said A. B. doth for himself, his Heirs, Executors, Administrators and Assigns, hereby covenant, &c.

But where there are more Covenantors than one it is best to say,

And the said A. B. C. do for themselves, and each of them for himself, his Heirs, Executors and Administrators, covenant, &c.

And when a Covenant is made to more than one, say,

—to and with the said C. D. E. F. and G. H. and to and with either of them, and either of their Heirs, &c.

And yet this will not divide the Action in all Cases.

There is no set Form appointed in Law for Covenants, but the Words *covenant* and *promise* are the Words by which Covenants are usually made in Form; but any other Words declaring any Thing to be agreed between the Parties, may make a Covenant; but it is best to keep to usual Forms, of which see a great Variety in the Second Part.

Covenants for the Matter of them must contain Things lawful and possible to be done; for if the Thing to be done be unlawful or impossible, the Covenant is not good nor binding.

Some Covenants properly belong to Fee-simple and Fee-tail Estates, and some belong to Estates for Lives and Years, &c.

Most of the Covenants that are applied to a Fee-simple Deed may be made to serve in a Lease for Years; but then in all Places of the Deed where he to whom the Deed is made, does covenant *that he, his Heirs and Assigns, shall do any Thing*; and where it is said *he, his Heirs and Assigns*, it must be said *he, his Executors, Administrators and Assigns*.

And so on the other Side the Covenant that is suited to a lease for Years, may be put in a Fee-simple Deed; but then where in the Lease it is said of him to whom the Deed is made, *he, his Executors, Administrators and Assigns*, it must be, *he, his Heirs and Assigns*.

And if one who makes a Lease for Life or Years of Land has the Fee-simple of the Land in him, then the Covenant in this Part, as to him, is the like in a Lease for Years by Deed as it is in a Fee-simple Deed.

(S) *What Covenants are void at Law.*

First, *For being against Law.*

Plaintiff declared, that the Defendant covenanted for the true Imprisonment of J. S. who escaped, and thereupon the Plaintiff was sued, and forced to pay the Debt. Defendant pleaded the Statute of H. 6. and that the Covenant was for Ease and

and Favour of *J. S.* Plaintiff replied, the said Covenant was entered into for better Security, *absque hoc*, that it was for Ease and Favour. Defendant demurred, and Judgment *pro* Defendant, because there was a Covenant to pay Chamber-Rent, &c. which in itself is for Ease and Favour. *T. Raym.* 222.

Agreement, that *D.* before *Easter* Term next following, at the Request of *P.* would surrender up to *P.* his Letters Patent of the Stewardship of *B.* to the Intent that he might renew the Letters Patent in his own Name. The Stewardship of a Court-Leet is within the Statute 5 *Ed.* 6. c. 16. of buying of Offices. *1 Brownl.* 71.

C. the Testator had the Office of Surveyor of Customs by Letters Patent to him and his Deputies; and by Indenture between him and *S.* for 600 *l.* paid, and 100 *l.* per *Ann.* to be paid during the Life of *C.* makes Deputation of the said Office to *S.* and covenants with *S.* that if *C.* dies before him, then his Executors shall pay to him 300 *l.* and *C.* was bound to *S.* for the Performance. *Per Cur'*, The Bond was void, as against the Statute 5 & 6 *Ed.* 6. of buying of Offices.

No Lease shall be made of any Benefice or Ecclesiastical Promotion, or any Part thereof; and not being impropriated, shall endure any longer than whilst the Lessor shall be ordinarily resident, and serving the Cure of such Benefice without Absence above eighty Days in any one Year; and all Bonds and Covenants for suffering any such Parson to enjoy any such Benefice with Cure shall be void. *Stat.* 13 *Eliz.* c. 20. 14 *Eliz.* c. 12. either by Parson or Curate; and so by the *Stat.* 13 *Eliz.* of Leases made by Parsons, that upon Non-residence for eighty Days the Lease shall be void. This Statute voids Bonds and Covenants for Non-residence.

Covenants upon usurious Contracts are also void, and Bonds of Covenants upon such Contracts.

Debt on Bond to perform Covenants in an Indenture, which was to pay Rent. Defendant pleads the Statute 32 *H.* 8. which makes Leases to alien Artificers void. *Sid.* 357.

Generally where the Matter being in a Condition will make the Condition void, because it is *against Law*; there it being in a Covenant will make the Covenant void.

And yet a Man may restrain himself where the Law does not restrain him; as a Tenant covenants that he will not cut any Fuel without the Assignment of the Lessor, &c. for in such Cases *Modus & conventio vincunt Legem*.

If a Man seised of Lands in Fee, covenants to stand seised of it to such Uses as no Estate will arise by the Covenant; yet it may be good by way of Covenant, and give Remedy to the Covenantee in an Action of Covenant; but with this Difference, if the Covenant be future, as where one Man covenants with another, that in Consideration of a Marriage his Lands shall descend, remain or revert to his Son and Heir apparent, and to the Heirs of his Body on the Body of his Wife; in this Case the Covenantee may have a Writ of Covenant; for if the Covenantee be present, as that a Man and his Heirs shall from henceforth stand and be seised to such and such Uses, and the Uses will not arise; by Law in this Case no Action of Covenant will lie for the Covenantee but where it is covenanted that a Thing shall be done hereafter, or has been done heretofore, and not for a Thing present; as when *A.* covenants with *B.* that his black Horse shall be for ever the Horse of *B.* this is no good Covenant, and altho' he keeps the Horse, still *B.* can have no Remedy. *Plow.* 307, 308. 27 *H.* 8. 16. *Finch Ley* 49.

The Sheriff made *B.* Under-Sheriff, and the Under-Sheriff covenanted that he shall not serve Executions above 20 *l.* without his special Warrant: This is a void Covenant, for that it is against Law and Justice; for the Under-Sheriff is liable to execute all Process as well as the Sheriff. *Hob. Norton and Simms.*

A Covenant that a Man shall not levy a Fine within 4 *H.* 7. or that he shall not suffer a common Recovery, is void. *10 Co.* 386. *b.*

If one covenants that he will maintain another in his Suits, or that he will appear in Inquest, or that he will forestall Corn, &c. these are against Law, and void.

If a Man be a Tradesman, and he covenants that he will not use or exercise his Trade: This Restraint if it be absolute and continual is void; but if it be *sub modo* only, as that he shall not use his Trade for some Time, or in such a Town only, this is good.

If *A.* owes Money to *B.* and *B.* owes Money to *C.* and *B.* makes a Letter of Attorney to *C.* to sue *A.* at his own Charge, and *B.* covenants with *C.* that he will not release the Debt to *A.* tho' in this Case it be Maintenance in *C.* to sue at his own Charge, yet the Covenant is not against Law.

In Debt upon Bond for Performance of Covenants: Plaintiff assigns a Breach. Defendant demurs. It was an usurious Covenant, and against Law; and a Breach cannot be assigned in omitting the doing of that which is unlawful to be done. *Cro. Jac.* 378.

If in a Deed some Covenants are *against Law*, and some good: Those which are against Law are void, *ab initio*, and the Rest shall stand. *11 Co.* 27.

A Covenant to perform a void Grant is void. So also is a Bond to perform it. *1 Raym.* 27. *1 Lev.* 45.

Let a Lease be good or void, yet when there is an Eviction Covenant lies. *5 Co.* 17. *a.* *3 vide 2 Roll. Rep.* 399.

Where a Covenant is only *Malum prohibitum*, (as not to import prohibited Goods) there it is a good Covenant, and an Action lies upon the Breach of it; but where it is to do a Thing which is *Malum in se*, (as to kill a Man) there it is a void Covenant, and no Action lies upon it. *Hill.* 35 *36 Car. 2.* *3 Co. Lit.* 206.

Where there are Covenants for Non-feasance, and Covenants for Feasance, the Defendant must plead to the one *that he has not done*, and to the other *that he has performed* generally; but if the Covenant for Non-feasance is a void Covenant, he may plead Performance generally. *Moor* 859. *pl.* 1175. *Godb.* 212. *Hob.* 12, 13.

A Covenant to enter a void Lease is a void Covenant, but where the Lease is but voidable, it is not. *Moor* 875. *pl.* 1223.

Upon an Eviction of Lessee for Years, all Rents, Bonds and Covenants depending upon the Interest are gone. *Telv.* 19, 123. *1 Sid.* 309. *Style* 357.

Where an Estate is created in which is implied a Covenant in Law, there if the Estate is void, the Covenant also is void; but where there is an express Covenant in a Deed, there it is otherwise, altho' the Lease is void or voidable; as if the Covenant is, that the Lessee shall enjoy during the Term; there if the Lessor resigns his Benefice, the Covenant is good altho' the Term is gone. *Owen* 136. *1 Brownl.* 21. *Moor* 877. *3 vide 2 Brownl.* 134, 136, 158.

A Man gave, granted and confirmed Lands to his Son after his Decease; this Deed had been void if Livery had been made. *Vide Cro. Eliz.* 344, 345. *Hob.* 170. *Co. Lit.* 48. *Moor* 687. *Poph.* 47, 48. *2 Roll. Abr.* 7.

Because there was no Execution of the Deed to pass an Estate out of which the Use may arise.

And it could not enure as a Covenant to stand seised, because the Deed was void in the Frame of it. *2 Vent.* 319.

Secondly, *For being impossible to be performed.*

Covenant to assign to the Covenantee a Commission of Bankruptcy, void. So a Bond. *Street and Daniell*; for it is impossible to assign the Commission.

Covenant to go from *St. Peter's Church in Westminster* to the Church of *St. Peter's in Rome* in three Hours; it is impossible. *Co. Lit.* 206. *b.*

If a Man covenants to do a certain Thing before a certain Time; altho' it becomes impossible by the Act of God, yet this shall not excuse him, inasmuch as he had bound himself precisely to do it. *1 Roll. Abr.* 450. *Q.*

If a Man covenants to leave a Wood in as good Plight as he finds it: If the Trees are thrown down by Tempest, by this the Covenant is not broken, for now it is become impossible by the Act of God, and in this Case the Covenantor is not bound to supply it.

If one covenants to sustain Houses or Sea-Banks, or covenants to leave them in as good Case as he finds them: If the Houses are burnt, or thrown down by Tempest, or the Sea-Banks overthrown by a sudden Flood, the Covenant is not broken by this Accident only; but if the Covenantor does not repair, and make up these Things in convenient Time, the Covenant will be broken. *Perk.* §. 738. *Plowd.* 227. *5 Co.* 15.

(T) *What*

(T) *What shall excuse the Performance of a Covenant, or not.*First, *The Act of God.*

IF a Man covenants to do a certain Thing before a certain Time, tho' it becomes impossible by the Act of God; yet this shall not excuse him, forasmuch as he precisely bound himself to do it. 1 Roll. Abr. 450.

If a Man covenants to deliver Goods at L. and the Boat is overturn'd by Tempest; yet this shall not excuse him. *Tompson and Miles, Trin. 32 Eliz. B. R. Q.*

If a Man covenants to build a House before such a Day, and afterwards the Plague is there before the Day, this shall excuse him from the Breach of the Covenant for not making it before the Day; for the Law will not compel him to venture his Life, but he ought to do it after. 1 Roll. Abr. 450.

Secondly, *The Acts of the Parties.*

If Lessee for Years covenants to convey the Water which stands upon the Land before such a Day, and after the Lessor enters before the Day, and continues there till the Day past; yet this shall not excuse the Performance of the Covenant, because it is collateral to the Land. *Hill. 37 Eliz. B. R. 1 Roll. Abr. 453.*

If a Man covenants with me to collect my Rents in such a Town, and I interrupt him, this shall excuse the Covenant. *H. 37 Eliz. B. R.*

Plaintiff declared, that the Defendant covenanted to deliver to him 1500 Measures of Saltpetre before such a Day, and that he had not done it. The Defendant demands Oyer of the Deed, in which the Covenant was as before: Provided that if any Mischief shall happen by Fire or Water to disable him, he shall not be excused; and pleads he was disabled by Fire: Issue and Verdict *pro Quer.* Moved in Arrest of Judgment, that there was a Variance in the Deed, on which he declared; and this produced in Court, for one is absolute, the other conditional: But Judgment was given *pro Quer.*; for he needs not declare on more of the Deed than the Covenant, and it is on the Part of the Defendant to shew the Proviso, which goes by way of Defence of Covenants. 1 Lev. 88.

If the Thing to be performed by the Covenant may not be performed without the Presence of the Covenantee, there his Absence shall excuse the Performance. 1 Roll. Abr. 457. As if the Covenant be to make a Feoffment to the Obligee.

If a Man be bound to B. that J. S. shall marry J. E. before such a Day, and before the Day B. marries her himself: Hereby the Covenant is discharged. *Co. Lit. 206.*

Piracy is no Excuse of Breach of Covenant. 1 Brownl. 21.

If Lessee for Years of a House covenants to repair, and to leave it in as good Plight as he found it, and after certain Sparks of Fire come out of the Chimney of the Lessor into this House near adjoining, by which the Lessee's House is burnt down; this shall excuse the Performance of the Covenant, so that he is not bound to re-edify it, because it came by the Act of the Lessor himself. 1 Roll. Abr. 454.

Covenant to enfeoff the Covenantee before such a Day; and after and before the Day the Covenantee disseises the Covenantor, and keeps it with Force and Arms till after the Day, so that the Covenantor cannot enter; this shall excuse the Performance. 8 Co. 92.

If Lessee for Years covenants to relinquish Part of the Land at the End of the Term, fallowed and fit for Wheat, Proviso the Lessee upon such Warning may surrender and depart at any Feast of *Michaelmas*, at any Time within the Term, performing the Covenants; if he after Warning surrenders and does not leave the Land fallowed, he has forfeited his Covenant, for the Acceptance of this Surrender does not dispence with the Covenant, inasmuch as by the Covenant he is to accept it. 1 Roll. Abr. 455.

Collateral
Covenant.

A Covenant not to assign without the Lessor's Consent, is not discharged by the Lessor's Entry into Part of the Land, *Stiles 265.* it being a collateral Covenant.

A Condition recited, that the Defendant served the Plaintiff as a Brewer's Clerk, and that if he performed such Covenants, &c. Defendant pleads, *Performavit* until Plaintiff replies, that one of the Covenants was to give the Plaintiff a true Account

of all such Monies as the Defendant should receive, when requested; and alledgeth that 30*l.* came to his Hands, and he requested, and Defendant refused. Defendant rejoins, confessing the Receipt, saith, that before the Request made by the Plaintiff, he laid it up in the Plaintiff's Warehouse, and that certain Malefactors (to the Defendant unknown) stole it away; *Et hoc prædict'*, &c. Plaintiff demurs generally: Excuse that he was robbed.

1. Because it is a Departure, it is rather an Excuse than Account.
 2. He ought to have averred his Plea, but concluded to the Country; for the Plaintiff in his Replication alledgeth 30*l.* the Defendant gave no Account, and the Defendant in his Rejoinder sets forth, he did give Account. There was an Issue; but both were over-ruled:

1. It is no Departure, but a Fortification of the Bar; for shewing that he was Departure. robbed, is giving an Account.

2. The Conclusion is proper, because the Defendant alledgeth new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Surrejoinder, and answer to it; for he does not say he gave an Account, but sets forth the special Matter how. *1 Vent. 121.* Conclusion of a Plea.

In Covenant concerning a Charterparty for the Freight of a Ship, Defendant pleaded, that the Ship was laden with *French* Goods, prohibited by Law to be imported. Upon Demurrer, Judgment was given *pro Quer'*. For *per tot' Cur'*, If the Thing to be done was lawful at the Time when the Defendant did enter into the Covenant, tho' it was afterwards prohibited by Act of Parliament, yet the Covenant is binding. *Durus sermo. 3 Mod. 39.*

If the Deed itself wherein the Covenants are, or the Estate on which the Covenants, as accessory to the Principal, do depend, is gone and determined, there regularly the Covenants are gone also; and therefore if a Lease for Life or Years be surrendered, whereby the Estate is gone, or a Deed becomes void by Rasure, or the like, and there be Covenants in the Deed, hereby the Covenants are gone also; but this Surrender doth not discharge the Breach. *Dyer 28. 5 Co. 23. 40 Ed. 3. 27. Bro. Surrender 47. Covenants 42.*

An Action of Covenant was brought upon an express Covenant in a voidable Lease, and the Question was, If the Covenant be good, the Lease being void? Adjudged that the Action lies well, altho' the Lease be void. *1 Brownl. 21.*

If a Lessee covenants for him and his Assigns to build an House upon the Land demised within seven Years, and the Lessee assigns it over; in this Case the Assignee is chargeable. *5 Co. 17.*

But if a Man covenants for him and his Assigns to make a Feoffment, Obligation, or the like; in this Case the Assignee shall not be charged altho' he be named.

A Lessee covenanted that he would repair the House with convenient, tenantable and necessary Reparations. Lessor brought Covenant, and alledged a Breach for not repairing for want of Tiles and dawbing with Mortar; and did not shew that it was not tenantable. The Opinion of the Court was, that he ought to have shewed it; for the House may want small Reparations, as a Tile or two, and a little Mortar, and yet have convenient, tenantable and necessary Reparations. *March 17.*

If I covenant that a Man shall enjoy such Land until or to the 15th of April, the 15th Day shall be taken exclusive.

3. Act of a Stranger.

If a Man covenants that his Son shall marry the Covenantee's Daughter: If the Daughter refuses, yet the Covenant is broken; for the Daughter is a Stranger, and he has taken it upon him that his Son shall marry her. *Perk. §. 756.*

If in a Lease for Years *N.* covenants to repair, &c. and to yield up at the End of the Term: But during that one *B.* enters by elder Title, the Lessee by that is discharged of the Covenant to yield up all; if the Land be gone, the Covenant is discharged. *Noy 75.*

4. Act of Law.

There is a Diversity where the Law creates a Duty or Charge, and the Party is enabled to perform it without any Default in him, and has no Remedy over, there the Law will excuse him; as in Case of Waste, where the House is destroyed by a Tempest: But when the Party by his own Contract or Covenant creates a Duty or Charge

Charge upon himself, *aliter*; as if Lessee is bound to repair, tho' it be burnt down by Lightning, he must do it. *Allen* 27.

(U) *What is a good Performance of a Covenant, or not.*

First, *With Respect to the Substance of the Covenant.*

IF the Covenant be performed in Substance and Intent, it is good tho' it differ in Words; as when one covenants to deliver the Testament of the Testator, if he pleads he has delivered *Literas Testamentarias*, it is good. 7 *Ed.* 4. 3.

If a Covenant be to give Licence to the Covenantee to carry Trees or any other Thing which he had bought of him; yet if a Stranger who has Right disturbs him, the Covenant is performed, for this extends but to the Person of the Covenantor. 18 *Ed.* 4. 20. *b.*

Aliter if the Covenant had been, that he shall have Licence, for this extends to all Strangers. *Ibid.*

If a Covenant be to withdraw a Suit, a Discontinuance is no Performance, and it differs in Substance, for a *Retraxit* is a Bar in another Action, a Discontinuance not. 2 *Ed.* 4. 8.

A Lessor covenants with the Lessee for Years, that it shall be lawful for the Lessee peaceably to enjoy the Land; and afterwards the Lessor enters tortiously upon the Lessee, and ousts him: This is a Breach, for the Intent was, that he should enjoy it without the Interruption of the Lessor. 1 *Roll. Abr.* 427.

If a Lessee of a House covenants not to lease the Shop, Yard, and other Things pertaining to the House, to one who sold Coals there, and after he lets all the House to one who sold Coals; he has broken the Covenant, for the Intent ought to be performed. *Ibid.*

If the Condition or Covenant be to assure certain Lands to such a Person as the Obligee or Covenantee shall name, and after he assures this to the Obligee himself; it is a good Performance, tho' it be not alledged that the Obligee named himself, for this Acceptance is a Nomination of himself. 1 *Roll. Abr.* 424.

A Man by Deed indented bargained and sold Lands to another in Fee, and covenanted by the same Deed to make him a good and sufficient Estate in the said Lands before *Christmas* next; and afterwards, before *Christmas*, the Bargainor acknowledged the Deed, and the same is inrolled. *Per tot' Cur.* By that Act the Covenant is not performed, for he ought to have levied a Fine, or to have made a Feoffment, &c. 3 *Leon.* 1.

A Covenant to convey Land must not only be an absolute but an effectual Conveyance.

If a Man be bound to surrender a Copyhold to the Use of *A.* and his Heirs on Consideration of Money; if he surrenders into the Tenant's Hands, he must get it presented, for it must be an effectual Surrender; as,

If a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment with Letter of Attorney to *B.* to make Livery to me, and he does so, this is a good Inception; yet if Livery be not made, it is a Forfeiture. 1 *Roll. Abr.* 425.

A Man covenants that *T. H.* Son and Heir apparent of *J. H.* shall marry *E. L.* before the said *T. H.* and *E. L.* shall attain their several Ages of fourteen Years, if *E. L.* would consent thereunto. Afterwards *T. H.* married *E. L.* *T. H.* being then thirteen Years old, and *E. L.* nine Years, and no more. Afterwards *T. H.* came to fourteen Years, and disagreed to the said Marriage. All this was pleaded in Bar as a Performance of the Covenant, and good. The Covenantor is bound that *T. H.* shall marry *E. L.* which was executed, but he is not bound to the Continuance of it, that ought to be left to the Law.

If I be bound to you, that *J. S.* (who in Truth is but an Infant) shall levy a Fine before such a Day, which is done accordingly, and afterwards the same is reversed by Error, yet the Condition is performed. 1 *Leon.* 52.

A Merchant covenants that if a Master of a Ship will bring his Freight to such a Port, he will pay him so much, and Part of the Goods were taken by Pirates, and the Rest he unladed; he ought not to pay the Money, because the Agreement was not performed. 1 *Brownl.* 21.

Performance

Performance in a Plea is intended of actual Performance. *Vide 2 Lev. 67.*

Agreement to surrender a Copyhold to such a Use: If a Surrender into the Hands of two Copyholders, according to the Custom, be sufficient Performance.

1 Lev. 293.

C. C. made a Jointure to *Mary* his Wife, and died without Issue, and the Land descended to *T. C.* his Brother and Heir, who grants an Annuity or Rent-charge of 200 *l. per Ann.* to Trustees, in Trust for *Mary*, and this to be in Discharge of the Jointure, *Habendum* to them, their Heirs, Executors, Administrators and Assigns, for the said *Mary* for Life, with a Clause of Distress, and a Covenant to pay the 200 *l. per Ann.* to the Trustees for the Use of *Mary*; and the Breach assigned was, that the Defendant had not paid it to them to the Use of *Mary*. *Per Cur'*, 1. This Rent-charge is executed by the Statute of Uses by express Words, and tho' the Power of distraining is limited to the Trustees by the Deed, yet the Statute transfers the Power to *Mary*, and she may distress also, and the Covenant lies in this Case. 2. The Assignment of the Breach according to the Words of the Covenant is good: And if any Thing be done which amounts to a Performance, they may plead it on the other Side; as the Defendant may plead the Money was paid to *Mary*, which is a Performance in Substance, but it shall not be intended without being pleaded. 2 *Mod.*

138. 1 *Mod.* 223.

If *A.* covenants with *B.* before *Easter* next to assure his House to him and *K.* his Wife during the Life of *J. S.* and *A.* surrenders his House to the Use of *B.* and such as *K.* shall name, at the Request of *B.* in this Case the Covenant is broken, for this is no Performance of it.

If Lessee covenants to pay his Rent to the Lessor, and he pays it before the Day, the same is not any Performance of the Covenant; contrary of a Sum in Gross. 1 *Leon.* 136.

The Plaintiff covenants to go with his Ship, with the first fair Wind, a Voyage to *Cales.* And the Defendant covenants, that if he so do, to pay him at his return so much for Freight. The Plaintiff alledged he had been there, and was returned, and the Defendant had not paid him. The Defendant pleaded a Plea, and traversed, *absque hoc*, that the Plaintiff sailed with the first fair Wind. *Per Cur'*, It is an ill Traverse; for the Substance of the Covenant is to perform the Voyage, and the first fair Wind is no material Part of it. *Hard.* 69.

Secondly, *With Respect to the Time and Place of performing a Covenant.*

If the Covenant be to pay Money without limiting any Time, he is not bound to pay before Request. 1 *Roll. Abr.* 438. 2.

A Covenant for Payment of Money, and no Time is limited: It is to be paid presently, that is within convenient Time. So in other Covenants to do transitory Acts, as Delivery of Charters, &c. *aliter* of local Acts. 6 *Co.* 30. *Co. Lit.* 208. *Cro. Eliz.* 798. *Poph.* 198.

Where a Covenant is to make a *Retraxit* of Suit, he ought to do it in convenient Time. So if it be to acknowledge Satisfaction in such a Court. 1 *Roll. Abr.* 436.

A Covenant to make further Assurance at all Time and Times, and the Covenantee advises he shall levy a Fine, he shall have convenient Time to do it; for the Words, *at all Times*, shall have a reasonable Construction. 1 *Roll. Abr.* 441.

Where by the Covenant a Thing is to be performed upon Demand, yet he shall have reasonable Time to perform it after the Demand. 15 *Ed.* 4. 30.

Where the Act to be done is of its own Nature local, as to make a Feoffment, &c. where the Covenantor, no Time being limited, has Time during his Life to perform it, if the Covenantee does not hasten the same by Request; for this is collateral, and not like to Payment of Money. *Cro. Eliz.* 798.

Yet when the Covenantor may do that that is local in the Absence of the Covenantee, as to acknowledge Satisfaction in the Court of *B. R.* there he must do it in convenient Time. *Co. Lit.* 208. a. 6 *Rep.* 30. b.

Plaintiff declared, that the Defendant by his Deed bearing Date, &c. did covenant that he would do every Act and Acts at his best Endeavour to prove the Will of *J. S.* or otherwise that he would procure Letters of Administration, by which he might convey such a Term lawfully to the Plaintiff, which he had not done, *Licet sepius requisitus.* Defendant pleads, that he came to *Dr. Drury*, in the Court of the Arches, and there offered to prove the Will of *J. S.* but because the Wife of *J. S.* would not swear

fwear that it was the Will of her Husband, they could not be received to prove it. Plaintiff demurs.

Per Cur', Tho' there be no Time limited by the Covenant when the Thing should be done by the Defendant, yet he has not Time *during his Life*, but he ought to do it upon *Request* within convenient Time.

But in some Cases a Man shall have Time *during his Life*, as where no Benefit shall be to any of the Parties; *e. g.* if it were to go to *Rome*.

And as to the Request, he ought to have shewed it specially with the Place and Time, for it is for the Benefit of the Covenantee; for without Request the Action doth not lie, and the Bar shall not help the insufficient Declaration.

Per Gawdy, The bringing the Action is a Request.

Per Clench, A Writ of Debt is a *Præcipe*, for which there *Licet sæpius requisitus* is sufficient, but a Writ of Covenant is not so. 1 *Leon. pl.* 124, 125.

If the Covenant be to do a Thing *upon Request*, the Plaintiff must make Request to the Person, and not by Proclamation giving Notice of the Request. 1 *Roll. Abr.* 443.

But a Condition to do such Acts, &c. for the better Assurance, &c. to B. that shall be devised by B. or his Counsel, &c. B. devises a Release. A. not being lettered, desires to shew it to Counsel before he seals it: He shall not be allowed *reasonable Time* to shew it, he having taken it upon him to do it. 2 *Rep. Mansel's Case*. 1 *Roll. Abr.* 440.

Thirdly, *With Respect to Notice as where it is necessary (or not) for the Performance of a Covenant.*

If a Man covenants with J. S. that if he will marry A. W. his Cousin, to pay to him 10 l. at the Day of his Marriage; J. S. needs not give Notice at what Day he will be married, but he ought to take Notice of it at his Peril, inasmuch as he hath taken upon him to pay it at the Day, tho' the Marriage is to be made by J. S. himself. *Beresford and Goodrouse*, 14 *Jac. Quære*.

If A. sells Lands to B. by the Name of twenty Acres, according to the Rate of 20 l. for every Acre; and it is agreed between the Parties, that the Land shall be measured by J. S. before the first Day of *January* next ensuing, and A. covenants to repay according to that Rate for every Acre before the first Day of *May* after: If there are not twenty Acres upon the Measure, and it is found there are not twenty Acres, A. ought to pay this before *May* at his Peril, without any Notice given how many Acres there wants of twenty, for he had taken upon him to perform it at his Peril. 1 *Roll. Rep.* 314. *Cro. Jac.* 390.

If a Man leases a Mill for Years, and the Lessee covenants to repair the Mill, and the Lessor covenants to find him great Timber for it; the Lessee ought to give Notice to the Lessor how much will suffice for the Reparation, and not to demand Timber for Reparation in general, or otherwise the Lessor is not bound to deliver any. *Holder and Taylor*, 12 *Jac. C. B.*

A. covenants to pay to B. all such Money as by a true and justifiable Bill under the Hand of the Attorney of B. shall appear to be before disbursed by B. or his Attorney. In Action if B. assigns for a Breach, that 24 s. by a true and justifiable Bill under the Hand of J. S. Attorney of B. appears to be disbursed, which A. has not paid: This is a good Breach, without alledging A. had Notice of it, or that the Bill of Attorney was shewed to him, for that the Attorney was a Stranger, of which A. ought to take Notice at his Peril. *Dewell and Wilmott*.

If I be bound to you to make you such an Assurance as J. S. shall devise, I am bound at my Peril to procure Notice; but if I be bounden to you to make such Assurance as Counsel shall devise, there Notice ought to be given to me. 1 *Leon.* 104.

The Defendant covenants to pay the Plaintiff and other Mariners their Wages; and the Plaintiff avers that 5 l. was due for a Month after his Departure in the Ship such a Day from B. but avers no Notice given to the Defendant of his Return, or going out, nor what was due, for which Cause the Defendant demurs. And *per Cur'*, The Defendant has bound himself, and must take Notice of it, as well as if it were to do a Thing in his own Conscience. 1 *Keb.* 681.

T. Lessee of the Bishop of *Rocheſter* for Years, covenants to find necessary Provision for the Steward, the Bishop, his Servant and Horse, at all Times that he held Courts there. *Per Dodderidge*, He shall take Notice, and there needs no personal Notice, for general Notice, as a Proclamation at Court, is given to him. *Palm.* 532. ^{1a}

In Covenant the Plaintiff declares upon a Writing of the Defendant's Testator, acknowledging himself to be accountable to the Plaintiff for whatever Money the Plaintiff should charge upon *J. S.* payable to Sir *T. V.* *Per Cur'*, It lies well, being against Executors, and so had it been against the Party himself; no Notice is given by the Plaintiff to *J. S.* who upon such Bills was to pay to Sir *T. V.* and it is not necessary. *1 Keb. 155. 1 Lev. 47.*

In Point of Covenant, Notice is not to be so strictly given as upon an Obligation, which is in Point of Forfeiture. *Cro. Jac. 390.*

Fourthly, *With Respect to Cases, where a Demand, Request or Tender, is necessary (or not) for the Performance of a Covenant.*

If *A.* covenants with *B.* upon reasonable Request to him made by *B.* to surrender certain Land and all his Interest in it to *B.* and also to permit *B.* to take the Profits of the Land; in this Case the Request does not go to the taking the Profits, but only to the Surrender; so that he is bound to suffer him to take the Profits without Request, altho' there is but one Word that goes to the Whole. *2 Roll. Abr. 248, 249.*

Whereas *B.* by other Indenture had assigned to *C.* a Messuage, &c. Now this Indenture witnesseth, that *B.* covenants that he or his Brother would deliver to *C.* or, in his Absence, to *E.* at his Shop, a Cartier of the Premises, and of the Verity of this, ad optima eorum peritiam, upon Request made to them by *C.* would take their Oath before a Master of the Chancery, and also would deliver to one *W.* safely to be kept, to the Use of the said *B.* and *C.* the original Demise, whereof he then had a Copy, &c. Tho' in this Case they are not bound to make Oath without Request, yet they are to deliver the original Demise sans Request, for the Request refers not to this, but the first, as appears by putting the Request amongst the Covenants, and not in the Beginning or End. *2 Roll. Abr. 250.*

The Condition was, to make Assurances of certain Lands to the Obligee before the 10th of March 17 *Eliz.* and if it happens that the Obligee refuses to accept the Assurance, and shall make Request to have 100 *l.* in Satisfaction for it; then if upon such Request, within five Months after, he pays the 100 *l.* that then, &c. and at the Day refused the Assurance; and afterwards 27 *Eliz.* he makes Request to have the 100 *l.* The Question was upon Demurrer, Whether this Request was sufficient for the Time? *Per Cur'*, A Request at any Time during his Life was good, and he is not restrained to make it at or before the Day the Assurance was to be made. Judgment *pro Quer'*. *Cro. Eliz. 136.*

Covenant to make a good and lawful Estate, as by the Counsel learned of the Plaintiff, upon Request made, shall be advised; and Plaintiff alledgeth *M. T.* was of his Counsel learned, and gave his Advice to the Plaintiff, that the Defendant should make such Assurance, &c. and that the Plaintiff gave Notice to the Defendant of the said Advice, and requested him to perform it, and the Defendant denied.

It is most proper the Counsellor shall give his Counsel to him with whom he is of Counsel, and he to notify it to him that makes the Estate; and if the Counsellor gives Advice to him that is to make the Estate, he may be ignorant whether he be of his Counsel or not. *5 Co. 19. b.*

In Consideration the Plaintiff had promised to pay the Defendant 700 *l.* for the Reversion of a Manor, the Defendant covenanted to seal the Instrument for the Assurance of it, with Warranty, &c. according to the Draughts between them before agreed; and tho' the Defendant tendered to him the first of March the Instrument written, *secundum tractationes præd'*, and the third of March requested him to seal them, yet he had not sealed them, nor conveyed the Reversion of the Manor; after Verdict *pro Quer'* moved in Arrest of Judgment:

1. That he ought to shew the Instruments to the Court, that they might judge of them; to which it was answered and resolved the Instruments were agreed before, and therefore he need not shew them to the Court.

2. He does not shew that he tendered him Wax, Pen, Ink, &c. as he ought; to which it was answered and resolved, there need no Tender, for the Defendant had taken upon him to do it.

3. The Request is not well made, being at another Time, not when the Tender was; but it was resolved the Tender after the Request was the better, for so he had Time to read them and consider them.

And by *Windham* Justice, Where Conveyances are before agreed and to be sealed according to this Agreement, so that there is not any need of Counsel, the Defendant is to do it at his Peril; and where one is to grant a Reversion, he had Time to do it at any Time during his Life, if it so long continues a Reversion, if he be not hastened by Request. Here is a Request, and the Conveyances being agreed, no Tender need to be; but if one be to seal a Conveyance generally, there the Counsel of the Purchaser is intended to draw them, and then the Purchaser ought to tender them. 1 Lev. 44. 1 Keb. 122.

The Plaintiff declares that the Defendant had covenanted to pay him so much Money as he should expend for repairing and victualling a Ship for him; and avers that he had spent 300*l.* in repairing and victualling it, and that he gave the Defendant Notice of it such a Day, and for Non-payment brings the Action. Defendant *protestando*, that the Plaintiff had not laid out 300*l.* in Manner and Form as he had declared: Demurs to the Declaration; 1. Because he has not averred a special Breach of Covenant; but this has been often over-ruled. 2. There is no Request alledged to pay the Money, and without Request he is not bound to pay it. *Per Cur'*, The Plaintiff's Action is not an Action of Debt where a Demand is necessary, but an Action of Covenant where it is not necessary to alledge a Demand. *Stile* 31.

(V) *When a Covenant is broken or not.*

IF one be seised of Land in Fee, or possessed of a Term of Years, and he aliens it, and supposing he has a good Estate, he covenants that he is lawfully seised or possessed; or that he has a good Estate, or that he is able to make such Alienation, &c. and in Truth he has not, but some other has an Estate in it before; in this Case the Covenant is broken as soon as it is made. *Dyer* 303. 9 Co. 60.

That the Covenantor is seised of a good Estate, &c.

For quiet enjoying.

And if I bargain and sell Land by Deed indented to *B.* and before the Deed is inrolled I grant the same Land to *C.* and covenant that I am seised of a good Estate of it in Fee, and after the Deed is inrolled; in this Case the Covenant is broken. *Sir Perall Brocas's Case*.

If *A.* lets Land to *B.* and covenants that he shall quietly enjoy it without the Let of any Person whatsoever, and *A.* himself, or any other Person that has any Title to the Land by or under him; as if he makes a Lease of it, or grants a Rent out of it to another, or any other Person that has any Title to the Land, altho' it be not by or under *A.* as if *A.* were a Disseisor, and the Disseisee enters or disturbs *F.* in all these Cases the Covenant is broken.

And so also is the Law deemed to be by some, in Case of Covenant in Deed for quiet enjoying, where a Stranger or one that hath no Title to the Land doth enter or disturb *B.*

But otherwise it is in Case of Covenant in Law for quiet enjoying; for in this Case if a Stranger that has no Title to the Land enters or disturbs the Lessee, this is no Breach of the Covenant in Law; and in all Cases where any Person has Title, the Covenant is not broken until some Entry or other actual Disturbance be made by him upon his Title. *M. 8 Jac. Lam's Case. Dy. 328. F. N. B. 145. 26 H. 8. 3. H. 39 Eliz. B. R. Corne's Case. Fitz. Covenant 26. Bro. Covenant 40.*

If a Man makes a Lease of Land, and after makes a Feoffment of the same Land, and the Feoffee disturbs the Lessee; it has been said, that this is a Breach of Covenant for quiet enjoying. *Sed Quære: Bro. Covenant 6.*

If a Man purchases Land to him and his Wife and his Heirs in Fee, and then makes a Lease for Years of it to *J. S.* and covenants for him, his Executors and Assigns, that the Lessee, his Executors and Assigns, shall quietly hold and enjoy the Premises, without the Let of the Lessor, his Heirs or Assigns, or any other Person by or thro' his or their Means, Title or Procurement; and after the Lessor dies, and his Wife enters and disturbs; in this Case and by this Means the Covenant is broken. *H. 20 Jac. B. R. Butler v. Swinerton.*

And so it is also if *A.* purchases the Land of *B.* To have and to hold to *A.* for Life, the Remainder to *C.* the Son of *A.* in Tail, and after *A.* makes a Lease of this Land to *D.* for Years, and covenants for the quiet enjoying, as in the last Case, and then he dies, and then *C.* doth oust the Lessee; this was held to be no Breach of the Covenant. *Swan's Case, M. 7 & 8 Eliz.*

So likewise if *A.* be seised of *Whiteacre* in Fee, and takes to Wife *B.* and then makes a Lease of it to *C.* with such a Covenant as before for the quiet enjoying,

and then *A.* dies, and after *B.* recovers Dower, by this the Covenant is broken; and yet if the Mother of *A.* recovers Dower, and ousts the Lessee, *contra.*

So also if a Tenant in Tail makes a Lease with such a Covenant, and his Issue disturbs the Lessee; this is no Breach of the Covenant.

And yet if the Lessor be the Cause of the Gift in Tail, or procure the Disturbance; this may be a Breach of the Covenant.

And so also it is where a Man is seised of Land in Fee, and he makes a Lease with such a Covenant, and afterwards dies, and then his Heir is in Ward by Reason of a Tenure, and thereby the Lessee is disturbed; this is no Breach of the Covenant. *Dy. 42. 26 H. 8. 3. Fitz. Covenant 6, 26.*

If one covenants that the Wife he is about to marry shall quietly enjoy all her Goods, and that the Covenantee shall take them into his Possession, and the Husband only takes the Goods and keeps them in his Possession; this is no Breach of the Covenant. *Paf. 6 Car. B. R. Crowle's Case.*

If a Covenant be for the quiet enjoying against all Persons but the King and his Successors, and the Patentee of the King disturbs; this is a Breach of the Covenant. *H. 38 Eliz. Woodroffe v. Greenwood.*

If two make a Lease, and covenant that the Lessee shall enjoy the Land without the Let of them, or any other, and one of them alone disturbs the Lessee; this is a Breach of the Covenant. *M. 2 Car. B. R. Sander's Case.*

If a Lessee grants and assigns all the Land contained in his Lease to *A.* and covenants with him that he has not done any Act or Thing by which the Grant or Assignment might be impaired, but that the Assignee, his Executors, &c. may enjoy it against all Persons; and before this Time the Wife of the Lessor had recovered and had Execution of a third Part of this Land for her Dower; this is no Breach of the Covenant, for the Words, *but that, &c.* do refer to the former, and are not absolute. *Dyer 240.*

If *A.* grants the Bailiwick of *W.* to *B.* for Life, and *B.* assigns it to *C.* for three Years, and after *D.* and *C.* covenants that he will not do, or suffer to be done, any Act during the said three Years by which the Grant made to *A.* may be forfeited, but that after the three Years ended he may enjoy it in as ample Manner as *C.* did or might have done, without any Act by *C.* and after the three Years ended *C.* executes a Process there, and thereby incroaches upon the Office; this is no Breach of the Covenant. *13 Jac. C. B. Rich v. Row.*

If *A.* grants Land to *B.* and his Heirs, rendering 10 *l.* Rent, and *B.* sells the Land to *C.* and his Heirs, and covenants with *C.* that from such a Day he shall enjoy it, discharged of all Incumbrances, and before that Day a common Recovery is had against *C.* in which *A.* is vouched, and this is to the Use of *C.* and his Heirs, supposing hereby the Rent had been gone, which is not so; in this Case the Covenant is broken, for this Rent is an Incumbrance. *H. 20 Jac. C. B. Greenway and Tuckwell's Case.*

If a Lease be made of Land for Years, and the Lessee devises it to his Wife *durante viduitate*, and after to his Son, and he in Reversion sells the Fee to the Woman during the Widowhood, and covenants that the Land is discharged of all former Sales, Rights, Titles, Charges; in this Case the Covenant is broken at the first by Reason of the Possibility of the Son. *10 Co. 52.*

If *A.* grants *Whiteacre* to *B.* and covenants that *B.* shall enjoy it against all Incumbrances, and *C.* disturbs him in the taking of a Common there, and this is a Common which is against common Right, and which he has by Prescription; this is a Breach of the Covenant; but if it be of a Common that is of common Right, *contra.* *Eliz. C. B.*

If *A.* covenants with *B.* before *Easter* to make him a good sure Estate of Land discharged of all former Bargains, Leases and Incumbrances whatsoever, (Leases or Grants for Life or Years, reserving the antient Rent during the Term only excepted) and *A.* after this and before the Estate made makes a Grant of all or Part of the Land, reserving the old Rent; this is no Breach of the Covenant. *Dy. 139.*

If one makes a Lease to *J. S.* for Years, and covenants with him that upon the Surrender of that Lease he will make him a new Lease, and the Lessor before *J. S.* can make any Surrender sells away the Reversion, or makes a Lease to another of the Land, and so disables himself; this *ipso facto* is a Breach of the Covenant without any Surrender made by the Lessee, which in this Case is not lawful. *For Lex neminem obligat ad vana & inutilia peragenda.*

To free from Charges and Incumbrances.

To make Estates and Assurances.

So

So if one be seised of Land in Fee, and covenants to make a Feoffment of it to *J. S.* by a Day, upon Request, and the Covenantor before the Day makes a Feoffment of it to another, and then dies before any Request made to him; in this Case the Covenant is broken. 5 Co. 21.

If *A.* covenants with *B.* to make such Assurance as *B.* or as the Counsel learned in the Law of *B.* shall devise, and *B.* tender such an Assurance to *A.* to seal, and *A.* refuses or delays to seal it; this is a Breach of the Covenant. Dy. 338. 2 Co. 3.

If *A.* covenants with *B. C. D.* and *E.* to make them a Feoffment such a Day, and then come to the Land at the Time to take it, and *A.* does not make the Feoffment; by this the Covenant is broken.

And so also if *B.* and *C.* only, or one of them, comes to the Land, for it may be made to any of them in the Name of the Rest; but if none of them come, altho' the Feoffor never comes there, the Covenant is not broken. Bro. Covenant 3.

If *A.* covenants with *B.* before *Easter* next to assure his House to him and *K.* his Wife during the Life of *J. S.* and *A.* surrenders his House to the Use of *B.* and such as *K.* shall name, at the Request of *B.* in this Case the Covenant is broken, for this is no Performance of it. B. R.

To pay Money and give a Bond.

If *A.* having Licence by Patent to buy *Spanish Wool*, &c. by Indenture grants the Licence to *B.* for eight Years, and in Consideration thereof *B.* covenants to pay him 100 *l.* yearly at *Lady-day* and *Michaelmas*, and that every Year at *Lady-day*, or within twenty Days after, he will make a new Bond for Payment of the Money; provided that if *B.* does not yearly make the Bond, or fails in Payment of the Money, that then and from thenceforth the Indenture, and every Clause, &c. therein contained, shall be void; and *B.* fails of making the Obligation at the first Day, yet *A.* may have an Action upon the Covenant, for it was said, the Intent of the Parties was only that it should be void as to have any Benefit of Covenants broken *in futuro*; but as to Covenants broken before, it was never their Intent but that the Party should have Advantage of them. Adjudged, altho' it was objected that the Breach of the Covenants made the Indenture void; and being both at a Time, there was no Priority. Cro. Eliz. 77, 78.

To build a House.

If *A.* covenants with *B.* to build a House by a Day, and *B.* forbids him, and thereupon he forbears to do it, and does it not; in this Case the Covenant is broken, for this will not excuse him; but if he by an actual Impediment hinders him, or be the Cause why the Thing is not done, then the not doing of it is no Breach of Covenant.

To cleanse a Ditch.

And therefore if a Lessee covenants to cleanse one of the Ditches in the Land demised, and the Lessor enters upon the Land itself and keeps out the Lessee, and he does not cleanse the Ditch by the Time; by this the Covenant is broken: But if in this Case the Lessor by Force keeps the Lessee out of the Ditch or Place itself, contra. 18 Ed. 4. 8. Kenw. 34. T. 36 Eliz. B. R. Carrell v. Read.

To repair.

If one covenants to repair, sustain and amend a House, and the House is burnt by the Negligence of the Covenantor, and not repaired again; this is a Breach of this Covenant.

And if the Lessee covenants for him and his Executors to repair at his own Costs, (the principal Timber not hurt or in decay for lack of Reparations, or otherwise, in Default of the Lessee or his Executors only excepted) and he dies, and afterwards the House is burnt in Default of the Executors; in this Case the Covenant is broken, and the Executors may be charged. Dy. 324.

If one covenants to leave a Wood in the same Plight he found it, and he cuts down Trees; in this Case the Covenant is broken presently, for it is now become impossible to be performed by his own Act: But if in this Case some of the Trees be blown down with the Wind, or the like, by this the Covenant is not broken, for it is now become impossible to be done by the Act of God, and in this Case the Covenantor is not bound to supply it.

And so likewise of a Covenant to repair Houses; or if one covenants to sustain Houses or Sea-Banks, or covenants to leave them in as good Case as one finds them, and the Houses be burnt or thrown down by Tempest, or the like, or the Banks be overthrown by a sudden Flood, or the like Accident; in this Case the Covenant is not broken by this Accident only; but if the Covenantor do not repair and make up these Things again in Time convenient, the Covenant will be broken.

And if Houses be let to me for Years, and I covenant to leave them in as good Plight as I find them, and I throw down the Houses; this is no Breach of the Cove-

nant;

nant, for I may rectify them, and therefore no Action will lie upon this Covenant until the End of the Term. *Fitz. Covenant* 29. 5 Co. 15. *F. N. B.* 145. 1 Co. 98. *Perk.* §. 738. *Dyer* 33. *Plow.* 29. 40 *Ed.* 3. 5.

If one covenants to repair a House before a Day, and it happens the Plague is in the House before and until the Day, and thereby it is not done; in this Case the Covenant is not broken, for this will excuse, but then it must be done in convenient Time afterwards, for otherwise the Covenant will be broken. *H. 8 Jac.*

If a Lessee covenants to do all the Reparations of a House demised at his own Costs and Charges, and he cuts Trees upon some of the Ground demised to amend the House; this is a Breach of his Covenant. *Dyer* 198.

If one covenants to pay Money at five several Days, and he fails of Payment the first Day; by this the Covenant is broken. *Co. Lit.* 292. To pay Money.

If one takes Land sowed, or a Stock of Cattle in Lease for Years, and the Lessee covenants to leave it in as good Plight as he takes it; in this Case he must leave it sowed again, and if any of the Cattle die, he must make up the Number, otherwise he breaks his Covenant. 40 *Ed.* 3. 5. To leave a Stock, &c.

If a Corporation covenants not to take Toll, and their common Officer appointed for that purpose takes it; this is a Breach of the Covenant. 43 *Ed.* 3. 17. Not to take Toll.

If *A.* and *B.* be Jointenants of a Shop, and *A.* covenants with *B.* that he and his Assigns shall have free Ingress and Egress in and out of the Shop, and *A.* appoints *C.* his Servant to enter as a Servant to him, and to occupy in common with *A.* and this Servant expells the Servant of *B.* this is a Breach of the Covenant. *H. 16 Jac. B. R.* To have Liberty to go in and out of a Shop.

Silward v. Loe.

If *A.* covenants with *B.* that *B.* shall come four Times into the House of *A.* without being ousted by *A.* and *A.* when he sees *B.* coming shuts the Doors and Windows, and does not suffer *B.* to come in; by this the Covenant is broken. 3 *H.* 4. 8. To come into a House.

If *A.* covenants with *B.* to marry the Daughter of *B.* to make a Feoffment, or do any other Act to *C.* (who is a Stranger to the Covenant) and *A.* doth tender it, and offer to do as much as doth lie in his Power, but the Stranger doth refuse it, and thereby it is not done; yet this doth not excuse, but the Covenant is broken; but if the Covenant be to do any such Act to the Covenantee himself, and the Covenantor tenders it, and the Covenantee refuses it; by this the Covenant is performed. 33 *H.* 6. 16. *Bro. Covenant* 3. *Fitz. Barre* 62. To marry another, make a Feoffment, &c.

The Dean and Chapter of *Norwich*, 8 *Eliz.* leased to *B.* for ninety-nine Years, and after, in 42 *Eliz.* they leased to *C.* for three Lives, and covenanted to save him harmless against *B.* if he is disturbed by *B.* he may have an Action of Covenant against the Dean and Chapter, tho' the Lessor is Owner, &c. and the Covenant was broke immediately upon fealing the Lease to *C.* *Owen* 136. To save harmless.

(W) *What will extinguish, suspend or discharge a Covenant.*

WHERE the Deed itself wherein the Covenants are contained, or the Estate on which the Covenants, as accessory to the Principal, do depend, is gone and determined; there regularly the Covenants are also gone; and therefore if a Lease for Life or Years be surrendered, whereby the Estate is gone, or a Deed becomes void by Rasure, or the like, and there be Covenants contained in the Deed; by these Means the Covenants are gone also. *Dyer* 20. 5 Co. 23.

But this Surrender does not discharge the Breach of Covenant which was before the Surrender. For if a Parson leases his Glebe for Years, and after resigns, whereby the Lease for Years becomes void; in this Case the Covenants of the Lease, as to the Time before the Resignation, shall be said to be in Force still. 40 *Ed.* 3. 27. *Bro. Surrender* 47. *Covenant* 42. *Hil.* 4 *Jac. B. R. Moile v. Austin.*

Where there is an express Covenant in Deed for quiet enjoying, the implied Covenant is gone. *Expressum facit cessare tacitum.* 2 Co. 80.

By a Release of all Covenants from the Covenantee, the Covenant is discharged, so as the Release be by Deed, for a Covenant by Deed cannot be discharged by Word; and therefore if *A.* by Deed covenants with *B.* to build a House by a Day, and *B.* wishes him to let it alone; there is no Discharge of the Covenant. *Ibid.*

If the Owner of a Ship covenants with *B.* that he will receive such Loading that he shall appoint at *T.* by such a Day, and then to go with the first fair Wind to *R.* and there unload and take in other Wares; and after *B.* discharges him of the taking in

in the Goods at T. but that he shall receive his Loading at R. this Discharge of Parcel of the Covenant is not any Discharge of the Residue, for these are several. 1 Roll. Abr. 472.

By Rasure breaking of the Seal, by Rasure of the Date after the Delivery, &c. Covenants may be avoided.

Where the Covenants are several, if the Seal of one of the Covenantors be broken off, yet this shall not avoid the Deed but as to him only; *aliter* where the Covenants are joint; there by the breaking one of the Seals of the Covenantors, all the Covenants are defeated. 5 Co. 22.

If the Estate be created and a Covenant in Law annexed to it, if the Estate ceases the Covenant shall cease; if express Covenant be annexed, *aliter*. Vide 2 Brownh. 162, 163.

The Mayor and Citizens of London covenanted to find eight Men to grind every Day in *Bridewell* Mill, which they let to the Defendant; and agreed that if they failed therein, the Defendant should retain so much of the Rent out of his Rent: The Defendant pulled down the Corn Mill, and made it an Horse Mill, and would now defalk so much out of his Rent as he ought to be allowed for the eight Men. *Per Cur'*, By the Alteration of the Mill in this Manner, the Lessors are discharged of their Covenant. Cro. Jac. 182.

Lessee covenants to repair; Lessor grants the Reversion to another: Grantee of the Reversion shall not recover Damages but from the Time of the Grant, and not for any Time before: And by *Manwood*, by the Recovery of the Damages the Lessee shall be excused for ever after, for making of Reparations; so as if he suffer the Houses, for want of Reparations, to decay, no Action shall be brought thereupon after for the same, but that the Covenant is extinct. 3 Leon. 51.

Covenant brought against the Assignee of Lessee for Years, whereas he made a Lease for Years, reserving Rent, &c. Lessee covenanted to build a House upon the Land within the first ten Years that he assigned over his Term. He brought the Action against the Assignee. Assignee pleads, that the Lessor entered, and had Part of the Possession for Part of the ninth Year. It is not good: That B. did enter it is too general, and shall be taken strictly against him that pleads it; and it may be that he entered by Wrong, and so it may be that he entered by Right, as for Non-payment of Rent, as the Truth was; and if he entered lawfully, then it is no Suspension or Extinguishment of the Covenant; and if the Covenant was suspended, it was only for the Time the Lessor had Possession, and the Party has not answered the Time before or after; and cited a Case, M. 28 & 29 Eliz. in B. C. Lessee for five Years covenanted to build a Mill within the Term, and because he had not done it, Lessor brought an Action of Covenant. Defendant pleads, that within the last three Years the Lessor held him out, &c. so as he could not bring it. *Per Cur'*, He ought to say, that the Lessor with Force held him out, otherwise it would be no Plea; and in the principal Case, he ought to have shewed that he would not suffer him to build. Godb. 69, 74. Moor 402.

It is resolved in *Brett and Cumberland's Case*, that no Act of the Lessee shall discharge himself or his Executors of a special Covenant to pay Rent, of which the Assignee of the Reversion shall have Advantage. Stat. 32 H. 8. T. Jones 144.

Lessee covenants to repair the Banks, which by sudden Floods are broken down, under Penalty of 10 l. Lessee is excused of the Penalty, but he must repair in convenient Time. Dyer 32.

S. and T. covenanted jointly and severally with two severally, and afterwards one of the Covenantors marries with one of the Covenantees: *Per Maller*, the Covenant is gone. March 103.

Covenant by two, artificially to build a House: The one makes Default, and the Issue is found for the other, the first shall be discharged. 1 Sid. 76.

Where a Covenant is become impossible to be done by the Act of God; as where one covenants to serve another seven Years, and he dies before the seven Years are expired, by this the Covenant is discharged. 1 Co. 98. Plow. 286.

If one covenants to leave a Wood in the same Plight he finds it, and he cuts down the Trees, the Covenant is broken presently, for it is now become impossible by his own Act; but if the Trees are blown down with the Wind, the Covenant is not broken, for now it is become impossible by the Act of God, and the Covenantor is not bound to supply it.

If a Man covenants with Tenant for Life of an House to find a Chaplain to sing, &c. in the House every *Saturday* during the Life of the Covenantee; if the Covenantee surrenders to the Lessor the House, and retakes an Estate for Years, yet the Covenant remains. 1 *Roll. Abr* 522.

The same Law if he had granted the House over, and he had not retaken an Estate. 6 H. 4. 3. (*Quære* this, for after the Grant, how is it lawful for the Chaplain to come into the House without a Trespass?) *Ibid.*

If A. grants a Rent charge to B. for the Life of C. *Habendum* to B. his Heirs and Assigns, to the Use of C. and A. covenants to pay it *ad usum* C. if the Rent is behind, B. may have an Action of Covenant against A. for tho' the Rent-charge is executed by the Statute, and the Power of distraining, as incident thereto, transferred to C. yet the Covenant being collateral, is not transferred nor discharged, but remains with B. 1 *Mod.* 223.

If A. covenants with B. to build an House by a Day, and B. forbids him, and thereupon he forbears to do it; the Covenant is not broken, and this will not excuse him: But if he by an actual Impediment hinders him, or be the Cause why the Thing is not done, then the not doing it is no Breach of Covenant; and therefore if a Lessee covenants to cleanse one of the Ditches in the Lands demised, and the Lessor enters upon the Land itself, and keeps out the Lessee, and he does not cleanse the Ditch by the Time, the Covenant is broken: But if the Lessee by Force keeps the Lessor out of the Ditch or Place itself, *contra*. *Trin.* 36 *Eliz.* B. R. *Carrel* and *Read*.

If the Lessor accepts the Rent of the Lessee or his Assignee after a Covenant is broken; this does not discharge the Breach of the Covenant, but the Lessor may sue for it notwithstanding. Adjudged in *Batchelor's Case*, *Pas.* 6 *Car.* B. R.

A Covenant is not a Duty nor Cause of Action till it be broken, and therefore it is not discharged by a Release of all Actions; and when it is broken the Action is not merely founded on the Specialty, as if it were a Duty, but favours of Trespass; and therefore an Accord is a good Plea to it, and it lies in Damages. *Allen* 38, 39.

(X) *How a Covenant shall be taken and expounded.*

A Covenant in particular (being one Part of a Deed) is subject to the general Rules of Exposition of all Parts of Deeds in general; as,

1. To be always taken most strongly against the Covenantor, and most in Advantage of the Covenantee, lest the Covenantor by the obscure Wording of his Covenant should find Means to evade and elude it.

2. To be taken according to the Intent of the Parties.

3. *Ut res magis valeat, &c.*

4. When no Time is limited for the doing of the Thing, it shall be done in reasonable Time, and the like. *Plow.* 287. *Lit. Rep.* 207. *Moor* 458. 8 *Co.* 83.

Wherever the Intent of the Parties can be collected out of a Deed, for the not doing or the doing of a Thing, an Action of Covenant will well lie. *Chan. Rep.* 194.

Altho' in an Indenture the Words are the Words of the Feoffor only, yet if the Feoffee puts his Seal to one Part of it, it is the Deed of both. *Co. Lit.* 230. *b.* *Lucas* 47, 48.

The Word *either* may be taken Conjunctive or Disjunctive, and has often Reference to more than two. 2 *Sid.* 107.

A particular Covenant in Fact restrains a general Covenant in Law. 1 *Saund.* 59, 60.

An express Covenant qualifies the Generality of the Covenant in Law, and restrains it by the mutual Consent of both Parties; so that it shall not extend further than the express Covenant. 4 *Co.* 80. *b.* *Cro. Eliz.* 674. *Yelv.* 175.

The Words *yielding and paying* were adjudged to be an express Covenant, whereupon an Action lies against an Executor. *Style* 406, 431. 2 *Brownl.* 215. 1 *Sid.* 266, 401. 2 *Mod.* 92. 1 *Vent.* 10. 2 *Jones* 102. 3 *Lev.* 155.

Restraining Words at the Commencement or End of a Sentence govern all. 1 *Sid.* 328.

A general Covenant may be restrained by a particular express Covenant, but not by an implied Covenant. *Lit. Rep.* 64, 67.

And

And where there are two particular Covenants, the one may restrain the other. *Lit. Rep. 64.*

If the Words of the Restraint are at the Beginning of the Sentence, or in the Middle, they shall always be expounded according to the Generality of the Words, Intent of the Parties, and Scope of the Deed. *Lit. Rep. 68.*

See more concerning Words antea (F), (G).

Where Covenants are coupled with an intire Sentence, the latter may explain the former; *aliter* if the Sentences are several. *Lit. Rep. 63.*

When the Exception is last put in the Covenant, it refers to all the Premisses. *Lit. Rep. 63. 9 Rep. 53.*

A Man covenants that he is seised of a good, perfect and indefeasible Estate in Fee-simple, and that he hath good Right and lawful Authority to sell, and there is not any Reversion or Remainder in the Crown for any Act done by the Defendant. The Plaintiff assigns a Breach, that he was not seised of a good Estate in Fee; whether these Words, *by an Act done by him*, at the End of the Covenant shall refer to all before, or only to this last Part. *Lit. Rep. 62, 63, to 69 & 203.* Adjudged by all the Judges for the Plaintiff, and that the Covenant upon which the Breach was assigned was an absolute Covenant of itself. *Lit. Rep. 203, &c. See Cro. Car. 106, 107. pl. 8.*

Where a Covenant is to permit a Man to enjoy without Molestation, the Word *Molestation* shall not extend to personal Torts, as to beating or assaulting of him; but to an Entry upon him, and a Disturbance in his Possession. *Cro. Eliz. 421. pl. 16.*

Joint and several.

In Cases where the Covenantees have or are to have several Interests or Estates, there when the Covenant is made to and with the Covenantees, *& cum quolibet eorum, aut altero eorum*; these Words make the Covenant several; as,

If one by Indenture demises *Blackacre* to *A.* and *Whiteacre* to *B.* and *Greenacre* to *C.* and covenants with them and either of them, or covenants with them and every of them, that he is lawful Owner of all these Acres; in this Case the Covenant is several.

But if he demises to them the three Acres together, and covenants in this Manner; the Covenant is joint and not several.

And if *A.* and *B.* covenant jointly and severally; the Covenant may be joint or several, and the Covenantors may be sued either the one way or the other, at the Election of the Covenantee. *5 Co. 19. Dy. 338. Bro. Covenant 49.*

To convey Lands of the Value of, &c.

If *A.* covenants with *B.* that whereas a Marriage is intended to be solemnized between *A.* and *C.* the Daughter of *B.* at or before the 14th Day of *August* next, and where the said *B.* has paid to the said *A.* 1000 *l.* for Portion, &c. the said *A.* in Consideration thereof covenants with *B.* that within one Year of the Day of the Marriage he will assure Lands of the Value of 400 *l.* per *Ann.* in this Case altho' the Marriage be not before that Day, yet the Covenant must be performed. *George v. Lane, 9. 21 Jac. B. R.*

That the Lessee shall make Estates.

If one makes a Lease for Years of a Manor, and covenants that the Lessee shall make Estates for Life or Years, and they shall be good; this Covenant shall not be taken to enable the Lessee to make his Estates for a longer Time than his Estate will bear. *Per Bridgman J.*

That Lessor shall have the first Refusal.

If the Lessee covenants with the Lessor, that if the Lessee be minded to sell his Estate, the Lessor shall have the first Refusal; in this Case when the Lessee is minded to sell, he needs do no more but acquaint the Lessor with this Purpose, and know his Mind, and if he does not answer him presently, he may sell it to whom he will.

And if the Covenant be that the Lessor shall give as much as another will, the Lessee must tell him what another offers him, and ask him whether he will give so much, and if he refuses or does not accept it presently, the Lessee may sell to whom he will. *Dyer 13.*

To do one Thing for another.

If one covenants to serve me a Year, and I covenant to pay him 10 *l.* for it; in this Case, altho' he does not serve me, yet I must pay him 10 *l.* But if I covenant to pay him 10 *l.* if he serve me a Year, *contra*; for in this Case I am not bound to pay him the Money unless he serves me a Year.

So if one covenants to make new Pales so as he may have the old; he is not bound to make the new Pales unless he may have the old Pales.

So if one covenants to pay Money for Service, Counsel, or the like, or covenants to marry one's Daughter, or make an Estate, and the Covenant is penned conditionally, and so as one Thing is the Cause of another, and it is not set down by mutual

mutual and reciprocal Covenants; in all these Cases if the Cause or Condition be not observed, the Covenant shall not be performed. *Co. Lit. 204. Dyer 371.*

If one makes a Lease for ten Years, and covenants *that if the Lessee pays him 10 l. That the Lessee shall have the Fee-simple*, and the Lessee surrenders his Fee within the Time; in this Case if the Lessee pays the Money, the Lessor is bound to make the Fee-simple to him.

But if the Words of the Covenant be, *that if he pays him 10 l. within the Term, he shall have the Fee*, and the Lessee surrender his Term, and then pays the 10 l. in this Case the Lessor is not bound to make the Fee-simple, for it was not paid within the Term. *1 Co. 144.*

If one covenants to do a Thing to *J. S.* or his Assigns, or to *J. S.* and his Assigns Assigns by a Day, and before the Day *J. S.* dies; in this Case it must be done to his Assigns, if he before the Day names any Assignee, and if he does not, it must be done to his Executor or Administrator, which is an Assignee in Law. *27 H. 8. 2.*

If one makes a Lease of Land to another, and covenants that he shall quietly enjoy For quiet enjoyment without the Let of any Person whatsoever, or without the Let of any Person whatsoever claiming by or under the Lessor; in both these Cases the Covenant shall be taken to extend to such Persons as have Title, or claim some Estate under the Lessor; for if in the first Case any Person that has no Title, and in the second Case any Person that shall claim under another, and has Title, or that shall claim under the Lessor, claims or enters, or otherwise disturbs the Lessee; this is held to be no Breach of the Covenant. *Sed Quere* of the first Case, for herein some conceive a Difference between a Covenant in Deed and a Covenant in Law; and that a Covenant in Law is extended only to Evictions by Title, but the Covenant in Deed shall be extended further.

And therefore if *A.* makes a Lease for Years to *B.* and covenants that *B.* shall quietly enjoy it during the Term without the Interruption of any Person or Persons; if a Stranger in this Case that has no Right interrupts *B.* he may have an Action of Covenant: As when such a Promise is by Word, an Action of the Case will lie upon *F. N. B. 145. 1. Dyer 328. 26 H. 8. 3. 4 Co. 80.*

And if the Lessor covenants with his Lessee, that he has not done any Act to Prejudice the Lease, but that the Lessee shall enjoy it against all Persons; in this Case the Words, *against all Persons*, shall refer to the first, and be limited and restrained to any Acts done by him, and no Breach shall be allowed but in such an Act.

The Covenant in Law upon the Words *Demise* or *Grant*, also for the quiet enjoying of the Thing demised, is general against all Persons that have Title during the Term, and extends to the Heir after the Death of the Lessor, as against himself only, and shall charge the Executors or Administrators for any Disturbance in the Life of the Covenantor, but not from any Disturbance afterwards; he that sues therefore upon this Covenant, must shew that he was molested or evicted by one that has an older Title. *Jervis v. Peade, M. 40 & 41 Eliz. B. R. 5 Co. 17. 22 H. 6. 52. 4 Co. 10. Dyer 257.*

If one covenants to enter into Bond for the quiet enjoying of Land, and does not pay what Bond; in this Case it shall be taken to be a Bond of so much as the Land to be enjoyed is worth. *5 Co. 78.*

A Warranty in a Lease for Years shall be taken for a Covenant for quiet enjoying. *12 Co. 21.*

If one covenants with another to acquit him of all Charges issuing out of the Land, and after by Parliament the tenth Part of the Value, not of the Issues of all Lands are given to the King; the Covenant shall not extend to this. To be free from Incumbrances and Charges.

But if the Parliament had given the tenth Part *exituum terræ*; the Covenant would have extended to this as well as to Rents, Commons, and such like Things, where the Land is charged. *7 Ed. 4. 6. Bro. Grant 164.*

If *A.* covenants with *B.* to make such Assurance, or such further Assurance of Land as the Counsel learned in the Law of *B.* shall advise; in this Case altho' *B.* be learned in the Law himself, yet he may not devise this Assurance, but some other learned in the Law must advise; otherwise *A.* is not bound to make it. *5 Co. 19.*

And if *A.* covenants with *B.* to make such Assurance of Land by a Day as *B.* or his Heirs shall devise; in this Case *B.* or his Heirs must first devise the Assurance before *A.* is bound to do any Thing. To make Assurances of the Land.

And therefore if one sells Land for Money, and the Vendee covenants to make back to the Vendor and his Heirs such Assurance of the Land as the Counsel of the Vendor

Vendor shall devise within one Year, provided that if the Vendee makes Default in the Assurance, then if he does not pay 20*l.* to the Vendor, that then the Vendee shall stand seised to the Use of him and his Heirs, and the Vendor tenders no Assurance, and the 20*l.* is not paid; in this Case the Land is in the Vendee freed from the Covenant.

And therefore in these and such like Cases, where a Man is to make such Assurance as *A.* or his Heirs, or their Counsel, shall devise; *A.* or his Heirs must take Care that in Time they have an Assurance reasonably drawn and ready to be sealed, and to tender it to him that is to seal it, for until then there can be no Breach of Covenant.

But if *A.* be bound to make a Feoffment, Lease, or other Assurance of Land to *B.* by a Day; in this Case *B.* needs not demand or tender the Assurance, for *A.* at his Peril must do it, or otherwise he doth break his Covenant: And yet if in this Case *B.* gets the Assurance drawn, and tenders it to *A.* *A.* is bound to seal it, or otherwise he breaks his Covenant. 5 Co. 19, 20. *Dyer* 361. & *Steed v. Spike*, T. 20 Jac. B. R.

And if *A.* is bound to make such Assurance to *B.* by a Day, at the Costs of *B.* in this Case *A.* must do the first Act, viz. notify to *B.* what Manner of Assurance he will make, that he may know what Money to tender; and when the Money is tendred, *A.* must see that he makes the Assurance accordingly at his Peril, and if he fails in either of these, the Covenant is broken. 5 Co. 20, 22.

If *A.* be bound to make such Assurance to *B.* as by the Counsel learned of *B.* upon Request made shall be devised; in this Case it is sufficient if the Advice be given to *B.* and that he makes it known to *A.* and it is not needful it be given to *A.* immediately. 5 Co. 20.

And if *A.* covenants with *B.* to make such Assurance to *B.* as *J. S.* shall devise, and *J. S.* devises a reasonable Deed of Bargain and Sale, and he tenders it to *A.* to seal; in this Case *A.* is bound to seal it presently, and he shall not have Time to advise with his Counsel upon the Deed; but if he be illiterate and cannot read the Deed, he may refuse and delay to seal it until he can get Somebody to read it, which he must do as soon as he can. 2 Co. 3. *Dyer* 338. And if one be bound by Covenant to make an Assurance upon Request, the Covenantee must request and tender an Assurance also, and he must tender such a one also as is reasonable, otherwise the Covenant will not be broken by the Refusal or Neglect to do it: As,

If one be bound to make a Feoffment to *A.* upon Request; in this Case *A.* must get a naked Deed of Feoffment drawn without Warranty or Covenants, and tender it.

And if the Covenant be to make such a Lease as the former; in this Case the second Lease must not differ from the former, and if it do, the Party is not bound to seal it. *Shep. Touch.* 168.

If one covenants to levy a Fine at the next Assises for thirteen Years *extunc*; this shall be taken from the Time of the Fine levied, and not from the Time of the Covenant. *Hil. 7 Jac. C. B.*

If one bargains and sells Land to me by Deed indented, and before the Inrolment of the Deed I covenant with *J. S.* to convey all the Land whereof I am seised, and to do this before such a Day, and before the Day the Deed is inrolled; in this Case my Covenant shall not extend to this Land conveyed to me by this Bargain and Sale. *Sir Jo. Bret's Case.*

If *A.* covenants with *B.* that in Consideration of a Marriage between the Son of *A.* and Sister of *B.* that he, at the Costs of his Son, and by his sufficient Deed, will before *Easter* Day assure Land to his Son, and *B.* covenants that if *A.* performs this, then he will make him a general Release; in this Case altho' *A.* be ready, and the Son does not tender the Assurance, and the Conveyance is not made, *B.* is not bound to make any Release. *Dyer* 371.

To repair the Houses.

If one covenants to keep and leave a House in the same or as good Plight as it was at the Time of making the Lease; in this Case the ordinary and natural Decay of it is no Breach of the Covenant; but the Covantor is hereby bound to do his best to keep it in the same Plight, and therefore to keep it covered, &c. *Fitz. Covenant* 4.

For having House-boot, &c.

If the Words of a Covenant be that the Lessee shall have Thorns by the Assignment of the Lessor, and necessary Fuel also; there must be an Assignment of the Fuel as well as of the Thorns. *Dyer* 19.

If the Lessor covenants with his Lessee that he shall have sufficient Hedge-boot by Assignment of the Bailiff of the Lessor; in this Case the Lessee is not restrained from

that Liberty that the Law gives him, and therefore he might take without Assignment: But if the Words be Negative, that he shall not take without Assignment, or that he shall take by Assignment, and no otherwise, *contra*. *Dyer* 19, 20.

Declaration on a Covenant made by Word by Defendant's Testator with the Plaintiff in *Bristol*, and that there is a Custom in *Bristol*, that *Conventio ore tenus facta* *Bristol*. shall bind the Covenantor as strongly as if it was made in Writing. *Per Cur'*, This Custom does not warrant this Action, for the Covenant binds the Covenantor by Custom, but does not extend to his Executors, but shall be taken strictly. *1 Leon.* 2.

(Y) *Where a Covenantor shall be relieved in Equity.*

WHERE it appears that a Covenant is contrary to the Intent of the Party, and by other Covenants it is contradicted, the Covenantor shall be relieved against it in Equity. *Finch Rep.* 90.

On a Covenant or Agreement for the Purchase of Lands, the Vendor stands as a Trustee for the Purchaser till the Conveyance is executed. *3 Chan. Rep.* 5.

And where a bad Title was sold, with Covenant for farther Assurance, and afterwards the Vendor purchased a good Title, and was decreed to confirm, &c. See *2 Chan. Ca.* 212.

A Power to release Lands raised by a Covenant to stand seised where an Estate was settled on the Covenantor for Life, Remainder to his Eldest Son, with Power to himself to lease Part of the Lands, &c. tho' not good at Law, was decreed good in Equity; it appearing that the Conveyance was intended to be by Livery, which the Father was advised would be as well by Covenant, and on other Circumstances. *1 Chan. Ca.* 161.

A. in Consideration of Marriage settles Lands upon himself for Life, Remainder to his intended Wife for Life, Remainder to the Heirs of his Body on his Wife to be begotten, Remainder to his own right Heirs; and in the *Settlement* there is a Covenant with the Trustees from the intended Husband for himself and his Heirs, that he will not discontinue, dock or suffer a Recovery to bar the Limitations in the Settlement, but that the Issue of the Marriage shall enjoy and hold the Premises, pursuant to the said Limitations: The Marriage takes Effect, and they have Issue a Daughter, who marries the Plaintiff, and to whom her Father, who made the Settlement and Covenant, gave a considerable Portion. The Father afterwards suffered a Recovery to the Use of himself and his Heirs, and then devised the Lands in Trust for his said Daughter for Life, Remainder to her first, &c. Son in Tail Male; and if the Daughter survived the Husband, to the Daughter in Fee; but if the Daughter should die first, then the Remainder over, and died. Husband and Wife brought a Bill for a specifick Performance of the Covenant; and it was held, That A. being Tenant in Tail, and as such having a Power to suffer a Recovery, the Lands devised should not be affected, tho' the Covenant was good to bind the Affets; and such Covenant being at first accepted, Equity ought not to vary or alter it. *1 Will.* 104, 461.

If a Lessee for Years covenants *not to alien without Licence of the Lessor, under Penalty of forfeiting the Lease*, and he afterwards aliens without Licence, Equity will not relieve him. *Mod. Ca. in Eq.* 110.

On a Covenant in Consideration of Marriage to settle Lands of 350*l.* *per Ann.* on the Husband and Wife and the Issue Male of the Marriage, Remainder to the Brothers of the Husband; a Court of Equity will compel an Execution of this Covenant, and not put the Party to an Action of Covenant in the Name of the Trustee. *2 Will.* 594.

A Covenant that if the Estate was to be sold the Mortgagee should have the Benefit of Pre-emption, but not being claimed before the Estate was sold, the Benefit of the Covenant was lost. *Mod. Ca. in Eq.* 2.

A. covenanted for himself and his Heirs to surrender a Copyhold Estate to such Uses, and died before it was done; but on a Bill by the Heir for a specifick Execution of the Covenant, it was decreed accordingly. *Mod. Ca. in Eq.* 106.

Now I come to treat of the particular Kinds of Covenants relative to their Uses, which are either such as are commonly annexed,

1. To all Kinds of Estates. Or,
2. To Estates for Lives or Years, and not to Estates in Fee-simple. Or,
3. Which may or may not be in Deeds of Conveyances of Land, or may be in Articles of Covenant only.

(Z) Of

(Z) Of Covenants commonly annexed to all Kinds of Estates.

First, That the Covenantor is lawfully seised (or possessed) of the Premises.

IN Covenant that the Bargainor was *seised in Fee at the Time of the Bargain and Sale, without Condition or Limitation*; the Breach assigned by the Plaintiff was, that he was not seised in Fee; he is not bound to shew in whom the Estate was, to which the Bargainor is only privy; as in 9 Co. 61. And the Replication could have been only, that he was seised in Fee, and not *absque hoc*, that any Stranger was seised; it is a good Covenant that he is seised in Fee, and the Words, *without Condition or Limitation*, is *super Addition*. 1 Keb. 58.

A. covenants that he is *seised of a good Estate in Fee*; the Plaintiff takes Issue by Replication, that he was not seised of a good Estate in Fee; Defendant rejoins, he was *seised of as good an Estate as J. W. who granted it to him, had*; which is nothing to the Purpose, because that he was seised of a good Estate, according to such an Indenture, refers to the Estate passed by the Indenture itself, and not to him that made it; which the Court agreed; Judgment *pro Quer*. 1 Keb. 95. The same Case is reported thus, in 1 Lev. 40. In Covenant Plaintiff declares that the Defendant bargained and sold to him certain Lands, (which he had purchased of W. and other Trustees in the late Times, for the Sale of Delinquents Estates) and covenants that he was *seised of a good Estate in Fee, according to the Indenture made to him by W. &c. and assigns for Breach*, that he was not seised of a good Estate in Fee. The Defendant pleads that he was seised of so good Estate as W. &c. conveyed to him. Plaintiff demurs, and Judgment was given for him, for the Covenant is absolute that he is seised of a good Estate in Fee, and the Reference to the Conveyance by W. serves only to denote the Limitation and Quality of the Estate, not the Defeasibleness or Undefeasibleness of the Titles. 1 Lev. 40.

A Lessor covenanted that he was then *seised in Fee of an indefeasible Estate*. The Plaintiff in his Declaration, *in facto dicit*, that at the Time of making the Indenture he was not lawfully seised in Fee, and so he had not performed the said Covenant. Defendant pleads, *Non est factum*. The Breach is well assigned tho' he does not shew that any other was seised, because the Covenant is general, and so the Breach may be assigned as generally, especially as this Case is, where the Defendant has made the Declaration good by pleading *Non est factum*: So he allows the Breach, if it had been his Deed. Cro. Jac. 369.

B. covenants that he was seised of *Blackacre in Fee-simple*, whereas in Truth it was *Copyhold Land in Fee*. Per Cur', The Covenant is not broken: *Quare*, because the Reporter adds, the Jury shall give Damages according to the Rate which the Country values Fee-simple Lands more than Copyhold. Noy 142.

Covenant that the Defendant was lawfully seised, is intended as to the Title; and a Covenant for quiet enjoying is as to the Possession. 3 Keb. 755.

A Man covenants that he is *seised of a good, perfect and indefeasible Estate in Fee-simple, and that he hath good Right and lawful Authority to sell, and that there is not any Reversion or Remainder in the Crown for any Act done by the Defendant*: The Plaintiff assigns a Breach, that he was not seised of a good Estate in Fee-simple; whether these Words, *by any Act done by him*, at the End of the Covenant shall refer to all before, or only to this last Part? Vide the Resolution, Lit. Rep. 62 to 69 & 203. Adjudged that it is an absolute Covenant, and shall not refer to all before; and that the Action well lay, 203, & vide Cro. Car. 106, 107. pl. 8.

A. conveys a Messuage with the Appurtenances to B. and his Heirs, and also grants to him Liberty of Ingress to a Well, &c. to draw Water, &c. and A. covenants with B. that he was *seised of the Premises*: It is no good Breach that A. was not seised in Fee of the Well, for that the Covenant that he was seised in Fee of the Messuage and Premises does not extend to the Well. Lut. 608.

A Man covenanted for him and his Heirs, that he was *seised of a good Estate in Fee*; the Executor of the Feoffee shall not have an *Action of Covenant*, but the Heir, for it is annexed to the Land. Winch 19.

In Covenant by a Lessee of Tenant in Tail, not warranted by the Statute, (on Assignment to the Plaintiff) *That he was possessed of the Indenture, and that it was*

unavoided and unavoidable; Tenant in Tail dies; the Breach assigned was, that the Issue entered. On Demurrer thereon, the Courts inclined this was no Breach, unless it had been, that it should continue so during the Term, or that the Assignee should enjoy it during the Term, for the Lease is only voidable on the Contingent of the Death of Tenant in Tail. 3 Keb. 816.

Secondly, *That the Premises are of such a yearly Value.*

A. covenants that at the Time of the Date of the said Indenture he was *seised of a lawful Estate in Fee-simple, notwithstanding any Act done by him or his Ancestors; and that the Land was then of the Value of 200 l. per Ann. and that the Plaintiff and his Heirs shall enjoy the same, according to the said Limitations, discharged and saved harmless from all Incumbrances made by him or them.* The Question was, whether this Covenant for the yearly Value depends on the first Part of the Covenant, *that notwithstanding any Act made by him, &c.* or whether it was an absolute and distinct Covenant. And it was held to be an absolute and distinct Covenant without any Dependence upon the first Part of the Covenant. Cro. Car. 106, 107. pl. 8. See Lit. Rep. 62 to 69, & 203.

A Covenant that the Lands conveyed are *of the yearly Value of 100 l. and shall so continue notwithstanding any Act done or to be done by him:* In an Action upon this Covenant, the Breach assigned was, that the Lands were not of the yearly Value of 100 l. Adjudged that the Words *notwithstanding any Act, &c.* extend as well to the Time of the Covenant as to the future Time; and tho' they were not then (*i. e.* at the Time of bringing the Action) of that Value, the Covenant was not broken, unless some Act was done by him which was the Cause thereof. Cro. Eliz. 43, 44. pl. 4. See Lit. Rep. 80, 81.

Thirdly, *That the Grantor, &c. has a Right to sell, &c.*

In a Covenant that a Grantor is *seised in Fee*, and has good Right to sell, the Words are synonymous. 3 Lev. 46. And if he has no Right, an Action may be brought for a Breach of Covenant. 2 Bulst. 12. T. Jones 195.

A Man was bound to perform all Covenants *which were to be performed* in such an Indenture, and there was a Covenant that he was *rightful Owner* at the Time of the Covenant, and was not; yet because of the Covenant being *which are to be performed*, it was adjudged that the Condition of the Bond was not broken, for that it goes only to Covenants to be performed *in futuro*. Lit. Rep. 205. 3 Leon. Case 290.

I now have Heirs and Assigns by these Presents, by the Will aforesaid do own full Power, good Right and lawful Authority to sell; this is good, and the Words [Heirs and Assigns] are insensible and Surplusage; he ought to be Owner of a Power as well as Owner of the Land. 1 Roll. Rep. 84.

The Plaintiff declared, that B. by his Indenture, dated, &c. demised to J. S. divers Lands and Tenements in S. for the Term of six Years, if R. R. Son of N. R. should so long live; and covenanted by the same Indenture with S. that the said B. then had full Power and lawful Authority to demise the Premises according to the Form and Effect of the same Indenture. S. for Breach of the said Covenant averred that B. at the Time of the making the said Indenture, had not full Power and lawful Authority to demise the Premises according to the Form and Effect of the said Indenture, *Et sic præd' B. conventionem suam præd' cum eodem J. in hac parte non tenuit sed illam penitus infregit.* B. pleads Concord, &c. S. denies the Concord, and it was found for him. B. brought a Writ of Error in the Exchequer-Chamber, and assigns two Errors for the Insufficiency of the Declaration; First, That the Plaintiff had not averred that the said R. R. was living at the Time of the Commencement of the Lease, nor at the Time of the Action brought; *Sed non allocatur;* for the Covenant refers to the Time of the Lease made, and then be R. R. alive or dead, the Action lies; for if he be dead before the Lease, then the Lease is absolute; and if he dies after the Lease, and before the Action brought, yet the Action lies, and Consideration thereof shall be had in Damages. Secondly, That S. in his Declaration had not shewed what Person had Estate, Right, Title or Interest in the Lands demised at the Time of the making the Indenture; by which it may appear to the Court that B. had not full Power, &c. But *per Cur'*, The Assignment of the Breach is good, for he had pursued the Words of the Covenant Negative, and it lies more properly in the Notice of the Lessor what Estate he had in the Land, than the Lessee, who is a

Stranger to it; and therefore the Defendant ought to shew what Estate he had in the Land at the Time of the Demise made; by which it may appear to the Court that he had full Power and lawful Authority, &c. 9 Co. 60. b. Cro. Jac. 304. Otherwise in Debt upon an Obligation with Condition to perform Covenants. Cro. Car. 176.

Fourthly, For peaceable Enjoyment.

All Covenants between the Lessor and the Lessee are Covenants in Law, or express. By Covenant in Law the Lessee is to enjoy his Lease against the lawful Entry, Eviction or Interruption of any Man, but not against tortious Entries, Evictions or Interruptions; and the Reason of the Law is clear and solid, because against tortious Acts the Lessee has proper Remedy against the Wrong-doers; and for the same Reason, if the Lessee be by express Covenant to enjoy the Term, (or to enjoy it against all Men, which is the same) he shall not have Action of Covenant against the Lessor, unless he be legally ousted or evicted; for if he is ousted tortiously by any Stranger, he has legal Remedy; but if the Lessor expressly covenants that the Lessee shall enjoy his Term without the Entry or Interruption, be it lawful or tortious, there the Lessor shall be charged by Action of Covenant for the tortious Entry of a Stranger, because no other Meaning can be given of the Covenant. Vaugh. 118.

Upon an Eviction of Lessee for Years, all Rents, Bonds and Covenants depending thereupon are gone. Telv. 23. So where the principal Thing to be performed is void. 1 Sid. 309. Telv. 19. Style 357.

There is a Diversity where the Covenant for quiet Enjoyment is general, and where special; for where the Covenant is for quiet Enjoyment against A. B. the Covenantor ought to defend against the Entry of A. B. without the Disturbance of any Person there; if there is any Entry upon the Plaintiff, he must shew that the Party who entered had a Title. Owen 100.

Per Twisden, I never met with a Case where Covenant would lie but upon an actual Ouster, either by a Stranger, by Eigne Title, or by the Lessor himself. 1 Vent. 45.

Covenant that the Lessee shall enjoy, binds not against a wrongful Ejector, unless it is particular against A. who wrongfully ejects, or else expressly against all Strangers. Hob. 35.

The Law shall never judge that I covenant against the wrongful Acts of Strangers, except my Covenant is express to that Purpose, for the Law defends every Man against Wrong. Hob. 35.

In Debt on Obligation for Performance of Covenants; the Breach assigned was, that the Defendant, Lessor, covenanted that it should be lawful for the Plaintiff, being Lessee, quietly to enjoy the Land, and that the Lessor himself ousted him; this illegal Ouster was a Breach of the Covenant. Cro. Eliz. 544.

Covenant that Lessee shall have and enjoy; Breach, that J. S. brought Trespass and recovered; it was moved in Arrest of Judgment, because it does appear that he that recovered had Title. Serjeant Levinz: Here is an express Covenant that he shall enjoy, and he is disturbed in his Possession, tho' upon no Title. Dyer 328. a. Vaughan 120. Hob. 35. 2 Vent. 46.

Lessee for twenty-one Years, rendering Rent, with a Condition to re-enter, &c. Lessee leases Parcel to the Plaintiff for a less Term and under a less Rent, with this special Covenant, That the Plaintiff should enjoy without Impeachment of him or any other, occasioned by his Impediment, Interruption, Means, Procurement or Consent. Defendant did not pay the Rent, therefore his Lessor entered into the Whole, and avoided the Plaintiff's Term. Per Cur', It is a Breach. 1 Bulst. 182.

An Action was brought against the Heir of E. A. the Condition was, whereas the said E. A. such a Day has granted and given to the Plaintiff the Presentation to the Church of D. if therefore the said E. A. from Time to Time shall make good the said Grant from all Incumbrances made or to be made by him and his Heirs, that then, &c. The Grantor died, the Church became void, the Heir of the Grantor presented; this tortious Presentation is no Breach; but this extends only to lawful Disturbance by the Heir; for it appears by the Pleading that the Heir had no Right to present, his Father having granted it before. Per Hobart, The Words shall be construed as if they had been, that he shall enjoy the same from any Act or Acts made by him or his Heirs; and in this Case there ought to be a lawful Eviction to make a Breach of the Condition; but otherwise if the Condition had been, that he should peaceably

peaceably enjoy from any Act or Acts made by him or his Heirs; for in this Case a tortious Disturbance would have been a Breach of the Condition. *Winch 25.*

The Condition of a Bond was, *that the Lessor should suffer his Lessee for Tears to enjoy, &c.* and that without the Trouble of him, or any other Person, a Stranger enters by Eigne Title: The Condition is not broken, for this Word, *suffer*, is Passive, and all the Rest is to be referred to it; but if any Procurement or Occasion of Disturbance be by the Lessor, his Executors or Assigns, then he forfeits the Obligation. *2 Ed. 4. 2. b. 1 Roll. Abr. 425.*

Debt to perform Covenants in a Lease; one was for *quiet Enjoyment against all claiming Title*. The Plaintiff assigns for Breach, that a Stranger entered, but saith not *Habens Titulum*: *Per Hale, Habens Titulum* at that Time would have done. *Dier's Case* is, Another entered claiming an Interest, but that is not enough, for he may claim under the Lessee himself. If the Covenant had been *to save him harmless against all lawful and unlawful Titles*, yet it must appear that he that entered did not claim under the Lessee himself. *1 Mod. 101. 3 Keb. 246. Hob. 34. Moor 861.*

The Plaintiff by Deed indented leased to the Defendant a Farm called *D.* except one Close by Name. Lessee (Defendant) was bound in a Bond to perform all the Covenants and Agreements in the said Indenture, and pleaded he had performed all the Covenants. The Plaintiff assigns for Breach, that the Defendant entered into the Close excepted. Defendant demurred. The Obligation was not forfeited by that Disturbance, for the Land excepted was not named. This Exception was not such an Agreement as was within the Intent of the Condition, it is an Agreement that the Land excepted should not pass by the Demise, but no Agreement that he shall occupy; but in some Cases, an Exception is an Agreement that shall charge the Lessee; but this is when he agrees on his Part that the Lessor shall have a Thing *debors*, which he had not before; as except a Way or Common, or any other Profit *Apprender*, that is an Agreement of the Lessee that he shall have the Profit; and if he be bound to perform all Covenants and Agreements, if he disturbs him in this, he shall forfeit his Bond. *Cro. Eliz. 657. Moor 553. 1 Roll. Abr. 43. Vide Plow. 67.*

A Covenant was, *That the Lessee and his Assigns shall enjoy without Interruption of F. E. and all others claiming under the said F.* The Breach assigned was, that he was ousted by *J. S.* who claimed under the Title of *F. E.* and shewed not how he claimed under his Interest, nor by what Conveyances: It is not good, and for that Reason reversed by all the Judges in the Exchequer Chamber. *Cro. Eliz. 823.*

The Defendant covenanted *to save the Plaintiff harmless concerning the Possession of such an House; and Breach is, that such a one had evicted him, and the Defendant had not saved him harmless.* Verdict *pro Quer.* It was moved in Arrest of Judgment, that it is not shewed that he was evicted by Title; and all Covenants extend only against legal Titles and Evictions. *Per Cur.* This Agreement is only *quoad* the Possession, not *quoad* the Title. Judgment *pro Quer.* *2 Lev. 194. 3 Keb. 744.*

Two made a Lease for Years by Indenture, and covenanted *that the Lessee should not be disturbed, nor by any Incumbrance made by them*: One of the Lessors made a Lease to a Stranger, who disturbed; it is a Breach of the Condition of the Bond for Performance of the Covenants, for the Word *them* shall not be taken jointly. *Latch 161. Poph. 200. Noy 86.*

A Covenant that the Lessee shall enjoy against the Lessor, and all claiming under him. The Defendant exhibited a Bill, whereby the Lessor appeared to be in Trust, and adjudged this was no Breach. *2 Keb. 288. 1 Brownl. 23. Moor 859.* But this Case was denied to be Law. *T. Raym. 371.*

To enjoy without lawful Impediment of *J. S.* The Breach is, that *J. S.* having Right, entered: It is a sufficient Breach. *2 Keb. 878. Per Hale, Having Right implies it a lawful Eviction. 2 Lev. 37. 3 1 Vent. 184.*

Covenant that *whereas D. had let to the Plaintiff the Parsonage of B. that he would save him harmless* concerning it against *M. B.* and he alledged *M. B.* entered upon him and put him out, and did not say that the Entry of *M. B.* was lawful. *Per Cur.* When the Covenant is to save him harmless against a Person certain, he ought to defend him against the Entry of that Person, be it by Right or Wrong; *aliter* if against all Persons, for there it shall be taken for a lawful Entry or Eviction. Had it been to have warranted against him, it must have been a lawful Title, so that in this Case to save harmless is more than to warrant. *Cro. Eliz. 213. 1 Leon. 324.*

In Debt on Bond against Baron and Feme, being made in her Widowhood, with Condition that she, her Heirs and Assigns, keep Contracts and Covenants made between

tween her former Husband and his Lessee the Plaintiff; and there was an Agreement that the Plaintiff should enjoy a Warren of the Demise of her former Husband, and that he entered till put out by the Defendant: Issue on the Agreement, and found for the Plaintiff. It was moved in Arrest of Judgment, that there was no Estate alleged in her former Husband *in jure Uxoris*, whereby tho' the second Husband be Assignee in Law, yet he enters of his own Wrong, and not as claiming under her. But *per Windam*, It is not requisite that the Husband be Assignee of the Estate, but her Assignee of Covenant. 1 *Keb.* 348, 512. Judgment *pro Quer*.

If Lessor covenants with his Lessee for Years, that it shall be lawful for the Lessee, &c. peaceably to enjoy the Land, and after the Lessor enters tortiously upon the Lessee, and ousts him; this is a Breach of the Covenant, for the Intention of it was, that he should enjoy it without the Interruption of the Lessor: So it had been if the Word *peaceably* had not been in the Covenant. *Hob.* 49.

But if Covenant be in a Lease by Indenture, that B. shall enjoy the Land peaceably and quietly to his own Use, according to the Intent of the Indenture, without any lawful Impediment, Suit, Disturbance, Eject', Contradict', Molestand', Charge, Incumbrance or Denial of the said A. the Lessor, and after A. enters upon B. and disturbs him in taking the Profits without any lawful Title but as a Trespasser: This is not any Breach of the Covenant, for that is expressly limited, that he shall enjoy this without any lawful Disturbance, and so a Disturbance by Tort is out of the Covenant; but if the Lessor enters and ousts him, tho' it be tortiously, it is a Breach. 1 *Roll. Abr.* 429.

If a Lessor covenants with the Lessee, that he shall have and enjoy the Lands quiete & pacifice sine evictione & interruptione alicujus Personæ, and after a Stranger enters per Tort; yet this is a Breach of the Condition, for that the Covenant is, that he shall not be interrupted in his Possession. *Dyer* 328. a. But in *Hob. Rep.* Sir William Tisdale and Essex's Case is, That if the Lessor covenants with his Lessee, Quod ipse heret, occuparet & gauderet the Land demised, and after a Stranger enters per Tort, and ejects him; this is not any Breach of the Covenant, for the Law will not construe the Covenant to extend to tortious Acts without express Covenant. *Cro. Jac.* 425. pl. 10. & 144. pl. 21. *Sem' cont' at Dy*.

If a Man covenants for Enjoyment against a particular Person or Persons, he covenants as well against their tortious Entries as legal. *Hob.* 34, 35. *Vaughan* 118. *Cro. Eliz.* 212, 213. 1 *Roll. Rep.* 397. *Moor* 867.

If a Lessor covenants with his Lessee for Years, that it shall be lawful for the Lessee peaceably, &c. to enjoy the Land, and after the Lessor enters tortiously upon the Lessee, and ousts him; yet this is a Breach of the Covenant, for the Intent was, that he should enjoy it without the Interruption of the Lessor. 1 *Roll. Abr.* 427.

A Covenant that the Indenture of a Lease at the Time of the Assignment is a good, true and indefeasible Lease, and that the Plaintiff shall enjoy, &c. without the Let or Interruption of the Defendant, or of any claiming by, from or under him: The Plaintiff shewed for Breach, that before he that made the Lease had any Thing, one J. S. was seised in Fee, and that he who made the Lease re-entered upon him and disseised, and leased prout, and that J. S. re-entered upon him; upon which Replication the Defendant demurs. *Per Cur*, The Words *indefeasible Lease* shall be construed as a distinct Sentence from the last Words, that he shall enjoy it without the Interruption of the Defendant. 1 *Sid.* 328. 1 *Saund.* 51. 2 *Keb.* 201.

Covenant in a Lease for Years of a Manor, that the Lessee shall not molest, vex or put out any Copyholder, &c. Plaintiff assigned for Breach, that the Defendant with arms entered upon a Copyhold, &c. in a Cow-house, Parcel of the Premises, & sic Molestavit, &c. This is not any Breach, for the Molestation is to be intended of such Sort that he may oust him out of his Copyhold, either by distraining, that he could not enjoy it quietly, or by some other Vexation, whereby he was forced to relinquish his Possession; and the Wrong is only here done to his Person, and not to his Copyhold Tenement, and so no Breach. *Cro. Eliz.* 421.

In an Action of Debt on Bond to perform Covenants; one of which was, that the Plaintiff should not be interrupted in his Possession of certain Lands by any Person that had lawful Title, and particularly that he should not be interrupted by one T. A. by Virtue of any such Title. Defendant pleaded Performance. Plaintiff replied 1 Nov. 20 Car. The Defendant made the Lease to Plaintiff for Years, and 3d of Nov. he entered; and that 17 Aug. 20 Car. before, the Defendant made a Lease to A. for Years yet to come, who 20 Aug. 20 Car. entered. The Defendant pleaded the Lease to A. was on Condition for Re-entry for Non-payment of Rent, and that before the Lease made

to the Plaintiff the Rent was behind, & *legitime demandat secundum formam Indenturæ*; and he re-entered and made the Lease to the Plaintiff. Upon general Demurrer, *per Cur'*, The Demand was not sufficiently alledged, for he ought to set forth when and where it was made, that the Court might know if it were legal. But for a Flaw in the Plaintiff's Replication, because he alledged his Entry after the Lease made to A. so that it appears not that he was interrupted by him, the Opinion of the Court was against the Plaintiff. *Allen 19.*

C. C. granted the next Avoidance, &c. to M. M. assigned it to L. to present to the same Church when it shall become void; and covenanted that the same Person who shall be so presented by him shall enjoy it without the Let or Disturbance of the said C. or M. or any of them, or any by their Procurement. L. presented J. S. and after J. M. presented another, claiming the first and next Avoidance by the Procurement of C. The Declaration was not good, for it ought to say, that C. granted to J. M. the next Avoidance, and procured him to disturb, and that by his Procurement he was disturbed. *Winch 4.*

A Lessor covenanted that the Lessee should peaceably and quietly enjoy the Land let during the Term; Plaintiff declared that a Stranger entered upon him, and ousted him within the Term. *Per Roll*: The Covenant in this Case is broken tho' he be a Stranger. *Stile 67.*

A Lessor covenanted that the Plaintiff and his Wife should enjoy the Premises during the Term, without the Interruption of him or J. his Wife; and the Expulsion is laid of the Plaintiff only, yet it is good, because the Husband has the sole Profits and Possession; and altho' the Entry of the Lessor is not alledged to be by Title, so as he is merely a *Tort Feasor*, and tho' he might have an Action of Trespass against him. *Cro. Jac. 383.*

A Man covenants that the Covenantee shall hold the Land for twenty Years; this will amount unto a Lease of the Land for Years; but if it is that he shall enjoy the Land for twenty Years, this is only a Covenant. *Cro. Jac. 172. pl. 13. Bro. Tit. Leases 20, 30, 60. Noy 14. Cro. Jac. 42, 659. Palm. 201. 1 Leon. 118. 3 Bulst. 252. Cro. Car. 207. 1 Jones 231. Vide Hob. 35. Contra Moor 861. 2 Brownl. 23. 1 Roll. Rep. 397.*

Where the Owner of the Land covenants that he should hold the Land at such a Rent to be paid, this will amount to a Lease: But where a Stranger covenants so, it amounts but to a bare Covenant. *3 Bulst. 204. 1 Roll. Abr. 847. Telv. 85. Brownl. 136. Cro. Eliz. 223. Bro. Tit. Leases 21.*

Altho' the Words in an Indenture are in Shew the Words of the Lessor only, yet the Lessee accepting thereof, and enjoying of it, it is as well as if it had been a Covenant *de facto*. *Cro. Jac. 522. pl. 7.*

If a Lessor covenants with the Lessee that he hath not done any Act to prejudice the Lease, but that the Lessee shall enjoy it against all Persons: These Words, against all Persons, shall refer to the first, and be limited and restrained to any Acts done by him, and no Breach shall be allowed but on such an Act. *5 Co. 17, &c. 22 H. 6. 2. Dyer 257.*

A Lessor covenanted with the Lessee that he has not done any Act to prejudice the Lease, but that the Lessee shall enjoy it against all Persons; the Words, against all Persons, shall refer to the first, and be limited to any Acts done by him. *Winch 4.*

The Condition of an Obligation was, that if the Defendant shall warrant and defend an Ox-gang of Land to the Plaintiff against J. S. and all others, that then, &c. Resolved that the Word defend shall be taken as a Defence against lawful Titles, and not against Trespasses. *Moor, pl. 294.*

If two Men lease for Years, and covenant that the Lessee shall enjoy, free from all Incumbrances made by them, and after the Lessee is disturbed by J. S. to whom one of the Lessors had made a precedent Lease: This is a Breach, for them shall be taken severally, and not jointly only. *1 Lutw. 161.*

In Covenant that whereas the Plaintiff was in Possession of such Lands, that neither J. S. nor J. D. nor J. G. should disturb him by any indirect Means, but by due Course of Law. Defendant pleads, that neither J. S. nor J. D. nor J. G. did disturb by any indirect Means, but by due Course of Law; it is not good, but a Negative pregnant: If he had pleaded he was not disturbed by any indirect Means, it had been good, if he had said, that he had not been disturbed *contra formam conventionis*. *Godb. 60. 2 Leon. 197.*

One covenants *that he shall enjoy against him and V.* and all claiming under him; and assigns a Breach, that C. claims under V. and ejected him. Defendant pleads, that at the Time of the Covenant he was seised of an indefeasible Title, and that by an Act of Parliament made, after reciting that V. had settled this Estate in Lady M. P. and that certain Persons had unduly procured a Fine of her; it enacts, that the Fine shall be void, and that any Person might enter as if no Fine had been levied; and that by Virtue of this Fine, & *non aliter*, the Defendant was seised, and sold and made the Covenant; and that after the Act, C. claiming by Title under the said Lady P. by V.'s Settlement, by Virtue of the said Act of Parliament entered and ousted him. Plaintiff demurs, for that the Title being good at the Time of the Covenant being made, and the Title upon which the Ouster, it being by Act of Parliament, it is no Breach, as 9 Co. 106. This Act does not make a new Title, but removes an Obstruction from the old, and doubtless V. was named in the Covenant for this Purpose, in Case this Fine unduly obtained should be avoided. *Twisden contra. 2 Lev. 26. 1 Vent. 175. 2 Keb. 831.*

Where a Covenant is to permit a Man to *enjoy without Molestation*, the Word *Molestation* shall not extend to personal Torts, as to beating or assaulting of him, but to an Entry upon him, and a Disturbance in his Possession. *Cro. Eliz. 421. pl. 16.*

By Covenant in Law upon the Word *Demise*, the Lessee is to enjoy his Lease against the lawful Entry, Eviction or Interruption of any Man, but not against tortious Entries, Evictions or Interruptions, because for such tortious Acts the Lessee hath his proper Remedy against the Wrong-doer. By the same Reason, if the Lessee be by express Covenant to enjoy his Term against all Men, or notwithstanding any Act done by the Lessor, or any claiming under him, the Lessee shall not have an Action of Covenant against the Lessor unless he is ousted; for if he is tortiously ousted by a Stranger, he hath his Remedy. But if the Lessor expressly covenants that the Lessee shall enjoy without the Entry or Interruption of any, then the Lessor shall be charged by an Action of Covenant for the tortious Entry of a Stranger, because no other Meaning can be given to this Covenant. *Vaugh. 119. Lucas 384.*

But where a Man covenants for quiet Enjoyment against a particular Person, there it seems the Covenant shall extend to his tortious Acts. *Vaugh. 125 to 128. Hob. 35.*

An Attorney covenants on the Behalf of another, *that the Covenantee shall quietly enjoy such Land at such a Rent for a Year*: Adjudged that this Covenant amounts to a Lease tho' made by a Stranger; for he acted on Behalf of the Owner of the Land, and it shall be taken that he had Authority to Demise. *2 Vent. 62.*

The Attorney must covenant in the Name of the Party for whom he acts, not in his own Name. *9 Co. 77.*

Covenant to *enjoy peaceably against M.* Breach was assigned, that M. had entered and cut down five Elms; upon Evidence it was, A. Servant of M. by Commandment, and in the Presence of his Master, had entered and cut, and good. *1 Leon. 157.*

Where a Man covenants that his Lessee shall quietly enjoy during the Term, without any Interruption of the Lessor, and the Lessor enters upon him, the Lessee may bring Trespass if he will, or Covenant if he will. *Cro. Jac. 383. pl. 11. Hob. 35.*

The Defendant covenanted *that the Plaintiff should enjoy a Close quietly for a Year*; upon which the Plaintiff put in his Beasts, and K. who had *Titulum virtute cuiusdam dimissionis ei inde fact' ante confection' articul' predi'*, entered upon the Plaintiff, and expelled him, and after brought an Action of Trespass against him for putting Beasts into the said Close, and that *Talit' Process' fuit* that K. recovered against the Plaintiff 20*l.* Damages, and 17*l.* Costs, of which the Plaintiff had Notice, and so by the Non-quiet Enjoyment the Defendant had broke his Covenant. Issue upon this, and Verdict for the Plaintiff. Defendant moved in Arrest of Judgment, for that Plaintiff had not shewed what Title K. had, and it may be the Title which he had was under the Plaintiff himself; and there having been a Suit wherein the Title of K. appeared, the Plaintiff ought to have shewed it, for now it is in his own Conscience; *Sed non alloc'*; for the Title of K. cannot be supposed to be under the Plaintiff, the Covenant is broken, as in *Procter and Newton's Case, Trin. 23 Car. 2. B. R. Rot. 856. Judgment pro Quer'. 3 Lev. 325.*

Plaintiff declared on a Demise of a Messuage, *Simul cum* one Garden, & *Latrina* [Angl. House of Office] *ad ulteriorem finem inde*; and Lessor covenanted, that the Lessee should enjoy *dimissa præmissæ*; and assigns a Breach, that the Defendant had erected on Part of the Garden a Mansion-house, whereby the Plaintiff *Usum Gardini præd' secundum formam & effectum dimiss' præd' habere non potuit*. Defendant pleaded, that *non obstante ædificat' præd'*, the Plaintiff *usum Gardini præd' habere potuit, secundum veram intention' dimissor' præd'*, *absq; hoc quod ædificatio præd' aliquo modo impediret le Plaintiff of the Use of the said Garden, secundum veram intentionem indentur' præd'*. Plaintiff demurred. *Per Cur'*, The Use of the Garden is the Use of all the Garden, and not the Use only to pass to the House of Office, as was pretended by the Defendant; and the Traverse contains more than is alledged in the Breach, *secundum veram intentionem indent' præd'*, and the Court cannot know the true Intention of the Indenture but by the Words of the Indenture. 3 Lev. 167.

Debt on Bond to perform Covenants; the Covenant was for *quiet Enjoyment, without Let, Trouble or Interruption, &c.* The Plaintiff assigned his Breach, that he forbade his Tenant to pay his Rent. *Per Cur'*, It is no Breach unless there were some other Act. 1 Brownl. 81.

A Covenant was, that the Covenantee should *peaceably enjoy an Acre of Copyhold Land according to the Custom of the Manor*. The Defendant pleaded, that by Custom of the Manor the Covenantee ought to pay to the Lord a Rent, and for Non-payment the Lord to re-enter; and that the Covenantee did not pay it, and the Lord entered and demanded Judgment *si alio*: A good Plea. *Bendl.* 32.

In Covenant Plaintiff assigned for Breach the Non-payment of Rent; Defendant pleaded a Bargain and Sale for Money for 100 Years before that Time of the same Land made to *A.* and pleaded the Statute of Uses, and then shews the Attainder of *A.* for High Treason, and that by this Attainder it is vested in the King; and pleaded the Act of Attainder, and the Exceptions; and it was demurred to this Plea upon *Co.* 53. and *Dyer* 256. because he had not pleaded that *A.* or any under him, had not entered upon the Lands, and without Entry and Expulsion of the Defendant he shall not be discharged of the Rent; but it was said, it being upon the Statute of Uses, no Entry was requisite: But the greatest Doubt was, the Title is in the King, and the King is in Possession without Entry, and the Party is in Possession, *viz.* the Defendant is accountable to him for the Profits. In *Keble* the Court agreed this to be a good Lease by way of Estoppel; and if the Rent be in Being, the Covenant remains, and *contra* if not. And *per Cur'*, This is a sufficient Eviction without Entry or Office alledged, nor need any Entry be laid by the first Lessee, he being said in Possession by Virtue of the Statute; and the King is in actual Possession as much as if the Party had entered actually, tho' a common Person should not be said to be in Possession without Entry by himself or the first Lessee: Now this cannot be good as a Lease in Reversion, being not so pleaded, but as a Grant of the present Estate; but all agreed that upon Assignment of the Lease there must be Attornment. The Plaintiff has declared on a Lease in Possession as at Common Law, which is avoided by Eviction. Judgment *pro* Defendant. 1 *Sid.* 399. 2 *Keb.* 364, 444.

In an Action of Covenant a Breach was assigned by the Lessee, that he did not quietly enjoy, &c. Lessor pleads in Bar, that the Covenant was, *that the Lessee performing the Covenants, and paying his Rent, should quietly enjoy, &c.* *Per Windham*, These Words, *paying the Rent*, is no Covenant precedent, but rather concomitant, and is liable to Construction as the Subject-Matter is; but here it can be no Condition, being an usual Clause at the End of all Leases. *Per Cur'*, And yielding and paying makes no Condition. 2 *Keb.* 9, 23. 1 *Sid.* 280. *Vide* 1 *Keb.* 895.

Covenant, for that the Testator sold to the Plaintiff twenty Ton of Copperas, and agreed with the Plaintiff, that if he failed of the Payment of such a Sum at such a Day, *that he might quietly have and enjoy the said twenty Ton of Copperas*; and alledged in *facto*, that the Money was not paid at the Day, & *quod non potuit habere & gaudere* the said twenty Ton of Copperas. An Action was brought, and Judgment was against the Defendant by *Nihil dicit*, and a Writ of Inquiry of Damages awarded, and 260 *l.* Damages returned. *Per Cur'*, The Declaration is not good, in that he assigned not a sufficient Breach, *Quod non potuit habere & gaudere, &c.* without shewing how and by whom he was disturbed, is not sufficient, for it ought to appear to the Court that it was a lawful Disturbance, otherwise there is not any Cause of Action; for the Goods being sold to him, if he were legally disturbed, he has a sufficient Remedy, and is not to maintain an Action of Covenant; and of this Opinion was

was all the Court : And tho' Judgment was given against the Defendant by *Nilil dicti*, yet *per Cur'*, he came Time enough to alledge this Matter, for until the last Judgment he may well inform the Court of the Insufficiency of the Declaration ; and the Court seeing it insufficient, shall abate it. *Cro. Eliz.* 914.

Covenant, for that the Defendant 35 *Eliz.* let to him the Barton of B. for six Years, and covenanted *that he should enjoy it during the Term quietly, and discharged from Tithes, &c.* and further, that if the Tithes were demanded and recovered against during the Term, that he should recoup in his Hands so much of the Rent as the Tithes amounted to : For Breach Plaintiff shewed, that in 42 *Eliz.* the Parson sued him for the Tithes of Corn growing there in the Years 38 & 39 of *Eliz.* whereupon it was demurred. *Per Cur'*, This Suit after the Determination of the Term was a Breach of Covenant, for he did not enjoy it discharged, &c. which is not intended of a real Discharge, for it appears not to be the Intent of the Parties, because it is agreed that if he were sued he should recoup as much of the Rent in his Hands ; but their Meaning was, he should be freed from Suit and Payment of it ; and he is as greatly prejudiced by a Suit after the Term as if it had been sued before the Expiration of the Term : But because it was not alledged that the Suit was lawful, or that the Tithes were due, for he was not bound to discharge him from illegal Suits, the Breach was not well assigned. *Cro. Eliz.* 916, 917.

A Condition *peaceably to enjoy from the 1 February until Michaelmas Day Tithes, paying Half-yearly during the Term, and on Default of Payment the Defendant (the Lessor) to be free from all Obligation to the Plaintiff.* He replied and assigned a Breach in Non-payment of Rent at *Michaelmas*, which was after the Term ended ; and Defendant demurred. Now the Substance of the Suit is quiet Enjoyment, and therefore ought not to be taken by Protestation. *Sed per Cur'*, Enjoyment need not be answered where it is defeated by Payment of Rent ; yet Judgment *pro Defendant.* 3 *Keb.* 550, 594.

A Condition to perform Covenants in a Lease ; one of which was, that he should *enjoy such Lands let him quietly without Interruption.* And the Plaintiff in his Replication shewed *in fact* that the Defendant 20 March 30 *Eliz.* had disturbed him, and in that assigned the Breach. The Defendant by Rejoinder shewed, that in the Indenture there was a Proviso, that if he paid 10 *l.* the 31 March 30 *Eliz.* that the Indenture and all therein contained should be void, and alledged he paid 10 *l.* at the Day (but this was after the Disturbance supposed). Plaintiff demurred. Judgment *pro Quer'*. For by the Covenant broken before the Condition performed, the Obligation was forfeited ; and it is not material that the Covenant became void before the Action brought ; but by *Wray*, if the Proviso had been, that upon the Payment of the 10 *l.* that then as well the Obligation as the Indenture should be void : *Aliter*, for then the Bond was void before the Action brought. *Cro. Eliz.* 244.

A. Tenant in Tail (Reversion to the Queen in Fee) let the Premises for twenty-one Years by Indenture, and covenanted that the Lessee *should enjoy it against all Persons, without the Interruption of any besides the Queen, her Heirs and Successors ;* the Queen granted her Reversion to *W.* The Tenant in Tail died without Issue ; *W.* entered, Lessee brought Covenant : It lies, for the Queen's Patentee is not excepted. *Cro. Eliz.* 517.

There was a Covenant in an Assignment of a Lease, *that the Assignee should quietly enjoy, &c. free and clear of and from all Arrears of Rent :* An Action was brought upon this Covenant, and the Breach assigned was, that the Rent was in Arrear and not paid. The Defendant pleaded that he left so much Money in the Hands of the Plaintiff, *ea intentione*, to pay it to the Lessor in Discharge of what Rent was then in Arrear : And upon Demurrer the Plea was held good, notwithstanding the Objection that the Intention was put in Issue ; for if it had been *ad solvend'*, it had been good, and in this Case the Plaintiff might have replied *non reliquit, &c. in manibus suis ad solvend'*. 4 *Mod.* 249.

In a Lease for Years the Defendant covenanted *that the Plaintiff should enjoy it during the Term.* On Demurrer the Case was, Tenant for Life levied a Fine Come *ce*, &c. to him in Reversion, the Uses were to the Conusee and his Heirs, on Condition to pay to the Tenant for Life 4 *l. per Ann.* during his Life, and upon Default, that should be to the Use of the Conusor for her Life ; the Conusee made a Feoffment to the Defendant, who leased to the Plaintiff ; the 4 *l.* was not paid nor demanded ; the Tenant for Life entered upon the Plaintiff : This is a Breach of the Condition without any Demand of the Rent, for it is a Sum in Gross, and not issuing out of the Land.

Land. The Covenant is, that the Lessee *shall absolutely enjoy it*; and it was held that this Feoffment has not destroyed the future Use, which is to arise from Non-performance of the Condition. *Cro. Eliz.* 688.

Plaintiff declared that *J. S.* let to him, &c. and covenanted that the Plaintiff should quietly enjoy it during the Term, without the Let or Disturbance of him, his Heirs or Assigns, or of any other Person by or thro' his Means, Title or Procurement; and shewed for Breach, that *L. P.* by Fine granted the Land to *J. S.* and his Wife (the Defendant) and to the Heirs of *J. S.* and that this Fine was so levied by the Means of *J. S.* and that after he made the Lease to the Plaintiff, *J. S.* died; his Wife entered, who was Executrix. *Per Cur'*, The Action lies; tho' the claims by Title derived from another, yet she claims by his Means. *Cro. Jac.* 657. 2 *Roll. Rep.* 286.

For tho' in Point of Estate the Wife was in by *L. P.* yet this was by Means of the Purchase and Procurement of her Husband; for this was procured to make her a Jointure. And if he makes a Lease, and the Lessee grants it over, and after he makes a second Lease with such Words; if this Lessee be ejected by the Assignee of the first Lessee, it is a Breach of the Covenant, because this is by Means of the Covenantor, altho' not his Act: And this Covenant provides as well against lawful Entries by his Means and Procurement, as against tortious; and the Word *Title* does not refer to Disturbance, but to Estate.

Tenant in Tail makes a Lease, and covenants that the Lessee shall enjoy against him and all claiming under him; if he dies, and the Issue ousts the Lessee, the Covenant is broken: For tho' he is in *per formam doni*, yet it is by Descent from the Father, and so by his Means, tho' not his Title; but if the Issue makes such a Lease and Covenant, and the Issue of the Issue enters, it is not broken, because he is not in by his Means, but by Descent, which is by Act in Law & *per formam doni*. *Palm.* 339, 340.

If a Man has good Title to Lands by Virtue of a Fine, and sells the same, and covenants with the Vendee, his Heirs and Assigns, that he shall enjoy against him and B. and all claiming under them; and after by an Act of Parliament, reciting that B. had settled this Estate upon C. and that certain Persons had unduly procured the said Fine from her; it is enacted, the Fine shall be void, and that every Person may enter as if no such Fine had been; and after one enters, claiming Title under C. This is a Breach of the Covenant, for the Act makes no new Title, but removes the Obstruction of the old; and it was said, that doubtless B. was named in the Covenant for this Purpose, in Case this Fine unduly obtained should be avoided. 2 *Lev.* 26. 2 *Keb.* 831.

If a Lessee for Years assigns to *J. S.* and after assigns it to *J. D.* and covenants with *J. D.* that he is possessed of the Term, and that *J. D.* shall enjoy it, and shall be saved harmless from all Incumbrances done by him; the first Assignment is not any Breach of the Covenant before Entry made by *J. S.* nor any Disturbance of the Possession. 1 *Roll. Abr.* 430.

A Conusee of a Statute extended and assigned it to one, and after granted the Land to another, and covenanted that notwithstanding any Act by him, or any other by his Consent, that the Statute, Extent and Execution shall be in Force; and in Covenant brought by R. this Assignment was assigned for Breach, and upon Demurrer adjudged *pro Quer'*. And on a Writ of Error this Judgment was reversed, for notwithstanding the Assignment, the Statute is in Force; but if the Plaintiff, *eo quod concessit* to him, which implies a Covenant, the Action had been maintainable: But the Breach is assigned in the Covenant only, which is not broken by the Assignment, for the Statute is in Force after the Assignment, so that the Conusee may release, 17 *Ed.* 3. and the Assignment proves the Statute to be in Force; but if he had covenanted that the Grantee shall enjoy without Disturbance, the Assignment had been a Breach of the Covenant; and so is a Breach of Covenant in Law implied in the Word *Grant*, if the Action had been brought upon it. *Palm.* 388.

The Defendant leased to the Plaintiff an House, by the Words *Demise and Grant*, which Words import a Covenant in Law) and the Lessor covenanted that the Lessee shall enjoy the House during the Term, without Eviction by the Lessor, or any claiming under him, (which expresse Covenant was narrower than the other); and gave a Bond to perform Covenants. The Plaintiff granted this Term over to a Stranger. The Plaintiff assigned for Breach, that one *S.* entered upon the Assignee, and in Ejectment recovered against the Assignee. Debt was brought. *Per Cur'*, By this Covenant in Law the Assignee shall have a Writ of Covenant, and for the Breach of the Covenant

in Law the Obligation was forfeited. But because the Plaintiff did not shew that S. had an Eigne Title, (for otherwise the Covenant in Law was not broken) therefore Judgment against the Plaintiff. 4 Co. 80. b. Cro. Eliz. 674.

And regularly no Covenant lies upon the Word *Demise*, unless in Case of Eviction of the Lessee, and actual Ouster or Expulsion by the Lessor or a Stranger.

An Assignee brings Covenant against the Assignor for being disturbed in *Non-enjoyment quietly*. Defendant pleads 40 l. accepted of him in Discharge of the Wrong: After Assignee brings Covenant against the Executor of the Lessor, who pleads this Acceptance: It is no Plea: Had he pleaded the Acceptance of the 40 l. in Satisfaction of the Covenant, it might have been good. *Stile* 300.

Lessor, Tenant for Life, lets for twenty-one Years, and covenants that he had not done any Act to Prejudice the said Lease, but that he *should enjoy it against all Persons*. Tenant for Life dies, the Lessor in Reversion enters: Lessee sues the Executors. The Action lies not, for the last Words refer to the first Words, *For any Thing done by him*. Cro. Eliz. 615.

J. and V. Jointenants by Lease for Years; V. assigned all his Interest to another without J.'s Assent or Privity, and died; J. after recited this Indenture by Lease, and that all came to him by Survivorship, granted the Premises to P. and covenanted that *he shall quietly enjoy it notwithstanding any Act done by him*, and gave Bond for Performance of Covenants: In an Action of Debt on the Bond, J. pleaded that the Plaintiff had enjoyed it, notwithstanding any Act done by him. P. replied, that V. Jointenant with J. assigned his Estate to J. D. who entered and expelled him. The Defendant demurred: But it was adjudged against him; for the Grant was never good, for he had no Power to grant one Moiety, and yet he had expressly granted the Premises to P. and the Condition of the Obligation being to perform all Grants, the Grant being defective at the first as to a Moiety, which is the Substance of the Agreement of all the Parties, this is not qualified by the Covenant ensuing; and it is not like *Nokes's Case*, 4 Co. for there the Grant was good for the Whole, and becomes ill by Eviction afterwards, and therefore in that Case the Covenant ensuing qualified the general Covenant. *Telv.* 175. *Lit.* 206. 1 *Bulst.* 3, 4. Cro. Jac. 233.

In an Action of Covenant to perform Articles; which were, that the Plaintiff *should hold and enjoy Lands free from all Titles and Incumbrances*; and for Breach the Plaintiff shewed, that B. died seised, and that his Wife had Title to Dower. Plaintiff demurs. *Cur.* This Covenant goeth to the Land, and there can be no Difference between a Covenant to discharge the Land of all Titles, and that the Defendant shall hold the Land so discharged. 1 *Keb.* 937.

Baron and Feme levied a Fine; J. S. covenanted that *the Conusee shall enjoy it against all lawfully claiming from B.* F. brought Dower after the Death of B. the Conusee did not plead the Fine, but suffered Judgment, and brought Covenant against J. S. and it was adjudged against him, for the Covenant shall not extend to a Right that is barred; and besides, she did not claim lawfully.

Covenant to enjoy *fine interruptione alicujus*, it must be shewn that the Party interrupting had a Title. 2 *Vent.* 61, 62.

Action of Covenant, for that the Defendant, *Non indempnem conservavit ipsum de E. cernente occupationem quorundam clausorum, &c. secundum formam agreement*; and sets forth no Title in the Disturber. Cro. Eliz. 914. Cro. Jac. 315, 425. *Vaughan* 120, 121. 2 *Saund.* 78. 1 *Mod. Rep.* 66. But this being after a Verdict, and the Plaintiff setting forth in his Declaration, that the Disturber recovered *per Judicium Curie*, Judgment was given *pro Quer.* 2 *Mod.* 213.

Upon a Covenant for quiet Enjoyment, the Breach assigned was, that a Stranger entered and evicted him, but doth not say that he hath a Title; it is nought: *Habens priorem E. legalem Titulum* at the Time of his Entry would have been good: But it is safe to say also, not having any Title from the Plaintiff. 1 *Mod. Rep.* 293, 294. 2 *Saund.* 178.

Where a Man covenants that he hath not done any Act to disturb the Plaintiff in his Possession, but that he should hold it without Disturbances of the Defendant or any other Person: The Plaintiff assigns for Breach, that one A. recovered Power out of the Land; the Defendant says that the Recovery was before he sold to the Plaintiff. *Curia*: The Defendant is not bound to warrant peaceable Possession, but only for all Acts done or to be done by him. *Dallison* 59.

One covenants with J. S. that he shall *enjoy the Land*; and further, that A. a Farmer of the Tithes, shall pay 8 l. per Ann. and is bound to Performance in Debt on the

the Bond, it is good to plead Performance of the Covenants, *ex parte sua perimplend'*, for this implies the Farmer had paid the 8 l. and exprefs Mention of that needs not to be. *Dyer* 372, 373.

In Covenant the Breach assigned was, that *B. Habens jus precedens*, to the Plaintiff's Conveyance, *Virtute Tituli* did enter, and good; tho' it had been plainer to have said *Legale jus*, (*contra Telv.* 30.) Had the Covenant been against the lawful Title of *J. S.* the Breach must have been so. *3 Keb.* 878.

In Covenant, the Plaintiff declared upon Articles of Agreement made between *W.* on the Behalf of *T. M.* of the one Part, and *R.* of the other Part: It was agreed between the Parties, that the said *R.* *quiete & pacifice haberet & occuparet tenement' vocat' S. for one Tear, excepta dimissione præd' cuidam E. K. nuper tenent' præmiss' unum parvum clausum parcellam præmissorum*, and that *R.* should pay 20 l. by Quarterly Payments for the said Tear; Plaintiff set forth he entered and put in his Cattle, and before the Year was out *K.* sued *R.* in Trespafs, and recovered Damage and Costs, which he was forced to pay, and so he did not hold the Premises quietly. *Per Cur'*, The Declaration is not good, for it is not set forth that *K.* had any Right, for the Articles amounted to a Lease: But if it had been a collateral Covenant by a Stranger, it would be hard to extend it to a tortious Entry. *Cro. Jac.* 425. Where the Promise was to enjoy without the Interruption of any Person; and yet holds, that a Title ought to be set out. *Dyer* 328. a. *1 Roll. Abr.* 430. *contra.* This is no Covenant expressly against *K.* for he is only mentioned in the Part excepted. *2 Vent.* 59.

D. was bound to *H.* upon Condition that *H.* and his Heirs might enjoy certain Copyhold Lands surrendered to him; the Defendant pleaded the Surrender, and that the Plaintiff entered, and might have enjoyed the Lands. Plaintiff replied, that after his Entry one *E.* entered upon him and ousted him. *Per Cur'*, The Replication is ill, because he did not shew he was evicted out of the Land by lawful Title, for else he had the Remedy against the Wrong-doer. *Vaughan* 121, 122.

A Condition was, to enjoy such Lands without Eviction: The Breach was assigned in the Recovery by Verdict in Ejectment, upon a Lease made by one *E.* and shews not what Title *E.* had to make the Lease, but avers that *E.* had good Title, and it might be he had Title derived from the Plaintiff after the Obligation made, and therefore he ought to shew that he had good and eigne Title before the Lease made; and in the Exchequer-Chamber the Replication was held ill. *Cro. Jac.* 315. *2 Saund.* 177, 178. *1 Lev.* 301. *2 Lev.* 37. *Moor* 861. *Hob.* 34. Tho' this was after a Verdict.

If Tenant for Life makes a Lease for twenty Years, and covenants that the Defendant shall enjoy it during the Term, that shall be construed during his Life, for the Term ends by his Death; aliter if the Covenant had been during the Term of twenty Years. *1 Brownl.* 22.

Covenant was, that the Lessee and his Assignees should enjoy, without the Let or Interruption of *F. E.* and all others claiming under the said *F. E.* The Breach assigned was, because he was ousted by *J. S.* who claims under the Title of *F. E.* and does not shew how he claims under his Interest, nor by what Conveyance: It is ill, tho' he be a Stranger. *Cro. Eliz.* 823.

Where the Covenant is to enjoy without the Interruption of any Person, yet the Title of him who interrupts must be set forth. *1 Vent.* 62.

Where the Breach is assigned in the Entry of a Stranger, there he ought to shew Title in the Stranger: But it is otherwise when the Lessor himself enters. *Moor* 861.

Bond with Condition that the Plaintiff should have, hold and enjoy Land acquitted from all Charges and Incumbrances; and for Breach the Plaintiff shewed, that there was a Rent-charge granted by the Predecessor, under whom the Defendant claimed, which is yet undischarged. Defendant demurred. *Per Cur'*, If the Acquittal refers to the Land itself, or to the Person, the Defendant must shew how he has discharged him from the very Rent. *1 Keb.* 927.

A Man made a Lease for Years, and covenanted that neither he himself, nor his Heirs or Executors, should interrupt: In an Action of Covenant brought for the Entry of his Executors, the Plaintiff need not shew that the Executors entered upon any eigne or good Title, for it is all one, whether the Action is brought against the Covenantor or his Executors; aliter where a Stranger enters, for that the Plaintiff ought to shew that he entered upon eigne Title, and upon good Title. *2 Roll. Rep.* 11. *1 Brownl.* 80.

Recovery

Recovery by Verdict is no Breach of the Covenant in Law for quiet Enjoyment, unless the Plaintiff shews that the Person who recovered had an eigne Title. *Ibid.* Cro. Jac. 315. 1 Mod. 298. 3 Mod. 135. 1 Vent. 84. 2 Lev. 37. 1 Mod. 66.

A Suit in Chancery is no Breach of a Covenant for enjoying without Disturbance. *T. Raym.* 371, 372. 2 Vent. 213, 214.

A Covenant to enjoy a Lease which is void, is a void Covenant; but a Covenant to enjoy a voidable Lease, is good until the Lease is avoided. *Moor* 875.

If I covenant with B. to enter into a Bond to him for the quiet Enjoyment of Lands, and do not express what Sum, he shall be bound in such a Sum as amounts to the Value of the Land. 5 Co. 78. a.

Fifthly, Free from Incumbrances.

Two Lessors covenant to discharge the Lessee of all Incumbrances done by them, or any other Person; one of the Lessors had made a Lease, and so a Breach: It is a good Breach; the Covenant goes to Incumbrances done severally as jointly. *Poph.* 200. *Latch* 161. *Noy* 86.

A. covenanted that the Land was discharged of all Acts and Incumbrances done by him; whereas in Truth a Post-Fine was not paid: The Covenant is broken, because the Land was, and all other of the Plaintiff's Lands were chargeable with the Post-Fine. *Dalison* 73.

If A. grants Lands to B. and his Heirs, rendring 10 l. Rent, and B. sells the Land to C. and his Heirs, and covenants with C. that from such a Day he shall enjoy it discharged of all Incumbrances; and before that Day a common Recovery is had against C. in which A. is vouched, and this is to the Use of C. and his Heirs, supposing hereby that the Rent had been gone, which is not so in this Case, the Covenant is broken, for the Rent is an Incumbrance. *Per Cur'*, Hil. 20 Jac. C. B. *Greenway v. Tuckfield*.

K. was seised and leased for Years to J. H. Husband of A. and J. H. being so possessed, by his Will devised that the said A. should have the Use and Occupation of the said Lands for all the Years of the said Term as she should remain Sole; and if she died or married, that then his Son should have the Residue of the said Term not expired. J. H. died, A. entered, to whom the said K. conveyed by Feoffment the said Lands in Fee, and covenanted that the said Lands from thenceforth should be clearly exonerated de omnibus prioribus barganiis, titulis, juribus, & omnibus aliis oneribus quibuscunque. A. married, and the Son entered: *Per Cur'*, This Possibility which was in the Son at the Time of the Feoffment, tho' it was not actual, yet the Land was not discharged of all former Rights, Titles and Charges by the Marriage of the said A. It is become an actual Charge, and the Term is not extinct by the Acceptance of the Feoffment. 1 Leon. 92.

I am bound in a Statute, and afterwards sell my Land with Covenant *prout supra*, here the Land is not charged; but if the Condition in the Defeasance be broken, so as the Conusee intends, now the Covenant is broken. *Ibid.*

If a Man bargains and sells a Manor, and covenants that it is free from all former Bargains, &c. and Incumbrances made by any Person, except the Estate of J. S. and such Estates as he has made, as will determine by his Death; and J. S. after grants Part of the Manor for three Lives by Copy of Court-Roll: This Grant by Copy made after the Bargain and Sale, is no former Incumbrance; and tho' it does not determine by the Death of J. S. according to the Intent of the Exception, yet an Exception in its Nature, being added to qualify the Covenant, it shall not be expounded so as to extend it further than the Words. *Sav.* 74.

One devised his Land to his Heir, paying a Rent-seck of so much *per Ann.* to his Sister after his Death without Issue. Devisor dies; Devisee sold the Lands, and covenanted that it was free from all Rents and Incumbrances, &c. She had no Remedy for this Rent-seck, because she had no Seisin, and then the Covenant is so remote and uncertain. *Per Cur'*, It is expressly within the Word Rents, but had it been only Incumbrances, it might have been a Question. 2 Sid. 167.

M. leased certain Lands to R. for Years, and afterwards leased them to one T. for Years; T. covenanted with the Defendant, that if the said R. should sue the said M. by Reason of the latter Lease, that then he would discharge and keep harmless without Damage the said M. and also would pay to him all the Charges he should sustain by Reason of any Suit to be brought against R. in Respect of the said former Lease: And M. by the said Indenture covenanted with T. that the said Land demised should continue

continue to the said *T.* discharged of former Charges, Bargains and Incumbrances; and now upon the second Covenant *T.* brought an Action of Covenant, and shewed that the said *R.* had sued him in an *Ejectione firmæ*, upon the said first Lease, and had recovered against him; and *M.* pleaded in Bar the said second Covenant, intending that by that latter Covenant the Plaintiff had Notice of the said former Lease made to *R.* so as the first Lease shall be excepted out of the Covenants of former Grants, for otherwise there should be Circuity of Action. *Per totam Cur' contra*; for the Covenant of *M.* shall go to the Discharge of the Land, but the Covenant of *T.* only to the Possession. 3 Leon. 123.

Upon a special Verdict the Case was, That the Defendant made a Lease of the Parsonage of *B.* and that he covenanted to save the Plaintiff harmless and indemnified, and also the Premises and the Profits of it, against one *P. B.* the Parson of *B.* and upon this the Plaintiff brought Covenant against the Defendant, and assigned a Breach, that the said *B.* had entered and ejected the Plaintiff; and it was objected for the Defendant, that the Plaintiff does not shew that *B.* entered by Title, and then it shall be taken that he entered by Wrong, and so the Covenant is not broken; for to save harmless, is only of lawful Harms, as in *Puttenham's Case*, *Dyer* 306. *Puttenham* was condemned for Default in a *Scire Facias* in Chancery upon Recognizance there; they commanded the Warden of the Fleet where *P.* was in Ward for other Causes, and him to detain in Execution upon the Condemnation aforesaid; the Warden takes a Recognizance of *P.* to save him harmless against every one, and suffers him to escape, who impails, and sues *P.* upon the Recognizance; Issue *Non damnificatus*. *Per Cur'*, He is not damnified, because he was not by Law chargeable for the said Escape, for *P.* was never lawfully in Execution to the Plaintiff for the said Debt, because a *Capias* doth not lie for Execution on a Recognizance in Chancery; but the Counsel for the Plaintiff in the said Case of *Foster al' contra*, for there is a Difference where the Covenant is general and where special; and here inasmuch as it is special to save harmless against *P. B.* he ought to defend against him, be his Entry by Title or by Tort; and he cited *Catesby's Case*, *Dyer* 328. Lessor covenants that the Lessee shall enjoy his Term, *sine ejectione vel interruptione alicujus*; Lessee brought Covenant, because a Stranger entered, and saith not that he had Title; and Judgment *pro Quer'*. *Gaudy*: The Covenant is broken, for if *B.* disturbed him so that he could not take the Profits, it is a Breach, be it *per Tort* or Title. 2 Ed. 4. 15.

If the Covenant be to warrant the Land, that is only upon Title; but here if the Lessee be *per Tort* or Title ousted, for to save harmless is stronger than to warrant: And *per Cur'*, The Covenant is broken; they agree that *Caterby's Case* is not like this. *Penner* vouched 18 Ed. 4. 27. where *H.* is bound to save *J. S.* harmless against me; if I arrest *J. S.* altho' it is tortious, the Bond is forfeited, which the other Justices denied to be Law. *Cro. Car.* 212, 213. *Owen* 100, 101.

A. covenants with *B.* before such a Feast to make a good, sure, sufficient and lawful Estate in Fee-simple, of and in the Manor of, &c. discharged of all former Sales, Bargains, Charges and Incumbrances whatsoever, (Leases or Grants of Life, Lives or Years, upon which the ancient and accustomed Rent, or more, are reserved and payable during such Estates only excepted). If a Lease for Years, with the accustomed Rent reserved of the whole Manor, or any Part made mean, between the Date of the Indenture of Covenant and the Delivery of the Deed, be a Breach? 2. For three were against two. *Dyer* 139.

Conusee of a Statute extends and assigns it to one, and after grants the Land to another, and covenants, that notwithstanding any Act by him, or any other by his Consent, that the Statute, Extent and Execution shall be in Force; and in Covenant this Assignment was assigned for Breach; and upon Demurrer adjudged for the Plaintiff; and in a Writ of Error this Judgment was reversed, for notwithstanding the Assignment, the Statute is in Force; but if the Plaintiff *eo quod concessit* to him, which implies a Covenant, the Action had been maintainable; but the Breach is assigned in the Covenant only, which is not broken by the Assignment, for the Statute is in Force after the Assignment, so that the Conusee may release; but if he had covenanted that the Grantee shall hold without Disturbance, the Assignment had been a Breach of Covenant in the Law, implied in the Word Grant, if the Action had been brought upon it. *Palm.* 388.

The Defendant granted to the Plaintiff all his Right, Title and Interest which he then had of and in the Lands in *B.* lately granted by *L. D.* or *R. F.* for twenty Years by Indenture, and covenanted with the Plaintiff that he is lawful Owner of the

Indenture, Demise, Term of Years and Premises; and that *dicta præmissa* then were and so shall continue discharged from all former Grants and Incumbrances made by the Defendant, or the said R. F. and Plaintiff alledged that R. F. before the Assignment to the Defendant had granted several Parts to several Persons for twenty Years, and so a Breach. The Defendant in his Plea said, that R. F. granted his Interest in the Lands, (excepting the Lands so severally demised); and the Doubt was, Whether it shall be intended he was Owner of the Term only, or the Term to him assigned, and of the intire Land, during the Term, or not?

Per Cur', The Word *Premises*, which were to be discharged of all Incumbrances made by the Defendant, or R. F. tend as well to the Land as to the Term; and the Word *Premises* need not to have been put in, if it intended only to have the Term granted to the Defendant to be discharged. 1 And. 236.

A Covenant was, that the Plaintiff should have, hold and enjoy the Lands, acquitted from all Charges and Incumbrances. The Plaintiff for Breach shews, there was a Rent-charge granted by the Predecessor, under whom the Defendant claimed, which is yet undischarged. The Defendant demurred, because the Action goes to the having and holding the Land, and it is not shewed that the Plaintiff was ever in Possession, nor that he was charged or endamaged; to which *Twisden* and *Keling* agreed: But *per Windham*, The Defendant ought to shew how he had discharged and acquitted him from the very Rent, and not to let it perpetually hang over him. But by all the Court, If the Acquittal refers to the Land itself, or to the Person, the Defendant must shew how. 1 Keb. 927.

If a Condition be to discharge a Messuage of all Incumbrances, there one may plead generally, that he discharged it of all Incumbrances; but if it be to discharge it of such a Lease, he must shew how. 1 Brownl. 63.

Sixthly, To make further Assurance.

There are many Cases relating to Covenants for making Assurances of Land, &c. but I shall here confine myself to such as relate to the making of further Assurances, and refer the Rest to the Division (BB) *post*. which see.

A Covenant for further Assurance, is not to give any Thing, but to assist, further and support, it being as a Wall or Muniment about the Estate. Hob. 215.

If a Covenant be to make further Assurance within one Month, upon Request of the Covenantee; if the Covenantee requests him within the Month, yet the Covenant is broken, in as much as the Time of the Month is limited to the Request; aliter had it been within a Month after the Date of the Deed of Covenant. H. 37 Eliz. C. B. *Perpoint* and *Thimblethorp*.

If the Condition of an Obligation be, that if the Obligor do at all Times hereafter, within the Space of one Month, when he shall be required, make such further Act and Acts, Assurance and Assurances, as the Obligee shall by his Counsel demand, &c. then the Bond to be void: In this Case if the Obligee does not demand any further Assurance within the Month after the making of the Obligation, yet the Obligor is bound to make further Assurance within a Month after Request made, after the Month passed after the making the Bond, for that the first Words, to wit, at all Times hereafter, are without Limitation, and the other Words, within one Month when he shall be required, refer to the Request, viz. he shall have a Month for doing it after Request, for the more favourable Construction shall be made to make the Agreement effectual; and it is not like a common Covenant, to make further Assurance within seven Years, for the Use in such Case has been to interpret it, that he shall not be troubled after seven Years. Hil. 1650. *Wentworth* and *Wentworth*.

If a Covenant be to make further Assurance; if he make Assurance on Condition, it is not a Performance. 1 Roll. Abr. 425.

In Debt on Bond, the Plaintiff sets forth an Indenture, which purports a Grant of Land by two Men and their Wives, seised in Fee in Right of their Wives, Partners to the Plaintiff in Fee; and it was covenanted that the Plaintiffs and their Wives had good Right to assure the Land, and to make further Assurance, upon Request, at any Time within seven Years. Plaintiff assigns for Breach, that one of the Wives was within Age at the Time of the Assurance, and dies, and the Right of the Land descended to her Son an Infant. The Defendant pleads, the Wife was of full Age, and it was found that she was within Age: It was moved in Arrest of Judgment, here is not any Request shewed to make the Assurance according to the Covenant, and so no Breach assigned;

assigned; and tho' he had Time for seven Years, and the Right descended to the Infant, and so impossible to make a good Assurance. *Per Cur.* The Death of the Wife in the Infancy of the Son was an Act of God, and it was the Fault of the Plaintiff that he did not demand the Assurance in the Life of the Wife, and after her full Age; for it appears by the Verdict, that in 29 Car. 2. she was twenty, and that 32 Car. 2. she had Issue, and so the Breach is not well assigned. But another Breach was shewed, (*viz.*) that the Wife being within Age at the Time of the Covenant, as appears by the Verdict, she had not Power then to convey the Estate according to the Covenant, and this was a manifest Breach. *T. Jones 195.*

One covenants to make further Assurance to the Bargainee as his Counsel shall advise; in this Case the Bargainee himself, altho' he be learned in the Law, may not devise this Assurance, but some Person of his Counsel ought to devise it; for if the Party himself may devise it, then it would be no Plea to say, *Quod consilium non dedit advisamentum.* 5 Co. 19. b. But in Easter Term 13 W. 3. in *C. B. Walker v. Gower*, this is denied for Law by all the Judges.

A. covenanted with B. to make and do all such Acts and Devises for the better Assurance which shall be devised by B. or his Counsel: B. devised a Release to be sealed by A. and C. his Son, and A. presently sealed it, but because C. could not read, he prayed B. to deliver it to him, that he might shew it to a Man learned in the Law, to inform him if it were according to the Covenant, and if it were according to the Covenant or Condition, he would seal it; which to do B. refused, and C. refused to seal it: This is a Breach of the Covenant, for that he did not require the Writing to be read to him, and he was bound to take Conusance of the Law, whether it was according to the Covenant, and he shall not have a reasonable Time to shew it to his Counsel, and the Covenant was peremptory, to be performed at his Peril. *Dyer 38. a. 2 Co. 3.* So in 1 Roll. Abr. 441, 442. If A. being Copyholder for Life, covenants with B. to surrender to B. in Reversion the said Copyhold Tenement, *super rationalem requisitionem ei fiend' per B.* and after B. tenders to A. a Writing, purporting a Letter of Attorney of Surrender of the said Tenement to B. and A. requests that before they seal it, that she by her Counsel *circa scriptum illud infra rationabile tempus tunc proximum sequens advisaretur*, which B. refuseth, and upon this A. refuseth to seal it: Admitting that A. was bound to seal the Letter of Attorney, and to surrender by such Letter of Attorney, then she had broken her Covenant, for she ought to take Conusance of the Law at her Peril, whether the Letter of Attorney be according to her Covenant, and shall not have any Time to be advised upon it, but the reasonable Time mentioned in the Covenant, intends reasonable Time in the doing it, *viz.* she shall have Time to read it before she seals it.

Where a bad Title was sold with a Covenant for further Assurance, and afterwards the Vendor purchases a good Title, he shall make the same over to the Vendee. *Chan. Rep. 274.*

One covenants for further Assurance to levy a Fine of all his Lands in D. which were To levy a Fine.
four Houses, and tenders a Fine. Defendant pleads, that at the Time of the Covenant he was only seised of two Houses, and that the other two descended to him afterwards, and good, for he is not bound to levy a Fine of more than he had at the Time of the Covenant, for then more would pass, and is not like to the Case where more Acres are comprehended in the Fine, which will be to the Conusor: So a Covenant to levy a Fine of two Acres, and the Fine is four Acres by the Name of two Acres, comprehended in the Indenture, is not good. 1 Roll. Rep. 103, 117. *Bulst. 317.*

Covenant to make further Assurance, and to do any Act or Acts, &c. Plaintiff shews that he demanded of him and tendered a Note of a Fine, comprehending that he should levy a Fine of three Messuages, &c. and that he required him to acknowledge before a Judge of Assise. The Defendant pleads, that in the Note there were more comprehended than he intended to assure: It is no Plea, for the Residue is to the Use of the Conusor, and the Plaintiff needs not shew that a Writ of Covenant is depending at the Time of the Request, tho' he must do that to make a good one. *Cro. Jac. 251.*

If one be bound to levy a Fine to another, he is not bound to sue forth the Writ of Covenant, but he who is to have Advantage of the Fine is to do it; and in the Case aforesaid, he ought to levy a Fine upon this Note notwithstanding there was no Writ of Covenant then hanging; and in the said Case, tho' the Note contained more Acres than the two Yard-Lands, it is good. 1 *Bulst. 90.*

A Condition that such a Woman should make such further reasonable Assurance to *J. D.* as *J. D.* should devise: *J. D.* levied a Fine, and required her to come before the Judge of Assise to acknowledge; she came, and the Judge refused her as *Non compos mentis*. *Per Cur'*, The Condition was not broken, because it is to make a reasonable Assurance; *aliter* if the Words had been special to acknowledge a Fine. 1 *Leon.* 304.

At whose
Cost.

Covenant that the Vendor shall make further Assurance at the Costs and Charges of the Purchaser; it was assigned for Breach, that a Note of a Fine was devised and ingrossed in Parchment, and delivered to the Vendor to acknowledge the Fine at the Assises, which he refused to do. The Plaintiff's Assignment of the Breach was demurred to, because he did not offer Costs to the Vendor; and *per Cur'*, it is ill. 1 *Brownl.* 70.

Where there is a Covenant for further Assurance, as the Counsel of *B.* shall devise, and it is not said at whose Charge, it must be at the Charge of him to whose Use the Fine is levied. 1 *Bulst.* 90.

See concerning Covenants to make Estates and Assurances by Deed, Fine or Recovery, *post.* (BB).

Seventhly, To stand seised to Uses.

Altho' at the Common Law a Man cannot be Donor and Donee without parting with the whole Estate, yet it is otherwise upon a Covenant to stand seised to Uses; and if any other Construction should be made, many Settlements would be shaken; in the making whereof nothing is more usual now than for a Man to covenant to stand seised to the Use of himself and the Heirs of his Body. 2 *Mod.* 211.

A. covenanted to stand seised to the Use of the Heirs of his Body. *Per Hale C. J.* The Heir and Ancestor are Correlatives, and as one Thing in the Eye of the Law; and that is the Reason why a Man cannot make his right Heir a Purchaser without putting of the whole Fee-simple out of himself, and if the Father's Estate turns to an Estate for Life, there will be no Question; and in *Fenwick* and *Milford's* Case there resulted an Estate for Life to knit the Limitation to the original Estate.

1. Here we are in the Case of an Estate-tail, and the Judges used to go far in making of such a Limitation good.

2. We are in the Case of an Use, which is construed as favourably as may be to comply with the Intention of the Parties.

This Case is not as if he should have covenanted to stand seised to the Use of the Heirs of the Body of *A. B.* for there the Covenantor would have had a Fee-simple in the mean Time; but here it is all one as if the Limitation had been to himself and the Heirs of his own Body. 1 *Mod.* 98.

A. covenanted that after his Death his Heir shall stand seised to the Use of his younger Son; this Covenant is void. *Hob.* 313.

If a Man in Consideration of Money received, and Marriage to be had with his Son, covenants to stand seised; there no Use will arise to the Son and Woman without Marriage, altho' the Money be paid, because the Marriage is the principal Consideration in the Intent of the Parties, and the Money is but the Accessary which attends the Marriage; but it would have been good by Estate executed by Fine, Feoffment or Recovery. *Moor,* Case 247.

A Father cannot covenant that his Son shall stand seised of the Lands whereof the Father is seised; for a Man cannot stand seised of that which he is not seised of. 3 *Lev.* 306, 307. 1 *Vent.* 140.

A Power to lease Lands raised by a Covenant to stand seised where an Estate was settled on the Covenantor for Life, Remainder to his eldest Son, with Power to himself to lease Part of the Lands, &c. not good at Law, was decreed good in Equity, it appearing that the Conveyance was intended to be by Livery, which the Father was advised would be as well by Covenant, and on other Circumstances. 1 *Chan. Ca.* 161.

For more concerning Uses, see Of Deeds of Covenant to stand seised to Uses, in the next Chapter.

(AA) *Covenants commonly annexed to Estates for Lives or Years, and not to Estates in Fee-simple.*

First, Concerning the Payment of Rent and other Payments issuing out of Land.

IF a Parson by Indenture leases his Parsonage for Years, rendring Rent, and the Lessee covenants to pay his Rent, and before any Day of Payment the Parsonage is sequestred for Non-payment of the first Fruits, yet the Lessee shall not be excused of the Payment of his Rent. *Heth. 54.*

C. C. made a Jointure to his Wife M. for her Life, and dies without Issue; T. C. his Brother and Heir, grants an Annuity or Rent-charge of 200*l.* per Ann. to the Plaintiffs in Trust for M. and this was to be in Discharge of the said Jointure, *Habendum* to them and their Heirs, Executors, Administrators and Assigns, in Trust for M. for Life, with a Clause of Distress and covenant to pay the 200*l.* per Ann. to the Trustees for the Use of M. The Breach assigned was, that the Defendant had not paid the Rent to them to the Use of M. Defendant demurs specially, because it appears here is a Grant of a Rent-charge for Life, which is executed by the Statute of Uses, and therefore there ought to have been a Distress for Non-payment. *Per Cur'*, The Clause of the Distress is given by the expresse Words of the Statute to *Cestuy que Use*; but here is a double Remedy by Distress or Action, for if the Lessee assigns his Interest, and the Rent is accepted of the Assignee, yet Covenant lies against the Lessee for Non-payment upon the expresse Covenant to pay; so if a Rent be granted to S. and a Covenant is to pay to N. to his Use, it is a good Covenant. It was objected, that it is not said the Money is not paid to M. and if not paid to her, the Breach is not well assigned: But *per Cur'*, It is good; and the Assignment of a Breach, according to the Words of the Covenant, is good enough. And if the Defendant did pay the Money to the Plaintiff, or to M. he might plead it. *2 Mod. Rep. 138.*

If A. leases to B. certain Lands for Years, rendring 40*l.* per Ann. and a Stranger covenants with A. that B. shall pay unto him the 40*l.* for the Farm and Occupation of the Lands, and before any Day of Payment A. ousts B. of his Farm, B. is excused of the Payment of the Rent, for the Covenant was, that B. should pay 40*l.* for the Farm and Occupation; so that it is as a conditional Covenant, and there ought to be *quid pro quo*; and here the Consideration upon which the Covenant is conceived, *viz.* the Farm, and the Occupation of it, is taken away by the Act of A. himself. *3 Leon. 159.*

If Lessee covenants to pay his Rent to the Lessor, and he pays it before the Day, the same is not any Performance of the Covenant; otherwise of a Sum in Gross. *1 Lev. 136.*

When an expresse Covenant is to pay the Rent at several Days, an Action of Covenant will lie before all the Days of Payment be past, and an Action of Debt will not lie till all the Days of Payment be past; and in such Case Debt lies properly on Grant of Annuity for Life or Years. *1 Brownl. 19, 20.*

A Rent of 200*l.* per Ann. was granted to B. and H. for the Life of M. *Habendum ad opus & usum* M. and there was a Covenant in the Indenture to pay the Rent, *ad opus & usum* M. B. and H. brought Covenant, and good. This Remedy by the Statute of Uses was not transferred to M. *1 Mod. 223.* By the Stat. 27 H. 8. c. 10. *Cestuy que Use* of a Rent hath all such Remedies as if the Rent had been actually granted to him; but that has Place only where one is seised of Lands in Trust that another shall have Rent out of them, and not where a Rent is granted to one to the Use of another. *Vide ibid. & 2 Mod. 138.*

A Man granted a Rent to one for Life, and half a Year after, to be paid at the Feasts of the Annunciation and Michaelmas by equal Portions, and covenants with the Grantee for the Payment of it accordingly. The Grantee died 2 Febr. and the Executors of the Grantee brought an Action of Covenant for 20*l.* which was a Moiety of the Rent, and to be paid at the Annunciation after; it is well maintainable. And by Coke, If a Man grants Rent for another's Life, the Remainder to the Executors of the Grantee, and covenants to pay the Rent during the Term aforesaid; this is good collective, and shall serve for both Estates. And it was agreed, when a Rent is granted, and by the Deed the Grantor covenants to pay it, the Grantee may have Annuity or Writ of Covenant at his Election. *2 Brownl. 283.*

Two Tenants in common make a Lease, and reserve a Rent and Covenant that neither should release, and one of them releaseth his Part; this is a Breach, for that in Debt they should both join, and now by their Release the Action is gone. *1 Brownl. 78.*

Sir John Spencer made a Lease for Years to Sir John Points, rendring Rent, by Indenture; Lessee covenants that if the Rent be behind at any Time of Payment, according to the Form of the Indenture, that the Lessor shall have 200 l. Nomine pœnæ for such Default; the Rent is behind. Debt is brought for the Nomine pœnæ. *Per Cur'*, Action of Debt did not lie without Demand of the Rent. *Vide F. N. B. 120.* seems contrary. *Godb. 154. 1 Roll. Abr. 459, 460.*

An Assignee of the Reversion shall have Covenant against the Lessee where the Lease was made, for Covenant goes only in Privy of Contract, and altho' now by the Statute the Covenant passes to the Assignee, yet the Nature of it is not altered by the Statute, but it is assignable only as a Contract, and therefore ought to be brought where the Contract was made; otherwise in Debt for Rent. *1 Lev. 239. 1 Saund. 237. 1 Sid. 401.*

Where Rent
is to be de-
manded.

If a Man lets Land by Indenture for Years, reserving a Rent payable at certain Days at L. and the Lessee in the same Indenture covenants to pay the same Rent at the Days and Place aforesaid, he ought to pay it without any Demand of the Lessor. *1 Roll. Abr. 459, 460.*

But if a Man lets by Indenture certain Coal-Mines, reserving Rent, and the Lessee is bound to observe, perform, pay and keep all Payments, Rents, Covenants, Grants and Agreements in the said Indenture mentioned. In Debt on the Bond it is a good Assignment of the Breach of the Condition, that the Lessee did not pay him the Rent at the Time of Payment by the Reservation, without alledging he demanded the Rent at the Day of Payment, for he is not bound to demand it, but the other ought to pay it without Demand; *aliter* if he covenant to pay the Rent, being lawfully demanded. *1 Roll. Abr. 460.*

If A. lets Land to B. *per* Indenture for Years, reserving 20 l. *per* Ann. Rent, payable at four Feasts by equal Portions; and after B. is bound in an Obligation to A. upon Condition that if he pays to A. for the Rent of the said Premises the yearly Sum of 20 l. for the Term demised, at four Quarterly Days, according to the Tenure and Effect of one Lease made, bearing Date with this Obligation, and made between the said Parties, according to the Tenure and Effect of the said Lease, by even and equal Portions, then the Bond to be void: The Lessee is not bound to pay the Rent by this Condition without any Demand of the Lessor, for that this refers to the Indenture of Lease, and that this shall be paid as a Rent, according to the Indenture. *1 Roll. Abr. 460. T. Jones 33.*

A Lease for Years of Land by Deed, rendring Rent, being made, the Lessee binds himself in a Bond of 10 l. to perform all Covenants and Agreements contained in the Deed. The Rent afterwards being behind, the Lessor brings an Action of Debt on the Bond for Non-payment. The Obligor pleads Performance of all Covenants and Agreements. The Lessor saith, the Rent is behind. It is no Plea for the Obligor to say, the Rent was never demanded: But in this Bar he ought to have pleaded, that he had performed all Covenants and Agreements, except the Payment of the Rent, and as to that, that he was always ready to have paid it, if any Person had come to demand it. But as to the first Plea it was held not to be good. But if the Lessee be particularly expressed by Covenant to pay the Rent, there he is bound to do it without any Demand. *Godb. 95.*

Condition to perform Covenants in an Indenture, whereby Land was leased, rendering 10 l. *per* Ann. Rent at such a Feast, or within six Days after the Feast. Defendant pleads Performance. Plaintiff assigns a Breach, that he such a Day, being the 6th Day after the Feast, before Sun-set, he demanded 5 l. Rent then due, and that neither the Defendant nor any for him was ready to pay it. *Per Cur'*, He needs not shew the certain Time when he came, nor how long he remained there. It was objected, that this Demand was not good, because he demanded as a Rent then due, for he ought to have demanded as a Rent due the last Feast: But *per Cur'*, It is not due to be demanded till the sixth Day, tho' the Tenant, if he will, may pay it before. *Cro. Jac. 499.*

In Error in the Exchequer-Chamber of a Judgment in Debt in B. R. on Bond of 200 l. conditioned, that if the Obligor should at all Times well and truly pay, perform and keep all and singular the Rents, Covenants, Grants, Articles, Payments and

and Agreements, which on his Part, &c. Defendant pleads generally Performance of all Covenants. Plaintiff replies, and shews a Breach for Non-payment of the Rent at such a Time, but doth not shew any Demand of that Rent; whereupon the Defendant demurred; and it was adjudged *pro Quer'*. Now the Defendant assigned for Error, that forasmuch as the Condition of the Bond is general, and not particularised for the Payment of the Rent, the Rent is not payable without Demand, and therefore the Breach was not well assigned. *Cur' contra*, and that the Judgment is well given; for he pleading Performance of the Payments, Covenants and Agreements, it shall be intended he had really performed them, and so had paid all the Rents; and when the Plaintiff replies, that he had not paid such a Rent, he need not to alledge a Demand, for the Defendant may not say it was demanded, for then it should be a Departure from the Plea; and yet the Obligation being general for Performance of Covenants, doth not alter the Nature of the Rent, but that it ought to be demanded. *Cro. Car.* 76.

In Debt for Rent, *Quod cum per Indenturam testatum existit*; on Demurrer in *Shelbery's Case*, Judgment was for the Defendant; but in Covenant on Bond to perform Covenants, such Declaration is good. *Per Cur'*, 2 *Keb.* 383. 1 *Keb.* 570. Debt is grounded on the Demise, which must be more positively alledged; *contra* in Covenant, which is collateral.

In Debt or Covenant by Heir or Executor for Rent, he must say the Testator was possessed; and so of Successors of Bishops, he must say he was seised and conveyed the Reversion by Deed; for Bishop, Dean or Corporation, cannot be intended seised in other Capacity. 3 *Keb.* 69. 2 *Lev.* 68.

The Plaintiff declared that he demised to the Defendant certain Lands for thirteen Years, to pay to him 40 l. Quarterly, and saith not *annuatim*: It was amended, and the Word *annuatim* inserted. By *Keling* and *Windham*, The Addition of *annuatim* is more than what the Law implied before. *T. Raym.* 160.

If the Lessee covenants to perform Articles in the Indenture, it is sufficient to say, the Rent was demanded; but if there be an express Covenant to pay the Rent, there needs no Demand. 3 *Keb.* 299.

In Covenant for Payment of Rent at divers Days, which amount to such a Sum; in the Declaration the total Sum was miscast, yet it was good, for that all in this Action shall be recovered in Damages; *aliter* in Debt for Rent. 1 *Roll. Rep.* 335. 3 *Bulst.* 155.

In Covenant to pay Rent, in the Declaration there needs not be any Demand alledged, because the Covenant was to pay such a Sum for Rent expressly, but as to a Condition of a Bond for Performance of Covenants expressed in such a Lease, one of which for Payment of Rent; in that Case the Bond will not be forfeited without a Demand. 1 *Vent.* 259.

Bond with Condition to perform Covenants in a Lease: One Covenant was, that the Lessee should pay 40 s. yearly at the Feast of the *Annunciation*, or within fourteen Days after; and the Breach assigned was for Non-payment at such a Feast in such a Year. Defendant said, he paid it at the Feast; on which they were at Issue; and on Evidence it appeared that the same was not paid at the Feast, but in eight Days after it was paid. *Per Cur'*, By his Pleading that he paid it at such a Day certain, and tendering that for a special Issue, he hath made it Part of the Issue; but if he had pleaded that he had paid it within fourteen Days, *viz.* the eighth Day, that had not made the Day Parcel of the Issue; but then he might have given Evidence that he paid it at another Day within the fourteen Days. *Qu.* If the Breach be well assigned, in saying he had not paid it at the Feast, without saying, nor within the fourteen Days? *Godb.* 100.

In Covenant upon a Deed not indented, Plaintiff declared upon a Lease of certain Land to the Defendant, rendring Rent, who covenants to pay it; and assigned a Breach in Non-payment. Defendant *protestando*, and that he did not enter nor occupy the Land, as the Plaintiff had supposed, *Pro placito dicit*, That the Plaintiff *Nil habuit in tenementis tempore dimissionis*. Plaintiff replies, *Quod habuit bonum titulum unde potuit dimittere*. Defendant demurs generally, and the Court held the Replikation ill, not shewing what Title he had, according to *Cro. Jac.* 312. And this notwithstanding it was not by Indenture; and it is all one in Debt for Rent, for if there is not any Rent, there is not any Covenant to pay the Rent. 3 *Lev.* 193.

Covenant to pay the Defendant's Wife (on Separation) 50 l. per Ann. and for Non-payment, the Separation continuing, the Action is brought; but upon Oyer it was, *Proviso*

Proviso that the Wife would live at such a Place as N. and W. appointed. Defendant pleads, she did not live at such a Place as N. and W. appointed. The Plaintiff replies, that she was always ready to live at any such Place, but that N. and W. appointed no Place. Defendant demurs, as being a Condition precedent. But *per Cur.* This is not a Condition precedent, but a Condition subsequent, and in Defeasance; the Covenant being in Pursuance of a former absolute Agreement to pay so much; and it is like the Assent of the Husband, which is intended till the contrary appears, and here must be an Appointment: Judgment *pro Quer.* 3 Keb. 229, 363.

In Action of Covenant the Defendant cannot plead the Plaintiff *Nihil habuit in tenementis*, tho' such a Plea is good in Action of Debt for Rent. 2 Ventr. 99.

If Rent be reserved out of a Thing incorporeal, and there is an express Covenant to pay it: *Qu.* If he may plead Eviction. Allen 79.

One reciting that he was seised of Land, granted a Rent out of it, and covenanted to pay the Rent, he could not plead to his Covenant that he had nothing in the Land. 2 Ventr. 69.

Covenant for not paying of Rent. Defendant pleads Entry and Suspension. Plaintiff replies. The Defendant did re-enter, and so was possessed of his former Estate: This is an ill Replication, for they ought to shew that he entered, and was possessed till the Rent grew due. To make Suspension of a Rent reserved on a Lease for Years, the Lessor must oust the Lessee of Part of the Thing let at least, and hold him out till after the Day on which the Rent is payable; and if the Lessee re-enters, the Rent is revived. Stile 432.

Covenant on a special Covenant to pay Rent at certain Days. The Defendant pleads, that no Rent was behind: It is an ill Plea in Covenant, for by that Plea the Defendant confesseth the Covenant broken, and that Plea tends but in Mitigation of Damages. 1 Brownl. 19.

But by 2 Brownl. 273. the Defendant levied by Distress. By this Plea the Defendant confesseth that it was not paid according to the Reservation, for the Plaintiff cannot distrain if it were not behind after the Day; but Payment at the Day had been a good Plea.

A. leased to B. Land for 40 l. per Ann. and a Stranger covenanted with A. that B. should pay him 40 l. for the Farm and Occupation of the said Lands. A brought Covenant; Defendant pleaded, that before the Day of Payment the Plaintiff put the said B. out of his Farm. *Per Cur.* It is a good Plea, for the Defendant hath covenanted that the Lessee shall pay for the said Farm and Occupation 40 l. so it is as a conditional Covenant, and here is *quid pro quo*; and here the Consideration upon which the Covenant is conceived, *viz.* the Farm and Occupation of it, is taken away by the Act of the Plaintiff himself. 3 Leon. 159. 2 Leon. 115.

In Debt on Bond for Performance of Covenants, Articles, &c. contained in a Lease for a Year. Defendant pleads Performance of Covenants. The Plaintiff replied, that the Defendant did not pay the Rent reserved upon the Lease at such a Day, according to the Form and Effect of the Condition of the Obligation. Defendant rejoins, and alledgeth an Entry by the Plaintiff into the Land leased before the Rent, and that he kept Possession till the Rent-Day was passed. On Issue found *pro Quer.* the Defendant moved in Arrest of Judgment, for that the Plaintiff saith, that the Defendant paid not his Rent according to the Form, &c. of the Condition of the Obligation, whereas there is no Mention of any Payment of the Rent in the Condition of the Bond, but in the Lease only; *sed non allocatur*; because the Defendant by this Rejoinder has confessed that such Rent was in Arrear, and has waived taking Issue upon it, and taken Issue upon another Matter, and therefore this shall be well enough after a Verdict. And *per Hale*, It is all one in Substance to plead as the Plaintiff has done, and to have pleaded *secundum formam & effectum Indenture*, for the Condition of the Bond comprehends all that is comprehended in the Lease. Hardr. 319. It might have been a Question had it been upon Demurrer.

In Debt on Bond to perform Covenants; one Covenant was, that the Defendant should pay 12 l. per Ann. for a Messuage to him demised, quarterly. The Defendant pleads Performance of Covenants. Plaintiff assigns for Breach, that he did not pay 3 l. one Quarter's Rent. Defendant rejoins, before the said 3 l. was due the Plaintiff entered upon him and expelled him. Plaintiff demurs, for the Rejoinder is a Departure, and so ruled *per tot' Cur.* There was cited a Difference out of Cro. Car. 76. where the Condition is to perform all Covenants contained, and where it is all Covenants and Payments, there the Defendant pleaded Performance of all. Plaintiff assigned

assigned a Breach in Non-payment of the Rent; the Defendant cannot rejoin, that it was not demanded, for it is a Departure. *T. Raym.* 22.

In Debt on Bond for Performance of Covenants; Defendant pleaded Performance generally; special Breach is for Non-payment of Rent. Defendant rejoined, that the Plaintiff entered before the Rent-Day. *Per Cur'*, It is a Departure, (but in *Baker and Spaines's Case*, *Hob.* 7. it was alledged in the Rejoinder, that there was no Demand made) but all agreed, that in an Action of Covenant this Rejoinder had not been good. But by *Windham*, It is a Departure, and not like the Case of Demand, which is necessary to make the Rent due, whereas this is only an Excuse of what he confesses. *Cro. Eliz.* 76. *Chapman's Case*. By *Twisden*, It should have been pleaded that the Defendant had performed Covenants specially, paying his Rent all such a Day, and that the Lessor entered, and so agreed *per Cur'*; but this general Performance is intended of an actual Performance. And by *Twisden*, Upon general Performance pleaded, the Plaintiff replies, Rent Arrear. The Defendant cannot rejoin by want of a Demand, tho' he might have excused himself by Pleading Tender in Bar. *1 Keb.* 115, 178, 185, 283.

In Covenant Breach was assigned for Non-payment of Rent according to the Covenant in the Indenture. Defendant pleaded *Nil debet*; that is no Plea in this Case upon the Indenture; adjudged upon general Demurrer. *3 Lev.* 170.

If the Lessee assigns his Term, and after the Lessor assigns his Reversion, and the Assignee of the Reversion accepts the Rent of the Assignee of the Term, yet he may have Action of Covenant against the first Lessee. But *per Twisden*, If after such Assignment of the Reversion Lessor brings Covenant, Lessee may not plead he had assigned over his Reversion. But which of them, whether the Lessee or Assignee, which first brings his Action, shall bar the other, *viz.* Lessee shall plead such Recovery in Bar to the former Action. *Sid.* 402, & *1 Lev.* 259.

The Plaintiff declared upon a Lease for Years, wherein the Reservation was by the Word *Reddendum*, and an express Covenant for the Payment of the Rent; and that the Lessor assigned the Reversion to him and his Heirs, and that the Rent became due at such a Feast after the Assignment, and was not paid; *Et sic infregit conventionem*. The Defendant pleads, that before the Rent became in Arrear, the Lessor had released to him all Covenants and Demands. Plaintiff demurs. *Per Cur'*, 1. Covenant lies upon the Word *Reddendum*, but doubted if this Word would maintain Covenant upon a Lease for Life. 2. The Release of the Lessor, after the Assignment of the Reversion, is no Bar to the Plaintiff, and this is by the Common Law, and also by *Stat.* 32 H. 8. for this Covenant runs with the Reversion. *T. Jones* 102. *Lev.* 206.

An Action of Covenant was brought by the Assignees of a Reversion against the Defendant's Lessees, upon a special Covenant in a Lease for Years, for Payment of the Rent according to the Reservation, and for Non-payment of the Rent incurred; after the Assignment, the Action is brought. One Defendant *Nil dicit*, the other Defendant pleads *Actio non*, and pleads a Release by him before the Assignment to the Plaintiff to the other Defendant by the Consent of the Lessor, and that the Lessor had accepted the other sole Tenant of the Messuage, &c. and he paid one Rent to the Lessor, who had accepted it as of his Tenant. Plaintiff demurs. *Per Cur'*, On *Bret and Cumberland's Case*, *Cro. Jac.* 522. it is expressly resolved that no Act of the Lessee can discharge him or his Executors of the special Covenant, of which also the Assignee of the Reversion shall have Advantage by the *Stat.* 32 H. 8. Judgment *pro Quer'*. *2 Bulst.* 282. *T. Jones* 144.

In an Action of Covenant for Payment of Rent reserved in a Lease for Years; Defendant pleaded that the Plaintiff after the Lease made had separated, taken down, and taken away a Penthouse fixed to the said Premises demised, and detained them before the Rent became due, *Et adhuc detinet*. Plaintiff demurs, and Judgment was given for him; for this was not a Suspension of the Rent, but a Trespass, for which the Defendant may have his Action. *T. Jones* 148.

In Covenant Plaintiff declares, that she was possessed of certain Houses in *St. Martin's Lane* for a Term of Years, and that she demised the said Houses to R. G. for twenty-one Years, under a certain Rent, which he covenanted to pay; that before the Sealing of the Lease, it was indorsed for the Payment of twelve Bottles of Mary Wine every Year to C. T. the Lessor. Lessee entered and made his Will, and made S. G. sole Executrix; she entered, and assigned the Term to the Defendant, who entered, &c. and assigned the Breach in Non-payment of the twenty-four Bottles

Bottles of Sack, which was due for two Years, and also for Arrears of Rent after the Assignment made to him by the said Executrix. Defendant pleads, that before the said Wine and Rent became due, he assigned his Interest to *J. M.* but did not plead Notice given to the Plaintiff, or that she had accepted the Rent. Judgment on Demurrer in *C. B.* was given *pro Quer'*, and Writ of Error brought. Now in *Keighly and Bulkley's Case*, 1 *Sid.* 338. Debt was brought for Rent by Assignee of a Reversion against the Assignee of a Term, who pleaded that he had assigned over his Interest, but not that he had given Notice of the Assignment; he was adjudged still Tenant, because he had not given such Notice; but by *Twisden* he need not give Notice. Error was brought in that Case; and *Hale C. J.* and *Bridgman* were of Opinion, that Notice was not necessary; but in the principal Case, Judgment was given for the Defendant in the original Action, and the Judgment in the Common Pleas reversed. It was held, that the Assignee was chargeable by Reason of the Land, and when he had parted with his Interest, there could be no Reason given why he should be any longer liable, especially since the Executor of the Lessee is still bound to perform the Covenants in the Lease so long as she hath Assets; and that was the true Reason of *Heliar and Casbard's Case*, 1 *Sid.* 266. *Vide 2 Ventr.* 228. 3 *Lev.* 295. 4 *Mod.* 71. 1 *Sid.* 338. 1 *Lev.* 215.

In Action of Covenant, Plaintiff declared on a special Covenant in a Lease by Deed for twenty-one Years to pay the Rent. The Defendant pleads a former Lease made by Bargain and Sale to one *Allen*, by the Lessor for 1000 Years, but no Entry is alledged of the first Lessee; to which the Plaintiff demurred on 4 *Co.* 53. *Dyer* 256. because no express Eviction is made of the Estate, but only of the Possession, and especially because no Entry is alledged. *Twisden* agreed this a good Lease by way of Estoppel, and if the Rent be in Being, the Covenant remains; *e converso* if not, which the Court agreed: But it being said that *Allen* was attainted by Reason whereof, and of the *Stat.* 13 *Car.* 2. it came to the Crown. This is a sufficient Eviction, without any Entry or Office alledged, and the King is in actual Possession as much as if the Party had actually entred, altho' a common Person should not be in actual Possession without Entry by himself or the first Lessee; Judgment *pro* Defendant: For this cannot be good as a Lease in Reversion, being not so pleaded, but as a Grant of a present Estate, and being a Lease extracted out of the Inheritance, there needs no Attornment be alledged, being by Bargain and Sale. But all agreed, that upon Assignment of Lease there must be Attornment, and in both special Notice must be given by the Assignee as to Penalties, tho' not as to the Rent, the Plaintiff hath declared of a Lease in Possession, as at Common Law, is avoided by Eviction. 2 *Keb.* 444. *Vide 1 Sid.* 399.

In an Action on an express Covenant to pay Rent, the Lessee pleaded Assignment and Acceptance; to which the Plaintiff demurred, because he hath Election, notwithstanding his Acceptance of Rent of the Assignee, which the Court agreed on, *Cro. Eliz.* 503. altho' this continues as a Rent. Judgment *pro Quer'*. 2 *Keb.* 640.

Pleadings.

In *Scire Facias* on Recognizance to keep Covenants specified in certain Indentures set forth, which was a Demise by *S.* to *E.* and a Re-demise by *E.* to *S.* rendering Rent at *Lincolns-Inn Hall*. Defendant pleaded Performance. Plaintiff shewed there is Rent due at *Michaelmas* last, and so a Breach. It was moved in Arrest of Judgment, that it is not sufficient; the Condition being to perform Payments in both Indentures, and the Breach is only assigned *in ultimo mentionat'*, and either in Severalty shall not be intended. But *per Cur'*, Either of them are supplied by the Nature of the Covenants. The Issue in Chancery was on Payment at *Lincolns-Inn Hall*, the Venue must be from *Holborn*. 1 *Keb.* 471.

Covenant was brought for Non-payment of Rent, upon a Demise of Allum Mines. Defendant pleaded the Plaintiff inclosed the Mines, so that the Defendant could not have Ingress to the Work; and this was tried at *London*, where the Covenant was alledged to be made. Moved that this was a Mis-trial; but this is aided by the *Stat.* 16 & 17 *Car.* 2. c. 8. To prevent Arrests of Judgment. *T. Jones* 82. *Aynsworth and Chamberlain*. Yet in the Case of *Crofts and Winter*, *Hil.* 20 & 21 *Car.* 2. *B. R.* it was held the contrary. See the Case of *Gerrard and Holland*, *Cro. Jac.* 43. But by later Opinions this is aided by the said Statute.

Annuity.

In Debt on Articles of Agreement to pay Annuity during the Residue of the Term assigned to *J. S.* not shewing for what Years a Term, and Breach assigned in Non-payment during the Residue of the Term, without saying *yet to come*, and so when the Damages are laid, the Term might be expired. After Judgment by *Nil dicit*, the Court

Court conceived it might be ill; *contra* if a Verdict were, for then a Term shall be intended. 1 *Keb.* 435.

In Action of Covenant upon an Indenture made between the Wife of the Defendant whilst she was Sole, to the Wife of the Plaintiff, whereby (reciting that she was seised in Fee of certain Lands, in Consideration of a Marriage to be had between the Plaintiff and her Son) she did grant to the Plaintiff a Rent-charge out of these Lands, *Habendum* after the Death of her Son, and covenanted to pay it, &c. The Defendant pleaded, that she had not been long in the Land at the Time of the Grant, but that a Stranger was seised of it. Upon Demurrer it was adjudged *pro Quer'*, both because the Defendant is estopped by the Deed, and that the Covenant extends to it as an Annuity. *Allen* 79.

Plaintiff declares that the Defendant's Predecessor, Bishop of *Salisbury*, being seised in Fee, let to the Plaintiff certain Lands for twenty-one Years, reserving the ancient Rent, and covenanted for him and his Successors to discharge all publick Taxes upon the Land, and that the Defendant was since made Bishop, and a Tax was assessed by Parliament, and he refused to pay it. Q. Whether this is such a Covenant as shall bind the Successor as incident to a Lease, which the Bishop is empowered to make by the Statute of 32 *H. 8.* If it should now be taken that every Covenant should bind the Successor, the Stat. 1 *Eliz.* should be of none Effect. By *Hale*, Admitting this was an ancient Covenant (and so it should have been averred to have been used in former Leases) to discharge ordinary Payments, as Pensions or Tenths granted by the Clergy, when it might bind the Successor, by 32 *H. 8.* but it were very hard to extend it to new Charges: However this Covenant shall prove it would not avoid the Lease, but the Declaration being insufficient, they did not resolve it fully; for he saith the Predecessor was seised, but saith not *in jure Episcopatus*, for he might be seised in his natural Capacity. 1 *Ventr.* 223. 2 *Lev.* 68.

Covenant to pay Taxes.

A Lessee covenanted with the Lessor to pay all Charges, Dues and Duties to be paid, for or by Reason of the Land, and to Discharge the Lessor of them; after this in 18 *Car. 1.* the Act of Parliament for the 400000 *l.* is made; which saith, That the Lessors shall be charged for their Rent to the said Tax. If this Act of Parliament discharged the Covenant, was proposed to Mr. *Hale* and Serjeant *Roll* to have their Opinions under their Hands, which they did in this Manner: Mr. *Hale* wrote, No; 1. Because the Act did not intend to Discharge this Covenant, for if it had intended so, then it would have said, That all Covenants shall be void, as in the Stat. 39 *Eliz.* 2. of converting Arable Land into Pasture; and Stat. 14 *Eliz. c. 11.* of Leases, expresses Clauses to make all Covenants void, which shews that otherwise they shall not be taken away. 2. This Covenant is a collateral Thing. 3. It was a Fault in the Lessee to make such a Covenant; he might have made a Covenant to Discharge all ordinary Charges. 4. Authorities upon the same Reason, Statute of Sewers, 23 *H. 5.* saith, that every one who may have Benefit or Loss shall contribute; yet it hath been adjudged, that if any particular Person be to repair a Bank by Prescription, he, and no other, shall repair it. 5 *Co.* 100. But Serjeant *Roll* and others wrote *contra*; 1. Because the Lessor is Party to the Act of Parliament, and hath dispensed with it, as in 6 *Co. Morris's Case.* 2. The Intent of the Act was to ease the Lessee of Part of the Burden, and put this Part on the Lessor. 3. *Alias* the Lessee, by the Force of the Covenant, shall be driven to pay all the Rent to the Lessor, and yet to bear all the Charge of the Tax, and the Lessor shall have all his Rent, and shall pay no Charge of the Tax, which will be against the Words and Intent of the Act: As to the Objection on the Statute of Sewers, the Book is not so, for the Commissioners may tax all, if they will, upon the Words of the Statute. *Law of Covenants* 251, 252. Per Ch. Just. *Roll* and Just. *Nichols*, *nullo contradicent'*, in *Rawson's* and *Marten's Case*, Trin. 1650. in *super' Banco*, it was held, that if an Ordinance of Parliament is, that the Lessee shall deduct the Money Monthly for the Parliament Army out of his Rent, and the Lessee covenants in his Lease to pay all the Taxes and Charges for or by Reason of the Land: If this Lease was made before the Ordinance, there the subsequent Order of Parliament shall take away this Covenant, because every one is privy to an Act of Parliament; and so the Lessor, by this subsequent Ordinance, hath taken away the Covenant, and then it is all one as if the Lessor had said, I will pay, and you shall not pay it; *alias* if the Lease had been made after the Ordinance.

Secondly,

Secondly, Concerning Reparations. Vide Concerning Building (BB) post.

Words.

The Words in a Lease for Years, *that the Lessee shall repair, make a Covenant.* 1 Roll. Abr. 518. Cro. Jac. 399, 521. 3 Bulst. 163. 1 Roll. Rep. 359. 2 Roll. Rep. 63.

The Lessee covenants to build three Houses upon the Premises, and keep them in good Repair, and deliver up the Premises, *ac domos & ædificia superinde erecta* well repaired: He builds four, and lets one fall to decay; the Covenant extends as well to the other House, as to the three which were agreed to be built. 2 Vent. 128. Vide 3 Lev. 264, 265.

Where one is bound to repair.

Magdalen College Oxon was seised of a House and a Mill, demised it to L. for thirty-one Years: L. let the Mill to J. S. for five Years, and afterwards demised the House and Mill to F. by Indenture for thirty-one Years; F. covenanted to repair the Premises, *durante Termino prædicto of twenty-one Years*; J. S. refused to attorn; and whether F. were bound to repair the Mill was the Question, because it was alledged, that the Covenant was to repair during the Term, and nothing in the Mill passed during the five Years for want of Attornment. *Per Cur'*, He is bound to repair, tho' the Lease did not commence in Point of Interest, yet it did in Point of Computation; and this Covenant was to repair during the Term of thirty-one Years. 1 Vent. 185. 2 Keb. 879.

Defendant covenanted that *ab & post emendationem & reparationem dicti Messuagii, by the Plaintiff, he at his proper Costs and Charges, as Need shall require, should well and sufficiently repair and sustain the said Houses*: The Defendant is not to repair it till the Plaintiff has first repaired it; tho' it were in good Reparations at the Beginning, if it afterwards happens to decay, the Plaintiff is first to repair it before the Defendant is bound thereunto, for this is not within the Reach of the Covenant if the Lessor does not first repair them. Cro. Jac. 645. 2 Roll. Rep. 248.

If a Lessor covenants to repair during the Term, and will not do it, the Lessee may do it, and pay himself by way of Retainer. 1 Leon. 237.

If Lessee for Years of an House covenants to repair it, and to leave it in as good Plight as he found it; and after certain Sparks of Fire come out of the Chimney of the Lessor into a House not much remote, by which the House of the Lessee is burnt: This will excuse the Performance of the Covenant to the Lessee, so that he is not bound to rebuild, because this comes by the Act of the Lessor himself. 1 Roll. Abr. 454.

If A. leases three Messuages to B. for forty-one Years, and B. covenants to pull them down, and erect three others in their Place, *ac etiam de tempore in tempus, to maintain the Messuages agreed to be erected in sufficient repair, ac etiam to repair the Pavements, &c. ac etiam dicta præmissa & domos superinde fore erecta*. at the End of the Term to leave in good Repair: And after B. pulls down the three Houses, and builds five; he must leave them all in good Repair at the End of the Term: For tho' by the first Covenant he is bound only to repair, &c. the Messuages *agreat. fore erecta*, yet by the last Covenant he is obliged to leave in good Repair *Domos superinde erecta* indefinitely, which extends to all Houses which shall be built upon the Premises during the Term. 3 Lev. 264.

If a Man takes a Lease of a House and Land, and covenants to leave the demised Premises in good Repair at the End of the Term, and he erects a Messuage upon Part of the Land, besides what was before, he must keep or leave this in good Repair also. 3 Lev. 265.

A Covenant is to erect three Messuages, & *dimissa præd' reparare*, and the Covenantor erects five Messuages; he is bound to keep all in Repair. 3 Lev. 264, 265. 2 Ventr. 126.

A Covenant to repair, except in principal Timber, and the Lessor covenants that if there were Need of Reparations he would give Notice, and that the Lessee should repair within three Months; and there was afterwards a Proviso, that if the Lessee did not perform all the Covenants, his Lease should be void: It was agreed that the second Covenant qualified the first, but that the Proviso afterwards separated them, for that the Lessee was bound to repair, without Warning, as often as there was Need. Lit. Rep. 205.

Where

Where the Covenant is, that *ab & post reparationes* by the Plaintiff, the Defendant will repair and sustain, &c. This is conditional, and the Plaintiff ought first to repair. *Cro. Jac. 645.*

In Covenant the Words were, the Plaintiff putting the House in good Repair, the Defendant should keep it so; these are held to be mutual Covenants. *T. Raym. 183. Stile 140.*

The Defendant covenants, that at three Months Warning during the Term he would repair, and leave it well repaired at the End of the Term: The Clause to leave it well repaired at the End of the Term is distinct by itself, and doth not depend upon the former Clauses; for he ought to leave it sufficiently repaired at his Peril at the End of the Term without Notice, the three Months Notice refers only to Reparations within the Term. *Cro. Jac. 644. pl. 7.*

Where there is a Covenant for the Lessee to repair upon a Penalty, and there is a Default of Repairs by Means of Thunder, Lightning, Inundation, or any such like Accident, the Lessee shall be excused of the Penalty: But yet because of his Covenant, he is bound to repair in convenient Time. *Dyer 33. a. pl. 101, 324. a. pl. 341.*

And if Lessee for Years covenants to repair during the Term, this shall bind all others as a Thing appurtenant, and which runs with the Land, whether they come in by Act in Law or of the Party. *5 Co. 17. b. 1 Roll. Abr. 522. Cro. Car. 221. W. Jones 245. 1 Lev. 109. 1 Sid. 157. T. Raym. 80. Carth. 519. Bro. Covenant 32. W. Jones 223. Cro. Car. 523.*

Lessee covenants to repair a House to him demised during the Term within three Months after Notice given, and to leave it so repaired: It is in the Election of the Lessor either to give Notice, or if the Lessee does not repair during the Term, to bring Covenant, and that there were several Covenants; and that if the Lessee comes without Lease, after the Term ended, to repair the House, he is a Trespasser. The first Covenant was absolute, and the second conditional, and one shall not take away the Effect of the other. *2 Roll. Rep. 250.*

Where Notice to repair must be given.

A Copyholder in Fee made a Lease of a Messuage for twenty-one Years, warranted by the Custom, &c. the Lessee covenanted to repair during the Term; the Lessor granted the Reversion to his Son, who surrendered to the Plaintiff, who brought an Action of Covenant against the Lessee for not repairing. The Question was, Whether it will lie, because it is a Copyhold, and so not within the Statute *32 H. 8. c. 34. Per Cur.* A Copyholder has an Inheritance, and his Estate is established by Custom, and it's Reason to construe him within the Equity of this Statute. *4 Mod. 80. 3 Lev. 326.*

Where Covenant will lie, and what is a Breach.

If one covenants to keep and leave a House in the same or as good Plight as it was at the Time of the making the Lease; in this Case the ordinary and natural Decay of it is no Breach of the Covenant, but the Covenantor is hereby bound to do his best to keep it in the same Plight, and therefore to keep it covered, &c. *Fitz. Covenant 4.*

The Assignee of a Reversion may maintain Covenants for Repairs, tho' not named in the Covenant in the Lease. *1 Lev. 109.* And likewise may maintain Covenant in the County where it is supposed to be made; *aliter* in Debt. *Ibid.*

If one covenants to leave a Wood in the same Plight he finds it, and he cuts down the Trees, the Covenant is broken presently, for now it is become impossible by his own Act to be performed; *aliter* in Case the Trees be blown down, for now it is become impossible to be done by the Act of God, and the Covenantor is not bound to supply it.

In a Covenant to sustain Houses, Sea-Banks, or Covenant to leave them in as good Case as one finds them, and the Houses be burnt or thrown down by Tempest, or the Banks overthrown by a sudden Flood, in this Case the Covenant is not broken by these Accidents only; but if the Covenantor do not repair and make up these Things in convenient Time, the Covenant will be broken. *Fitz. Covenant 29. 5 Co. 15. 1 Co. 98. Perk. §. 738. Plow. 229.*

If Houses are let to me for Years, and I covenant to leave them in as good Plight as I find them, and I throw down the Houses; this is no Breach of the Covenant, for I may re-edify them, and so no Action will lie upon this Covenant till the End of the Term.

M. let a House for Years to A. by Indenture, by which A. covenanted with M. to repair the House, and that M. should enter to see in what Plight the Reparations stood, and if Default was found, and thereof Warning to be given to A. his Executors, &c. then within four Months after such Warning the Default should be amended. The House in the Default of the Lessee became ruinous; M. granted the Reversion

sion over in Fee to C. who upon View of the House gave Warning to A. of the Default, which is not repaired, upon which C. as Assignee of M. brought Covenant. It was moved, the Action did not lie, because the House became ruinous before his Interest in the Reversion. *Sed per Cur'*, The Action is not conceived upon the ruinous Estate of the House, but for not repairing of it within the Time appointed by the Covenant after the Warning. 1 Leon. 62.

If A. covenants to repair the Premises before *Midsummer*, it is not a Condition precedent, but only the Time divided and mutual between A. and B. viz. that A. shall repair it before *Midsummer*, B. after during the Term, for which each of them may have his Remedy by Action against the other.

Lessee covenanted that he would not cut down more Timber growing than sufficient for needful Reparations of the Building; the Plaintiff assigns a Breach, that he had cut down Timber to the Value of 10 l. and converted it to his own Use. Verdict pro Quer'. *Per Cur'*, It is erroneous, it is not the same Covenant, and so no Breach if he had converted it to his own Use, except it be averred that he had cut down more than was necessary for Reparations. *Stile* 5.

Covenant upon a Lease for Years made by the Plaintiff to the Defendant of a Park, &c. for five Years, if she should so long live; in which the Lessee covenants for her, her Executors and Assigns, to keep the Premises in good Reparation, and so to leave them at the Expiration of the Term, and also to deliver to the Plaintiff (upon Notice given) four Bucks and four Does in Season, during the Life of the Plaintiff, in every of the said Years; and after the Expiration of the aforesaid Term of five Years, the Plaintiff brought Covenant, and assigned the Breach, because that in the End of the Term he had committed Waste, and because that after the End of the Term the Defendant refused to deliver the Deer: Now the Delivery of the Deer are during the Life of the Plaintiff, yet they are also every of the aforesaid Years; and therefore it was resolved, that she not having them during her Life, tho' it be *in fine Termini*, and not *ad finem Termini*, yet it shall be intended a Breach of Covenant, and the Action well lies. *Poph.* 146. 2 Roll. Rep. 38.

A Surrendree or Assignee of a Reversion of a Copyhold Estate may bring an Action against the Lessee for not repairing of the Premises, and that he is within the Equity of the Stat. 32 H. 8. c. 34. 4 Mod. 80.

Lease to B. and F. and they covenanted to do no Waste, or to repair Houses. B. dies, F. survives and holds in; if the Wife commits Waste, or does not repair the Houses, no Action lies against the Wife, for to such a Lease the Wife is tied to pay the Rent, or to perform a Condition made by the Part of the Lessor, but not to observe or perform the Covenants of the Lessee. 1 Brownl. 31.

Covenant to repair a House; if Lessee comes after the Term without Licence to repair it, he is a Trespasser. 2 Roll. Rep. 250.

Lessee for Years covenants for himself and his Executors (*sans* the Word Assigns) to repair; he assigns, and an Action of Covenant for Repairs is brought against his Assignee, and held to be good; for tho' the Lessee hath not covenanted for his Assigns, yet such Covenants as extend to the Support of a Thing demised, are *quodammodo* appurtenant thereunto, and run with the Land; and in Respect that the Tenant hath taken upon him the Repairs, the annual Rent is the Lessor's, *Et qui sentit commodum sentire debet Et onus.* 5 Co. 24. b.

Declaration.

In the King's Letters Patent there is a Clause for the Patentee's repairing; tho' this is by Patent, wherein the Lessee takes only, yet that Clause shall be taken and interpreted as a Covenant on the Lessee's Part to bind him and his Assigns; for when he takes by the Patent, he consents to all Things therein; and the Words in that Clause, for the leaving and keeping the Houses and Fences in repair, are as spoken by him, and it is a Covenant which runs with the Land; and tho' the Bargainee be not named Assignee in the Declaration, it is good enough. *Cro. Jac.* 240.

One lets a Lease of Houses, Courts, Orchards and Gardens appertaining to them; Defendant covenants to repair the Houses, Edifices and Buildings, with necessary Reparations; and that he would maintain and keep demissa *præmissa* sufficiently maintained, repaired, pailed and fenced; and shews, that at the Time of the Lease the Houses were well repaired; and that afterwards, *Diversa domus loca parcella, Et res eorundem tenementorum Et præmissorum de casuat. dirupta Et fracta fuer' Et inde casu devener' Et diverse alia parcella Et res eorundem tenementorum Et præmissorum eisdem præmissis affixa ab inde acuta Et asportat' fuer' prout sequitur, &c.* and instances in the Pavement of the Court, carrying away the Locks and Keys of a Cupboard, the breaking of the Glafs in the Windows, carrying

carrying away of a Shelf, which was not shewed to be fixed: It was objected, that the Breach for not repairing the Pavement is out of the Covenant, for it is neither Building, Pailing nor Fencing. *Sed per Cur'*, It is within the Intention of the Covenant, and it is *quasi* the Building, and within the Words, *leave them sufficiently repaired*; and the Shelf needs not be shewed to be fixed. *Cro. Jac.* 329. *2 Bulst.* 112.

Covenant that the Defendant shall put in good Repair the Houses, Outhouses and Stables; the Breach was, that the Defendant permitted the Racks in the Stable to be in Decay. It was moved in Arrest of Judgment, that the Plaintiff did not set forth that the Racks were fixed in the Stable, and so Part of the Freehold. By *Pollexfen*, It ought to have been shewed that the Racks were set up and fixed; *alii Justiciarii contra*, It shall be intended they shall be fixed for the Use of the Stable. *2 Ventr.* 214.

The Defendant, by Indenture upon a Lease made unto him of a House, covenanted that he would from Time to Time, during the Term, after three Months Warning, sufficiently Repair; and at the End of the Term Action was brought, and shews in what Part, &c. Defendant demurred, because he doth not alledge, that he for three Months before gave Notice unto him of the Defects. But *per Cur'*, The Declaration is good notwithstanding that Exception; for the Clause, *to leave it well repaired at the End of the Term*, is distinct by itself, and does not depend upon the former Clauses; for he ought to leave it sufficiently repaired without Notice, at his Peril; and the Notice within three Months, refers only to the Reparations within the Term, whereto he is not tied without three Months Notice before. *Cro. Jac.* 644.

Covenant that the Lessee should repair the House, provided and it was agreed that the Lessee should have necessary Timber, to be allowed and delivered by the Lessor; the Lessor allowed so many Loads of Timber, and a general Request was laid: The Plaintiff should have alledged a special Request to the Defendant; it was laid in the Declaration that a Stranger brought the Timber, which was ill, for that amounted to an Entry on the Lessee's Possession. *1 Brownl.* 23.

Defendant covenanted that he, his Executors and Assigns, would repair a Mill; and alledged, that the Mill was defective in Reparations; and the Defendant, his Executors and Assigns, did not repair it: The Declaration was demurred to, because he did not alledge that he, nor his Executors or Assigns, did not repair it. *Per Cur'*, It ought to be alledged in the Disjunctive, not in the Conjunctive. *Cro. Eliz.* 348.

A Lessee covenanted to repair the House well from Time to Time during the Term, and at the End of the Term to leave the same well repaired to the Lessor; Plaintiff assigns for Breach, that the Defendant did not leave it well repaired at the End of the Term; the Breach is good, tho' he doth not shew it in what Point it is not repaired: But if the Defendant had pleaded, that at the End of the Term he had delivered it up well repaired, then if the Plaintiff will assign any Breach, he ought to shew in what Particular it was not repaired, so as the Defendant might give particular Answer to it. *Cro. Jac.* 170.

Lessee covenants to repair a Park, and in the End of the Term to leave it sufficiently repaired. Breach *quod non reparavit*, but in the End of the Term *fecit vastum, viz. in permittendo* the Pale to decay; it is good, tho' the End of the Term is an Instant of Time in which a Thing cannot be said properly to be done, yet it may be permitted. *2 Roll. Rep.* 38.

In Covenant for *not repairing*, the Plaintiff shews for Breach, that the House was Plea. burnt down thro' the Negligence of the Defendant, &c. and that he did not repair it. Defendant traversed, that it was not burnt down, *prout*, &c. And it was adjudged an ill Traverse, because the Defendant's not repairing it is the substantial Part, and the other but Inducement. *24 Car. 1. Hardr.* 70. But in *Stile* (88) the Case is thus: Plaintiff declared, and shewed that one of the Houses was burnt down by Negligence. Defendant pleaded a special Plea, that the House which was burnt was not burnt by Negligence, nor with common Fire, as the Plaintiff hath declared; and as to the Rest pleads the general Issue, that they were in good Repairs at the End of the Term. This Plea contains a Negative pregnant, for there are two Matters offered in Issue; 1. That the House was not burnt down by common Fire. 2. That it was not burned by the Negligence of the Party. It ought to have been demurred to, but there was a Verdict.

In Covenant to repair, Defendant pleads, that the House was burnt by Casualty; it is no Plea. *Stile* 161.

The

The Breach assigned *in hoc*; whereas the Defendant being Lessee for Years covenanted at the End of the Term to leave and yield up the Tenements well repaired to the Plaintiff, and that he had not left, &c. Defendant pleaded, that one B. was seised in Fee until by the Plaintiff disseised, who let to the Defendant; and afterwards B. re-entered, who infeoffed J. S. who is yet seised, &c. Adjudged upon Demurrer a good Bar. *Cro. Eliz.* 656.

The Plaintiff assigned a Breach in not repairing; Defendant pleads, the Plaintiff had acquitted and discharged him of all Reparations. Plaintiff demurred. *Per Cur'*, This is an Acquittance and Discharge of the Reparations for the Time past, as well as the Time to come, and amounts to as much as if he had released that Covenant; but the Covenant being broken, that Discharge shall not take away the Action on the Obligation, which was forfeited. 3 *Leon.* 69.

In Covenant Plaintiff declared upon a Lease made by the Queen to G. B. and brought the Reversion to himself by divers mean Conveyances, and brought the Term to the Defendant by a *Que* Estate he had by divers mean Conveyances in general, *Concurrentibus iis quæ in jure requiruntur*; and assigns divers Breaches in not repairing the Premises. Defendant pleads, *Non infregit conventiones*. Plaintiff demurs, and Judgment for him. The Pleading an Estate in Term in either Person, under whom he does not claim, but is a Stranger, is good; for he is not privy to the Estate and Conveyances to a Stranger, but to plead an Estate in himself in a Term, or in any other under whom he claims, is not good. The Plea is too general; 1. Several Breaches being alledged. 2. Two Negatives cannot make a good Issue, and the Breaches in *non reparando*, *ideo non infregit*, cannot be good. 3 *Lev.* 19.

In Covenant to repair within a Month after Warning. Defendant pleads, long Time before that Warning he assigned over to J. S. who had always after paid his Rent, and the Plaintiff excepted it, and avers Performance of all the Covenants till the Assignment: It is an ill Plea, for he may charge the Lessee or Assignee at his Election. *Cro. Jac.* 309.

In Covenant the Breach was, that the Defendant did not repair; he pleads generally, *Quod reparavit*; this was held a good Issue after a Verdict. 2 *Mod.* 176.

Where the Lessee covenants to repair; in an Action of Covenant brought by the Lessor against him for Defect of Reparations, he concludes, *Et sic infregit conventionem*. *Non infregit conventionem* is an ill Plea upon a Demurrer, but it is good after Verdict; and in that Case the Defendant ought to answer to every Breach, and conclude to the Country.

Lessee covenanted during the Term to keep in Repair the Messuage demised: The Defendant says he did, during the Term, keep all the Premises demised in good Repair, except only a ruinous Kitchen, which before he took the House was so ruinous that it could not be repaired; and he pulled it down and rebuilt it, and hath afterwards kept it in good Repair; held to be a good Plea in Waste, but not in Covenant. 2 *Leon.* 238.

Demurrer.

In Covenant for not repairing a House, being in Decay, and not said wherein: The Plaintiff demurred, and shewed for Cause, that it was not particularly set forth wherein it was in Decay; which, *per Cur'*, is as well as in Waste. 3 *Keb.* 478.

The Plaintiff let Houses for Years to the Defendant, and covenanted to repair the Houses by such a Day; the Defendant by the same Indenture covenanted with the Plaintiff, that from the Time that the Plaintiff was to repair the Houses, unto the End of the Term, he would repair and leave them so repaired; and for not performing this Covenant on the Defendant's Part, the Plaintiff brought his Action. Defendant demurred to the Declaration, because the Plaintiff had not shewed for his Part that he had repaired the Houses according to the Covenant, and so the Declaration supposed he was not bound to repair, because he was bound to repair from the Time that the Plaintiff had repaired them, and not before, and so no Cause of Action. *Stile* 140. These are reciprocal Covenants on his Part, it does not excuse the other.

In Covenant to repair, and so to leave the Premises repaired; in the Declaration the Plaintiff shews the Breach in sixty Roods, &c. Defendant pleads, that one Barn was pulled down by the Plaintiff's Consent; and as to the Rest, that they were repaired, and so left. To which the Plaintiff demurred generally, the particular Breach being not answered. *Per Hale*, He should have either taken Issue *reparavit* the Particulars, or to say, they were not *in decasu modo & forma*. 2 *Keb.* 298.

Plaintiff declared that he let to the Defendant a House, and that he covenanted to repair it. Defendant pleaded, it was sufficiently repaired before the Action brought.

Plaintiff

Plaintiff demurred, because he did not plead that he himself did it. *Keling* and *Rainsford* inclined against the Demurrer, for be it repaired, tho' by any Body, the Plaintiff has no Damages, nor Cause of Action. *Twisden* doubted; afterwards they waived the Demurrer. 1 *Vent.* 38. 2 *Keb.* 535.

Defendant pleads, that after the Decay he made such Concord that the Plaintiff should take 30 s. and such Goods, in Satisfaction of that Destruction, &c. and shews it to be executed: On Demurrer, it was held the Plea was good; tho' when an Action is grounded upon a Deed, it cannot be discharged unless by Deed; as a Bond with Condition cannot be discharged by Contract: But this Plea here is not pleaded in Discharge of the Covenant, but only for the Damages which are demanded by Reason of the Breach of the Covenant, and the Covenant remains. And in every Action where only Amends is demanded by Way of Damages, Accord executed is a good Bar in Discharge of them, and so adjudged. *Cro. Jac.* 199.

The Plaintiff declared (*inter alia*) on a Covenant to repair all the Pales of a Garden demised, (excepting the Pales on the East-side) and assigned a Breach in not repairing the Pales *contra formam conventionis*, but shews not that the Defect was in the Pales not excepted. Defendant pleads, he had repaired the Pales according to the Covenant; and Issue upon it; and Verdict *pro Quer.* It was moved in Arrest of Judgment, that the Breach was not sufficiently alledged, for the Defect might be in the Pales excepted; *sed non allocat'*; for it shall be intended after a Verdict, who had given Damages to the Plaintiff, that the Defect was in the Pales to be repaired by the Covenant, *Et eo potius*, because the Issue was as to Repairs according to the Covenant; but it was agreed, if the Defendant had demurred, Judgment ought to have been given for him. *T. Jones* 125.

Covenant for that he let to R. M. *Quoddam molendinum aquaticum in Paroch' de S. & omnia domus edificia aquas, aquarum cursus Ripas* [*Angl' Dams*] *dicto molendino adjacent' spectant' & pertinent'* for twenty-one Years, and he covenanted to repair the Houses of the said Mill, the Flood-Gates, &c. The Breach was assigned for not repairing of the Mill and Mill-Banks, and for not leaving the Mill-Stones; and Exception was taken, because he shews not in what Vill the Mill-Banks were; *sed non allocat'*; 1. For they shall be intended to be in the same Vill where the Mill is. 2. Because it was not shewn whether it were a Corn-Mill or a Fulling-Mill; *sed non allocat'*; for all is one, the Breach being assigned for not repairing. It was also moved, that there were three Breaches assigned, and the Defendant having demurred upon the whole Declaration, the Plaintiff ought to have Judgment for them wherein the Breach was well assigned; and of that Opinion was all the Court, for they are as several Actions. *Cro. Jac.* 557.

The Lessee covenants to repair the demised Premises as often as Need shall require; a Barn is built upon the demised Premises after the Covenant entered into, which is pleaded by the Defendant in an Action of Covenant; and upon a Demurrer it was held, that the Tenant shall repair it tho' built after the Covenant made. *Brown and Blundel*, 34 *Car.* 2. *Rot.* 752. 3 *Lev.* 265. *Skin.* 121.

Plaintiff declared of a Lease made in *Hampshire* of a Messuage in *Berkshire*; and assigns a Breach for not repairing a House. Defendant pleads, *Non infregit conventionem*: And Issue was tried in *Hampshire*, where it is supposed the Covenant is made. Verdict *pro Quer.* Moved in Arrest of Judgment, that it ought to have been tried in *Berkshire*, where the House is, and the Repairs to be made; and so *per Cur'*, it ought to be. The Breach is in not repairing, and the Issue is *Non infregit conventionem*: This shall be intended only in answer to the Breach, *viz.* that he had not broken the Covenant for want of Repairs; and so this is the only Matter triable, and only where the House lies. 1 *Lev.* 114. 1 *Keb.* 575, 601. The Plaintiff had made this Breach local in not repairing, and the Issue, *Non infregit conventionem*, refers specially to that. This is a special Issue, as well as if the Defendant had pleaded that the House was in good Repair. *T. Raym.* 85. 1 *Sid.* 157.

A Man made a Lease for Years, and the Lessee covenanted to make Reparations; Who shall recover Damages. Lessor granted the Reversion to another; Lessee for Years made his Wife his Executrix, and died. *Per Cur'*, The Grantee of the Reversion shall not recover Damages but from the Time of the Grant, and not for any Time before; but yet the Wife, the Executrix, should be charged for the not repairing, as well in the Time of her Husband as in her own Time; and if she makes the Reparation depending the Suit, yet thereby the Suit shall not abate, but it shall be a good Cause to qualify the Damages, according to that which may be supposed that the Party is damaged for the

the not repairing, from the Time of the Purchase to the Time of the bringing the Action; and by *Manhood*, By the Recovery of the Damages the Lessee shall be excused ever after for making of Reparations; so as if he suffers the Houses for want of Reparations to decay, that no Action shall be brought for the same thereupon afterwards, but the Covenant is extinct. 3 Leon. 51.

Thirdly, *That the Lessee will not assign, &c. the Premises leased.*

A Lessee for Years covenanted with the Lessor that he would not assign the Land let, nor any Part thereof, without the Lessor's Consent; the Lessor entered into Part, the Lessee assigned over the Rest without Consent; an Action of Covenant lies, for it was collateral; and the Covenant is broken notwithstanding the Lessor's Entry into Part of the Land. *Stile* 265.

A Lessee covenanted that he would not alien the Advowson let to him without Consent of the Lessor, and shewed he had aliened to *J. S.* without his Consent. Defendant pleads, he had not aliened without his Consent; and found *pro Quer'*: The Breach was well laid, tho' he has not laid the Alienation to be by Deed, (an Advowson not passing without Deed) for it shall be intended to be by Deed. *Winch* 34.

Debt on Bond conditioned for Performance of Covenants in a Lease: One Covenant was, that the Lessee, his Executors or Assigns, shall not alien without Licence of the Lessor, but only to his Wife and Children. The Lessee deviseth to his Wife, and makes her his Executrix, who enters therein as Legatee, and takes *K.* the Defendant to Husband, and they alien the Estate. The Lessor brings Debt upon the Bond; they pleaded they had not aliened *contra formam conventionis*. The Plaintiff shews the Alienation abovesaid; and it was thereupon demurred. *Per* three Justices, The Covenant is broken, for the Feme is restrained from aliening by express Words, as well as the Lessee himself, for it extends to the Lessee and his Assigns, and she is Assignee; so tho' there was once Alienation by Licence, yet that Assignee cannot alien without Licence. But *per Walmesley*, The Words are, that the Lessee or Assignee should not alien but to his Wife or Children; and the Wife is not within these Words, for she cannot alien to herself. But it hath been adjudged, that where a Condition within a Lease was, that neither he nor his Assigns should alien without Licence, the Lessee died Intestate, the Administrator was bound by this Condition. *Cro. Eliz.* 757.

If a Man by Indenture letteth Lands for Years, provided always and it is covenanted and agreed between the said Parties, that the Lessee should not alien; it was adjudged that this was a Condition by Force of the Proviso, and a Covenant by Force of the other Words. *Co. Lit.* 203. *b.*

Fourthly, *That the Lessee will drain the Water which is upon the Land.*

If Lessee for Years covenants to drain the Water that stands upon the Land before such a Day, and after the Lessor enters upon the Land, and disturbs the Lessee; this is a good Excuse of the Performance of the Condition. 1 Roll. Abr. 454. *Cro. Eliz.* 374. *Owen* 66.

If Lessee for Years covenants to drain the Water which is upon the Land before such a Day, and after the Lessor enters before the Day, and there continues till the Day is past; yet this shall not excuse the Performance of the Covenant, because this is collateral to the Land. 1 Roll. Abr. 453.

But if it had been a Covenant adhering to the Land, and in Respect of the Enjoyment thereof, it would have been otherwise; but then it must have been shewed that he held him out of Possession. *Moor* 402. *pl.* 534. *Owen* 65.

Fifthly, *That the Lessee will do all reasonable Chares for the Lessor.*

If Lessee for Years covenants to do all reasonable Chares for his Lessor with his Carriages, and otherways, upon Request, and the Lessor requires him to bring him three Load of Coals: If the Lessee has no Cart nor Carriage, he is excused; for he is not bound to keep Carts to serve his Lessor. *Latch* 202.

Sixthly, *That the Lessee shall have House-boot, &c.*

A Lessor covenants that the Lessee shall have House-boot, Hay-boot and Plough-boot, without committing Waste, upon Pain of Forfeiture; whether this was a Condition. *Curia*: This Covenant is no more than what the Law appoints, and therefore vain; also it is a Covenant on the Part of the Lessor, and therefore cannot be a Condition. *Cro. Eliz.* 604. *pl.* 18.

Seventhly, *That the Lessor may view the Premises.*

Lessee covenants that after four Years the Lessor might come twice a Year to see if there were any Waste done: The Lessor comes within the four Years; and adjudged that he might, for that this particular Covenant doth not take away the general Covenant in Law, which is, that the Lessor may come when he pleases, to see whether any Waste is done. *Lit. Rep.* 205.

Eighthly, *That the Lessee will render up the Possession at the End of the Term, and in good Condition, &c.*

One seised in Fee of Lands, lets it for Years, and Lessee covenants to render up the Possession to the Lessor, his Heirs and Assigns, at the End of the Term, upon Request; and after the Lessor assigns over the Reversion to two, and one of them at the End of the Term comes to the Lessee and demands the Delivery of Possession. Upon this Demand, by one only, he is bound to deliver Possession, otherwise he has forfeited his Covenant, for the Demand of one Joint-tenant is sufficient for both. *1 Roll. Abr.* 428.

Lessee covenanted that he would leave the Land in as good Condition as it was demised to him: He cut down Oaks, which could not grow again during the Term; an Action of Covenant does not lie till after the Term, but Waste lies presently. *2 Roll. Rep.* 332, 347, 348.

If a Lessee for Years covenants to leave Part of the Land at the End of the Term fallowed and fit for Wheat; provided that the Lessee, upon such Warning, may surrender and depart at any Feast of Michaelmas at any Time within the Term, performing the Covenants: If after Warning he surrenders, and does not leave the Land fallowed, he has forfeited his Covenant; for the Acceptance of this Surrender does not dispense with the Covenant, inasmuch as by the Covenant he is to accept thereof. *1 Roll. Abr.* 454.

(BB) *Of Covenants which may or may not be in Deeds of Conveyances of Land, or may be in Articles of Covenant only.*

First, *To pay Money.*

IN an Indenture the Word *Covenant* is the Word of both; as if Lessee covenants to pay the Rent, this amounts to a Reservation. *1 Roll.* 80, 81.

I oblige myself to pay so much at such a Day; this is a Covenant. *Hard.* 178. *Chan. Rep.* 249. And an Action of Covenant lies upon the Default of the first Day, but Debt doth not lie till the last. *Co. Lit.* 223. *b.* 47. *b.* 292. *b.* 3 *Co.* 22. *a.* *Cro. Jac.* 505. *Cro. Car.* 241. 4 *Co.* 94. 5 *Co.* 51.

It was agreed that *A.* shall pay *B.* 100 *l.* for Lands in *D.* It seems to be a mutual Covenant, and Covenant lies if he will not convey the Lands. *1 Sid.* 423. *T. Raym.* 183.

A Covenant with three jointly and severally, that they should pay, &c. and one of the three was sued, and a Breach assigned that he hath not paid: And it was decreed unto, because he had not paid, Nor any of the other had not paid. *Curia*: If the Action had been brought against all, the Non-payment of all must be alledged; but when brought but against one, then it is sufficient to say, That he hath not paid; and if either of them hath paid, the Party sued ought to plead it.

So if two are jointly and severally bound in a Bond, in an Action against one, it is sufficient to say, That he hath not paid it. *Latch* 50. In a Charterparty the Covenants are several and not joint. 5 *Co.* 22. *b.*

In

Time and
Place.

In an Action of Covenant on Indenture for Payment of Money at a certain Time; Defendant pleaded Payment at the Time, and upon this Issue was joined; adjudged *pro* Defendant. Plaintiff moved in Arrest of Judgment, for that the Issue was misjoined, because the Place of Payment was not alledged, which is material, and so there can be no Judgment. It was said on the other Side, it is not material to alledge a Place of Payment, because it is a personal Action, and it shall be intended where the Action is brought. 1 *Ed. 5. fol. 3.* There is Difference between finding the Money paid, and the finding it not paid. *Stile 172.*

Covenant to pay 10 s. when *A.* comes to his House, and 10 s. at the Feast of *St. Michael*, and at the Feast of *St. Andrew* then next following, 10 s. These last Sums ought to be paid at the said Feasts or Times, and not at the next Feast after *A.* comes to his House. 1 *Roll. Abr. 442.*

Covenant upon an Adventure to *Newfoundland*, to pay so much Money within forty Days next after the Ship shall make her first Return and Arrival in this Voyage from *Newfoundland* into the Port of *Dartmouth*, or into any Harbour, Creek or Port of *England* where she shall first unlade her Goods: The Covenantor is to pay the Money within forty Days after the Arrival of the Ship, and shall not have forty Days after the Unlading of the Goods, for this is not for Freight, but for Adventure; and the Unlading of the Goods is only mentioned to describe the Haven where the Arrival shall be, and not to put a Limitation of the Payment of the Monies to have forty Days after the Discharge. *Stile 30. 1 Roll. Abr. 442.*

A Covenant to deliver twenty Quarters of Corn on the 29th of *February* next following, and that Month had but twenty-eight Days. *Per Cur'*, He is not bound to deliver the Corn till such a Year comes, when *February* hath twenty-nine Days, and that is Leap-Year. 1 *Leon. 101.*

If a Man is bound by Covenant or Bond to pay a Sum of Money at such a Feast and Place, and between certain Hours of the Feast-Day; and before the Feast, at another Place, he pays the Money to the Covenantee, and he makes Acquittance of this: This is a Discharge of the Covenant or Condition by the Acceptance, &c. *Dyer 122.*

Covenant to render and pay 1188 Florins, which then amounted to 33 l. 12 s. to be paid *Ad solutionem festi Purific'*, called *Candlemas Day* next ensuing. The Plaintiff in his Declaration avers, that *predictae solutiones dicti festi Purification'* next, after the making the Covenant, according to the Use of the Merchants, were the twentieth Day of *February*. Defendant pleaded *Non est factum*, and found against him. Upon Arrest moved, it was resolved that Payment among Merchants is known to be on the 20th of *February*; and the Judges ought to take Notice of it, and the rather, the Defendant by his Plea confesseth the Declaration to be true in that Averment. 1 *Brownl. 102.*

If *A.* covenants the first of *May* to pay to *B.* 10 l. at the Feast of *St. Michael*, without saying more; this shall be intended the Feast of *St. Michael* next ensuing. 1 *Roll. Abr. 444.*

A Covenant that *D.* Deputy Post-Master of *Oxon*, for six Months should pay all such Sums as he received while he continued Post-Master. On *Oyer*, the Defendant pleads Performance generally. Plaintiff replies, *E.* continued two Years longer Post-Master, and such a Day received so much, and paid not over. *Per Cur'*, No Action lay, the six Months being past, and the Continuance after must be on new Agreement. 3 *Keb. 45, 59. 2 Saund. 411.*

If a Place of Payment be limited by the Covenant, he is not bound to pay it in any other Place. 1 *Roll. Abr. 445.*

Covenant to pay 10 l. at *D.* if the Covenantee accepts this at another Place, it is a good Performance. *Ibid. 456.*

To pay Mo-
ney on Pro-
curement of
Pardon.

In Covenant to pay 1200 l. on Procurement of Pardon for *B.* who killed *L.* in *Ireland*. The Condition of the Articles was, that if *B.* were acquitted or pardoned, they should pay 1200 l. *B.* was convicted of Manslaughter, and the Penalty pardoned; 900 l. was deposited in the Hands of Sir *J. F.* It was prayed that common Bail might be accepted, this being an odious Contract to be discountenanced; which the Court agreed as to the Acquittal, being in Effect to stifle Evidence and embrace Jury; but as to the Pardon alone, it might be less illegal; but here is no Pardon of the Offence within the Intent of the Articles, but only a Pardon of the Penalty of Conviction, and an Appearance was only granted. 3 *Keb. 415.*

Secondly.

Secondly, To make Assurances of Land, &c. See before concerning Covenants for further Assurance.

In Debt for 100 l. the Plaintiff declared, that by Articles of Agreement 1 May, 8 W. 3. between the Plaintiff and Defendant, First, it was agreed between the Parties aforesaid, and the Plaintiff covenanted that he, and all Persons claiming under him, should make to the Defendant a good and sufficient Title, Assurance and Conveyance of certain Lands, upon or before the 17th of November then next ensuing. Secondly, the Defendant covenants with the Plaintiff, that he or his Assigns, tempore executione & sigillatione talis Conveyance, and in Consideration thereof, would well and truly pay, or cause to be paid, unto the Plaintiff, his Executors, Administrators or Assigns, the full and just Sum of 503 l. at the House of Sir Francis Child, situate, &c. and some other Articles, doth bind themselves in 100 l. for Performance. The Plaintiff avers, he had performed all the Covenants and Articles on his Part, and that the Defendant had not kept the Articles and Covenants on his Part; and in particular the Plaintiff avers, that he and one R. M. of, &c. post consecutionem prædictam scripti articulorum prædictorum & ante prædictam 17 diem Novemb' in eodem scripto articulorum mentionat' scilicet 16 die ejusdem mensis Novemb' (eodem Roberto Markham) possessionat' existens de & in tenementis & præmissis prædictis pro residuum terminorum annorum reversione inde præfatus Willo' Chaloner (le Plaintiff) & hæredibus suis spectant' apud S. prædictam quandam indenturam suam barganie & venditionis de tenementis ac præmissis prædictis in scripto articulo prædicto mentionat' fecer' & sigillaver' & ut facta sua indentur' ill' ad usum ipsius Thomæ Davis adtunc & ibid. deliberavere per quam quidem indentur' prædicta Willielmus Chaloner & Robertus pro & in consideratione separat' Sum of 5 s. &c. eisdem W. C. & Robert' in manibus respectivo solut' (and so recite the Lease for a Year) and then recites the Release dated 17th of Nov. sealed and delivered to the Use of the said Thomas Davis: The said Thomas Davis did grant, release and confirm (in Consideration of 503 l. bona, &c. in manibus mentionat' fore solut') and the said R. M. in Consideration of 5 s. (and so recites the Release); and the Plaintiff avers, that he was then and there ready, and offered semperque postea fuit & adhuc paratus existit ad custagia ipsius Thomæ (le Defendant) facer' & procurare fier' aliquam aliam conveyanciam de tenementis & præmissis prædictis secundum formam articulorum prædictorum: And further avers, that the Defendant postea scilicet prædictam 17 die Novemb' apud S. prædictam de præmissis notitiam habuit. Et sic inde notitiam habens prædictam (le Defendant) indent' ill' se agreeare seu ill' de eisdem W. Chaloner & Roberto ut fact' eorund' W. Chaloner & Roberto prædictam Thomæ acceptare adtunc & ibid' penitus recusavit & adhuc recusat & prædictam summam 503 l. eidem W. Chaloner secundum formam & effectum scripti articulorum prædictorum, prædictam Thomæ seu assignat' suis non solver' seu solvi causaver' sed ill' eidem Willo' Chaloner solvere secundum formam & effectum articulorum prædictorum, prædictam Thomas contradixit & adhuc contradicit per quod actio accrevit eidem Willo' Chaloner ad exigend' & habend' de prædicta Thomæ prædictam 100 l. prædictam tamen Thomas licet sæpius requisit', &c. ad damnum 20 l. Et inde, &c. On Demurrer these Exceptions were taken to this Declaration:

1 Except. That the Execution of the Conveyance ought to precede the Payment of the Money, and then if the Plaintiff hath not sufficiently shewed that he had executed such Conveyance, he hath not well intitled himself to the Action, and the Execution of the Conveyance ought to precede the Payment of the Money: And it was said by the Defendant's Counsel, that by the Articles no Day certain was appointed for the Payment of the Money; but this by Agreement of the Parties was to be reduced to a Certainty by the Act of the Plaintiff, viz. the Execution of the Conveyance: By the Articles the Conveyance was to be made upon or before the 17th of November then next ensuing; and, as it seems, if the Plaintiff had executed a Conveyance before this Day, he might have brought an Action for the Money immediately after, by which it is proved the Duty accrues to the Plaintiff after the Execution of the Conveyance, and not before. If the Covenant had been to convey the Lands on a certain Day, then there had been some Colour that the Words, *Tempore executionis* & in consideratione inde, &c. should refer to the said Day, and not to the Execution of the Conveyance; and yet in such Case it hath been adjudged, that the Payment of the Money should refer to the Act to be done, as was in the Case of *Elwick and Cudworth*, 1 Lut. and so the Case of *Shales and Seignoret*, Intr. 10 W. 3. B. R. where the Plaintiff covenants with the Defendant to transfer to the Defendant 400 l. in the Bank-Stock; and the Defendant covenants that he would accept it, and that he,

Tempore translationis inde, would pay so much to the Plaintiff; and in an Action on the Breach of this Covenant, the Plaintiff declares that he had given Notice to the Defendant, that he at such a Day and Place would transfer, &c. and appointed the Defendant to be there, &c. which he had refused, and the Breach was assigned in Non-payment of the Money; but upon Demurrer, Judgment was given for the Defendant; for that it appears by the Plaintiff's own shewing that there was not any Transfer, and so no Money was due: The Opinion of the Court was, that the Execution of the Conveyance was to precede the Payment of the Money.

And as to the Point of Pleading the Execution of the Conveyance, it was not well pleaded, for that upon the whole Matter there was a Surrender of the Interest of *Markham* to the Plaintiff, and by Consequence the Lease for a Year was only the Lease of the Plaintiff, and then the Plaintiff ought to have declared upon the Truth of his Cause, according to the Operation of Law, upon all the Matter of Fact of the Case, which not being done, the Declaration for this is ill; and these Cases were cited to prove it, 2 *Saund.* 96. *Noy* 66. 1 *Mod.* 14. 7 *Co.* 24. 2 *Vent.* 149, 260, 266. And the Opinion of the Court was, that for this the Declaration was ill; for it was said, Tenant for Years may not make a Lease within the Statute of Uses, and by this Means to give Possession to the Defendant to make him capable of a Release of the Reversion.

2 *Except.* to the Declaration, That by the Articles the Plaintiff was to seal and execute to the Defendant and his Assigns a good and sufficient Assurance, &c. and the Declaration is, that he sealed and delivered to the Use of the Defendant a Lease and Release, which is not a sufficient Averment of Performance of the Covenant in this Respect, for Peradventure they were delivered to him who would not deliver them to the Defendant, and the Defendant had not any Means to compel the Delivery to him, because the Plaintiff has not mentioned any Person to whom he delivered them; and for this Exception these Cases were cited, *Noy* 18. 4 *Leon.* Case 48. *Cro. Car.* 143.

3 *Except.* That the Covenant of the Defendant was to pay 103 *l.* to the Plaintiff or his Assigns; and the Declaration is only that he had not paid them to the Plaintiff, but doth not say, or his Assigns; and the Case of *Colt and Howes*, *Cro. Car.* 348. *Penson's Case.* 3 *Keb.* 440. *Abbot and Bishop's Case.* 2 *Sid.* 41. were cited.

4 *Except.* The Covenant is, that the Declaration shall pay the Money upon the Execution of the Conveyance at the House of Sir Francis Child, &c. and the Declaration is, that he has not paid *secundum formam & effectum articulorum*, which is not good Pleading: For there being a Time and Place appointed for the Payment, it ought to be alledged, that the Money was not paid at such Time and Place. 2 *Keb.* 874. was cited as to this Exception. *Vide* 1 *Lev.* 145. 3 *Lev.* 293. *Cro. Car.* 281. 2 *Mod.* 268. *Cro. Car.* 5. But no Resolution of the Court was upon these three last Exceptions. Judgment was given *pro* Defendant. 1 *Lut.* 565.

A Man by Deed indented bargained and sold Lands to another in Fee, and covenanted by the same Deed to make him a good and sufficient Estate in the said Lands before Christmas next, and afterwards before Christmas the Bargainor acknowledged the Deed, and the same is inrolled. *Per Cur'*, By the Act the Covenant is not performed, for he ought to have levied a Fine, or made a Feoffment. 3 *Leon.* 1.

The Condition or Covenant is to make an Estate of Inheritance to the Oblige or Covenantor at such a Day and Place: The Defendant pleads, he was ready at the Day and Place to make it, &c. Plaintiff demurs. *Per Cur'*, The Plea is ill, he ought to give Notice what Estate of Inheritance he would make him. *Stile* 61. *Allen* 24. 5 *Co.* 22.

If a Man covenants to make a Conveyance of certain Lands; if a Warrant or Covenant be put into the Deed, he is not bound to seal it. 1 *Roll. Abr.* 424. *T. Rayn.* 190. *Cro. Jac.* 571.

In Covenant on Articles to pay upon St. Thomas's Day, the Plaintiff making a good Estate, and licet the Plaintiff had performed tho' Defendant did not. Defendant pleads, ready to pay and Tender, and that the Plaintiff made no Assurance. The Plaintiff replied, that he sealed a Feoffment, and the Defendant neglected to take Seisin. Defendant demurs, because here is no sufficient Averment without Notice of the Character made, and when and how he will execute it; for he making a good Estate, is a Condition precedent to the Payment; which the Court agreed; and where a precedent Condition is expressed, it must be averred in the Declaration, and a Licet the Party

Party had performed all on his Part, is not sufficient. Judgment *pro* Defendant.

2 *Keb.* 801. 1 *Ventr.* 147.

If a Man is bound to make a good, absolute and perfect Assurance in Fee of Copyhold Lands, or others, it must not only be an absolute but an effectual Conveyance. If a Man be bound to surrender a Copyhold to the Use of *A.* and his Heirs, on Consideration of Money; if he surrenders into the Tenant's Hands, he must get it presented, for it must be an effectual Surrender: As if a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth so; this is a good Inception; yet if Livery be not made, it is a Forfeiture of the Condition. 1 *Roll.*

Abr. 425.

If one of the Parties covenants to assure Lands, and the other, in Consideration of the same Covenant performed, covenants to pay a Sum of Money, he is not obliged to pay the Money until the Lands are assured. 2 *Saund.* 156. But otherwise it is if the Covenant had been in Consideration of the Covenant to be performed. *Ibid.* and *Brocas's Case*, 3 *Leon.* Case 290.

If a Man makes a Feoffment to the Use of *A.* for Life, Remainder to *B.* for Life, Remainder to *C.* in Fee; if *A.* refuses, *B.* shall take the Estate presently, because it is a Transmutation of Estate. But in Covenant to raise Uses, the Consideration which raises every several Use is also several, and all the Uses grow out of the Covenantor's Estate; and therefore if *A.* refuses, the next in Remainder shall not take presently, but the Covenantor shall retain it. 1 *Co.* 154.

On a Covenant or Agreement for the Purchase of Lands, the Vendor stands as a Trustee for the Purchaser till the Conveyance is executed. 3 *Chan. Rep.* 5.

And where a bad Title was sold with Covenant for further Assurance, and afterwards the Vendee purchased a good Title, and was decreed to confirm, &c. See 2 *Chan. Ca.* 212.

One in Consideration of Marriage settles Land upon himself for Life, Remainder to his intended Wife for Life, Remainder to the Heirs of his Body on his Wife to be begotten, Remainder to his own right Heirs; and in the Deed of Settlement there is a Covenant with the Trustees, from the intended Husband, for himself and his Heirs, that he will not discontinue, dock or suffer a Recovery to bar the Limitations in the Settlement, but that the Issue of the Marriage shall enjoy and hold the Premises pursuant to the said Limitation. The Marriage takes Effect, and they have Issue a Daughter, who marries the Plaintiff, and to whom her Father, who made the Settlement and Covenant, gave a considerable Portion. The Father afterwards suffers a Recovery to the Use of himself and his Heirs, and then devises the Land in Trust for his said Daughter for Life, Remainder to her first, &c. Son in Tail Male; and if the Daughter survived the Husband, to the Daughter in Fee; but if the Daughter should die first, then the Remainder over, and dies. Husband and Wife bring a Bill for specific Performance of the Covenant, and it was held that *A.* being Tenant in Tail, and as such having a Power to suffer a Recovery, the Lands devised shall not be effected tho' the Covenant was good to bind the Assets; and such Covenant being at first accepted, Equity ought not to vary or alter it. 1 *Will.* 104, 461.

By Agreement between the Plaintiff and the Testator of the Defendant, a Parcel of Land was to be sold for 400 *l.* but if it did not arise to so much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Testator covenants for himself and his Executors to pay his Proportion to the Plaintiffs, so as the Plaintiff gave him Notice in Writing by the Space of ten Days, but saith not such Notice was given to his Executors or Administrators. On Oyer of the Indenture, there was a Variance between the Covenant (which was for Notice to be given to the Testator) and this Declaration, by which Notice is averred to be given to the Executor, and so a Demurrer. *Per Cur'*, This is no material Variance, because the Covenant runs in Interest and Charge, and so the Executor is bound to pay, and therefore it is necessary that he should have Notice: But the Declaration was nought for another Reason; they had not declared that this Notice was given in Writing, and that he gave Notice *secundum formam & effectum conditionis*, which was not good. 2 *Mod.* 268.

In Consideration the Plaintiff had promised to pay the Defendant 700 *l.* for the Reversion of a Manor, the Defendant covenanted to seal the Instrument for the Assurance of it with Warranty, &c. according to the Draughts between them before agreed; and tho' the Defendant tendered to him the first of March the Instrument written,

According to
Draughts
made.

written, *secundum tractationes præd.*, and the third of *March* requested him to seal them, yet he had not sealed them, nor conveyed the Reversion of the Manor; after Verdict *pro Quer.*, moved in Arrest of Judgment.

1. That he ought to shew the Instruments to the Court, that they might judge of them; to which it was answered and resolved, the Instruments were agreed before, and therefore he need not shew them to the Court.

2. He doth not shew that he tendered him Wax, Pen, Ink, &c. as he ought; to which it was answered and resolved, there needs no Tender, for the Defendant had taken upon him to do it.

3. The Request is not well made, being at another Time, not when the Tender was; but it was resolved the Tender after the Request was the better, for so he had Time to read them and consider them.

And by *Windham* Justice, Where Conveyances are before agreed, and to be sealed according to the Agreement, so that there is not any Need of Counsel, the Defendant is to do it at his Peril; and where one is to grant a Reversion, he had Time to do it at any Time during his Life, if it so long continues a Reversion, if he be not hastened by Request. Here is a Request, and the Conveyance being agreed, no Tender need to be; but if one be to seal a Conveyance generally, there the Counsel of the Purchaser is intended to draw them, and then the Purchaser ought to tender them.

1 *Lev.* 44. 1 *Keb.* 122.

To make Estate of such a Value.

On Covenants that before such a Day he would make sufficient Estate of Lands of such Value to the Plaintiff for Life; the Defendant pleads he made an Estate in Lands of such a Value, &c. he must shew what Estate was advised, and what Land, that so there be an Issue. 28 *H.* 8. 1. *b.*

Of such a Quantity.

One is bound to assure twenty Acres of Land; the Acres shall be accounted according to the Estimation of the Country where the Lands lie, and not according to the Measure limited in the Statute. *Cro. Eliz.* 665.

To such Person.

If a Covenant be to assure certain Lands to such Person as the Covenantee shall name, and after he assures this to the Covenantee himself; this is a good Performance of the Covenant, tho' it be not alledged that he named himself, for this Acceptance is a Nomination of himself. *M.* 13 *Fac. Housy and Wild.*

Usual Covenants.

Condition of a Bond was, that if the Plaintiff shall seal to the Defendant a good and sufficient Conveyance in the Law of his Lands in Jamaica, with usual Covenants, as by the Defendant's Counsel shall be advised, then if the Defendant should thereupon pay, &c. After Oyer of the Condition, the Defendant pleads, that Mr. *W.* a Counsellor at Law, did advise a Deed of Bargain and Sale from the Plaintiff to the Defendant, with the usual Covenants, of all his Lands in Jamaica, and tendered the Conveyance to the Plaintiff, who refused to seal the same. Plaintiff demurs.

1. Because the Defendant hath not shewed the Conveyance, and an Affirmative Plea ought to be particular: As to plead generally *exoneravit*, is not good, but it must be shewed how. *Cro. Fac.* 165, 359, 363. 1 *Sid.* 106. *Cro. Car.* 384.

2 *Leon.* 214.

2. The Matter of the Condition consists of Law and Fact, and both ought to be set out. The preparing of the Deed is Matter of Fact, and the Reasonableness and Validity thereof is Matter in Law, and the Court must judge of it.

3. The Plea is that the Indenture had the usual Covenants, but doth not set them forth.

But *per Cur.*, The Plea is good; for if the Defendant had set forth the whole Deed *verbatim*, yet because the Lands are in Jamaica, and the Covenants are intended such as are usual there, the Court cannot judge of them, but they must be tried by the Jury. He hath set forth, the Conveyance was by Deed of Bargain and Sale, which is well enough; and so if it had been by Grants, for Lands in Jamaica pass by Grant, and need no Livery and Seisin. If any Covenants were unreasonable and not usual, they are to be shewed on the other Side. Judgment *pro* Defendant. 2 *Mod.* 239, 240.

Such Assurance as Grantee or his Counsel shall advise.

One covenants to make such Assurance as the Plaintiff's Counsel shall advise, and he pleads Performance of Covenants, he cannot afterwards say, *Concilium non dedit advisamentum.* *Cro. Eliz.* 822.

If I am bound to make you such Assurance as *J. S.* shall devise, I am bound at my Peril to procure Notice; but if I am bounden to make such Assurance as your Counsel shall devise, there Notice ought to be given to me. 1 *Leon.* 105.

If a Man covenants to make such reasonable Assurance as Counsel shall advise; usual Covenants may be put in; for the Covenant shall be so understood, but there must not be a Warranty in it. 1 Mod. Rep. 67.

A Covenant to make such Assurance as shall be reasonably devised, must be of such Assurance as differs not from the Bargain. Hob. 275.

In a Declaration on a Covenant to make such good and lawful Estate and Assurance as the Law, as by the Plaintiff's Counsel learned in the Law shall be advised. Plaintiff says, that J. S. was of his learned Counsel, and advised such a Conveyance, and that the Plaintiff gave Notice to the Defendant of the Advice, and requested him to perform: Whether this Advice of Counsel ought to be given to the Man who was to make the Conveyance, or to him for whom it was to be made; and adjudged that it must be given to him for whom the Conveyance is to be made, and he is to give Notice thereof to the Party who is to make it.

If a Covenant be to make such Assurance to the Covenantee as the Covenantee shall advise, and after the Covenantee devises an Indenture, and tenders it to him, and he requires Time to shew it to his Counsel to advise with, which the other denies to him, yet if he seals it not presently, the Condition is broken. 2 Co. 3.

A covenants with B. to make such reasonable Assurance to B. in Fee of such Land, reserving to A. and his Heirs 20 l. Rent per Ann. as Counsel shall advise; and after B. tenders to A. a Deed Poll, by which A. shall enfeoff B. of Land in Fee, reserving the said Rent to A. in Fee: This is not any such reasonable Assurance to bind A. to seal, for this is a Rent-seck, and the Deed belongs to the Feoffee, and then A. without the Deed cannot have any Remedy for the Rent, it ought to have been a Feoffment by Indenture, rendering Rent. 1 Roll. Abr. 423.

If one be bound to make to a Man a sure, sufficient and lawful Estate in certain Lands by Advice of J. D. if he makes an Estate to him according to the Advice of J. D. be it sufficient or not, lawful or not lawful, yet he is excused of the Obligation. Co. 23. b.

A Lease was made for Life by B. and F. and the Covenant was, that he should make such reasonable Assurance as the Counsel of the Lessee should advise. The Counsel advised a Fine with Warranty by B. and F. with Warranty against the Husband and his Heirs; it was moved it was not a reasonable Assurance, because the Warranty did reach to other Land; but the Court over-ruled it, and said it is the ordinary Course in every Fine to have a Warranty, and the Party may rebut the Warranty. Godb. 435.

Covenant to assure such Land by reasonable Assurance, as by the Plaintiff shall be advised and required; who devised and required an Indenture of Feoffment, with Assurance. Covenant to save and discharge him of all Incumbrances made by the Defendant, and for further Assurance, and for not sealing this Assurance the Action is brought. Per Cur', On Demurrer to the Declaration, tho' these Covenants are ordinary and reasonable, yet the Agreement not being to make it with reasonable Covenants, but only reasonable Assurance, he is not bound to seal it, for it is not any Part of the Assurance, and an Assurance may be without Covenants. Cro. Jac. 571. T. Raym. 190. 1 Sid. 467. Quere.

Articles of Agreement, whereby the Plaintiff covenanted to make an Assurance by a Day of Lands, as the Counsel of the Defendant shall advise, and on Perfecting thereof the Defendant is to pay 300 l. and 300 l. at a Day after. The Defendant pleads, the Plaintiff had not at the Time of the Covenant, or after, any Right or Estate. Plaintiff demurs. Per Twisden, He may demur, for tho' the Plaintiff has no Estate, yet if he be required to convey, and doth not then do it by the Time, the Covenant is broken, for the Estate of the Covenantor may be in Trust; sed Cur' contra. This is good in Action by the Defendant for Non-assurance; but here the Action is for the Money, and so the Defendant hath Election to plead as here, or that he tendered special Conveyance by Advice, and the Plaintiff refused; and the manifest Intent of the Parties is not to pay any Money but upon Assurance. 1 Keb. 734, 756.

Covenant to make such Assurance as Counsel shall devise; they say they tendered a Lease and Release devised by Counsel, and sets it forth with the usual Covenants, and with a Warranty: Usual Covenants may be put in, but not a Warranty. 1 Mod. 7. Vide 2 Keb. 685. T. Raym. 190.

Covenant to make such Assurance as Counsel of, &c. shall devise; and the Defendant by Advice of Counsel demands a Release with Warranty. Per Cur', This is not any Assurance, but a Means to recover in Value. 1 Leon. 130.

If *A.* covenants to make such Assurance for the Payment of 100 l. to *B.* as his Counsel shall devise, and his Counsel devises that *A.* shall make an Obligation of 1000 l. for the Payment of 100 l. he ought to perform it; aliter if the Covenant had been to make such reasonable Assurance. 1 Roll. Abr. 423.

A Man covenants to make such Assurance as the Counsel of the other shall devise; and the Counsel adviseth that he shall be bound in a certain Obligation that the other shall occupy the Lands peaceably; he is not bound to perform it, for this is not any Assurance within the Intent of the Covenant. *Per Cur'*, But if a Man be bound to do such Acts for the Assurance of the Manor of *B.* as the Counsel of the other shall devise, and the Counsel deviseth that he shall make an Obligation or Statute that the other shall enjoy it, he ought to perform it, otherwise he hath broken his Covenant.

If a Man covenants to make such Assurance as the Counsel of the Covenantee shall devise, of an Annuity of 30 l. and of 200 l. in Monies; and the Counsel deviseth that he shall make an Obligation, by which he shall oblige himself, his Heirs and Executors, to pay to the other the Annuity, and also 200 l. at certain Days; he is not bound to perform it, for this Obligation is not any Assurance of the Annuity.

A Covenant is to make to the Covenantee, or his Assigns, as good a Lease as Counsel may advise; and that after the Obligee comes to the Obligor and appoints him to make a Lease to *J. S.* he ought to do it, altho' no Counsel adviseth it but the Obligee himself; for by the Words it is not necessary to have the Advice of Counsel, but only that the Lease may be made so good as Counsel may advise.

If the Condition or Covenant be to make such Assurance in Law of certain Lands to the Covenantee or Obligee, as by the Counsel of the Covenantee, upon Request made, shall be advised; and after *J. S.* was of Counsel of the Covenantee, and gives his Advice to the Covenantee, that the Covenantor shall make a certain Assurance; and the Covenantee gives Notice to the Covenantor of the said Advice, and requires him to perform it: He ought to perform it, for it is more convenient that the Counsel shall give the Advice to the Covenantee than to the Covenantor, for that the Covenantor doth not know whether he be of Counsel in this Matter, for he may be of Counsel in one Thing and not in another. 5 Co. 51. b.

If the Condition or Covenant is to make such Assurance to the Obligee or Covenantee as the Obligee or Covenantee shall devise, and after the Covenantee deviseth an Indenture, and tenders this to him, and he requires Time to shew it to his Counsel, he must seal it presently, for the Covenant is peremptory. 1 And. 122. Case 117. 1 Roll. Abr. 424. 2 Co. 3.

Defendant covenanted to seal such a Conveyance of an Estate as Counsel should advise; and the Breach assigned was, that the Defendant did not seal such Conveyance as his Counsel advised; whereas the Plaintiff ought to have said, That his Counsel advised such Conveyance, and the Defendant refused to seal it; and after Verdict upon *Non est factum*, *Pollexfen pro Quer*: It shall be intended the Covenantor's and not the Plaintiff's Counsel, because the Covenantee hath none of the Deeds which made the Title, and so cannot advise any Conveyance. *Holt contra*, It is a vain Construction to say, that the Counsel shall be intended to be the Defendant's Counsel; surely they will be ruled by the Defendant, and then the Plaintiff will be in a very bad Condition: And he cited 5 Co. 19, 20. *Roswell's Case*; and *Allen* and *Wedgwood*, *Bridgman's Reports*. But Judgment was given, that the Defendant, who had the Deeds, ought to have produced his Title to the Counsel, and to have given Notice thereof to the Plaintiff. *Hayward and Gee*, *Pasch. 4 Jac. 2. B. R.*

A Covenant to make an Assignment according to an Agreement between him and the Defendant, and as Counsel should advise, (and says not what Counsel); an Action was brought for Non-performance, and moved that the Plaintiff's Counsel should give the Advice, because he is the Person interested. Answered, that the Defendant had also an Interest, for it is an Advantage to him to make the Assignment for the Saving of his Covenant. But it had been otherwise, had it been to make such Conveyance as Counsel should advise; for that the Person to whom the Covenant is made may chuse whether he will have a Feoffment, Release or Confirmation; and then the Counsel shall advise what Sort of Conveyance is proper. But here it is to make such Assignment as the Parties had agreed upon.

3 Mod. 191, 192.

In Action of Covenant, which was to make such an Assignment to the Plaintiff, Who be according to an Agreement made between him and the Defendant, as Counsel should advise. The Question was, If the Plaintiff's or Defendant's Counsel shall give the Advice? It seems his Counsel shall advise to whom the Covenant is to be made.

1 Bulst. 160.

A Covenant to make such Estate to the Plaintiff as his Counsel shall advise, and faith, *Concilium non dedit advisamentum*: It was a *Quære*, whether he ought not to say, *Concilium nullum dedit advisamentum*; but now it is settled a good Plea, 11 H. 7. 23. a. 6 H. 7. 4. and he needs not alledge what Persons were of his Counsel, and that they gave no Advice, for the Plea is in the Negative: But if he pleads his Counsel gave to him such Advice, he ought to plead what Persons were of his Counsel; then the Replication was, that *J. W.* was of the Plaintiff's Counsel, and no more, and he gave such Advice, &c. which Advisement the Plaintiff notified to the Defendant: Issue on the Advice. 6 Hen. 7. 4.

The Defendant covenanted, that whereas the King had granted the Office of *Anuegeor* to the Duke of *Lenox*, who had made the Plaintiff his Deputy for seven Years, of all Places except *Colchester*; that the Defendant covenanted with them, whereas the said Duke had made a Deputation of that Office in *Colchester* for two Years, he would procure a Deputation to them for seven Years in the same Manner as *Everden* had it, Proviso that they, upon the making thereof, should give Security for the Payment of 100 l. per Ann. Rent for it, and Performance of Covenants; and they alledged that they were always ready to give Security for the Rent, and the Defendant had not procured the Deputation. Defendant demurs: 1. Because they do not alledge Performance of the Promise, but only a Readiness to have given Security; *sed non allocat*; for they need not give Security till Deputation made, and the Non-performance of the Promise ought to come on the other Part. 2. Because it is not shewed that they required a Deputation to be made, and the Quality how the other was made, nor *in facto* that there was any Deputation made to *Everden*; *sed non allocat*; for the Covenants mention that there was a Deputation, and he is estopped to say the contrary; and at his Peril he ought to procure such a one to the Plaintiff as the other was, and that the Defendant ought to procure it immediately after the two Years expired, that the Plaintiff might not lose the Profits thereof after they were due. 3. Because they shewed not the Breach according to the usual Form. *Et sic non tenuit conventionem in hoc, &c. Sed per Cur*, There being a Breach thereof sufficiently alledged, they need not make a Repetition. *Cro. Jac. 297.*

In Covenant to convey Land to make and suffer, &c. all and every such reasonable *Act* Request, and *Acts, Thing and Things*, whatsoever they be, for the good and lawful Assuring and sure Making of the Manor of *S. to J. S. and his Heirs, &c.* and the Breach assigned was, that he requested the Defendant, *Quod ipse conveyaret & assuraret manerium de S. to J. S. &c.* It is sufficiently assigned, for the Defendant ought to have done this upon Request by Feoffment, or some Kind of Assurance; and if after the Plaintiff request a Fine, the Defendant ought to acknowledge it also, and so upon every several Request; but he is not bound to give any Obligation or Recognizance, which is collateral Security. *Telv. 44, 45. Moor 682. 1 Brownl. 84.*

Whereas *B.* per another Indenture had assigned to *C.* a Messuage, &c. Now this Indenture witnesseth, that *R.* covenants that he or his Brother would deliver to *C.* or in his Absence to *E.* at his Shop, a Tarrier of the Premises, and of the Verity of this, *ad optimam eorum peritiam*, upon Request made to them by *C.* would take their Oath before a Master of the Chancery, and also would deliver to one *W.* safely to be kept, to the Use of the said *B.* and *C.* the original Demise whereof he then had a Copy, &c. Tho' in this Case they are not bound to make Oath without Request, yet they are to deliver the original Demise *sans* Request, for the Request refers not to this, but the first, as appears by the Request amongst the Covenants, and not in the Beginning or End. 2 Roll. Abr. 250.

W. covenants for himself, his Heirs, Executors, Administrators and Assigns, within seven Years, upon Request, to convey to the Plaintiff a Copyhold Estate: *W.* dies, a Request must be made to his Executors; tho' *W.* was seised in Fee, the Executors are bound to see it done. 2 Bulst. 158.

Covenant to make a Lease of so many Rooms upon Request, and the Covenantor prostrated Part, the Plaintiff did not aver in his Count, that he requested the Defendant to make him a Lease; but it seems not to be necessary, the Defendant having disabled himself by the Prostration of the Buildings. 1 Lut. 308.

If

If *A.* covenants with *B.* upon reasonable Request to him made by *B.* to surrender certain Land and all his Interest in it to *B.* and also to permit *B.* to take the Profits of the Land; in this Case the Request doth not go to the taking of the Profits, but only to the Surrender, so that he is bound to suffer him to take the Profits without Request, altho' there is but one Word that goes to the Whole. 2 Roll. Abr. 248, 249.

The Condition was, to make Assurance of certain Lands to the Obligee before the tenth of March 17 Eliz. and if it fortunes that the Obligee refuse to accept the Assurance, and shall make Request to have 100*l.* in Satisfaction of it; then if upon such Request within five Months after he pay the 100*l.* that then, &c. and at the Day he refused the Assurance, and afterwards, 27 Eliz. he maketh Request to have the 100*l.* The Question was upon Demurrer, whether this Request was sufficient for the Time? *Per Cur'*, A Request at any Time during his Life was good, and he is not restrained to make it at or before the Day the Assurance was to be made. Judgment *pro Quer'*. Cro. Eliz. 136. 1 Leon. 185.

Covenant or Condition before Michaelmas to make, acknowledge and suffer, &c. all and every such reasonable Acts and Things, whatsoever they be, for the lawful Assuring, sure Making, of the Manor of *D.* to *J. S.* and his Heirs. Defendant pleads, that before Michaelmas the Plaintiff *rationabiliter non requisivit le Defendant ad faciend'*, &c. *aliqua rationabilia actum & acta quæ forent pro bona & legitima assurantia* of a Manor. Plaintiff replies, *quod* such a Day before Michaelmas he requested the Defendant, *quod ipse conveyaret & assuraret manerium de D. to J. S. secundum tenorem conditionis (conventionis) præd'*: found *pro Quer'*. Moved in Arrest, that no sufficient Breach was found, for the Plaintiff ought to have required an Assurance in certain, *viz.* Feoffment, Fine, &c. The Condition being special, all and every Act, &c. *sed non allocatur*; the Issue is good, and the Condition is broken, for by the Condition the Defendant is to do all and every Act whatsoever; so that if the Plaintiff request a Fine, &c. then when the Plaintiff requested to convey the Manor in Generalty, the Defendant ought at his Peril to do it by some Kind of Assurance; and if he makes a Feoffment, yet if after the Plaintiff request a Fine, &c. he must do it. Telv. 44. 1 Brownl. 84. Moor 682.

Tender.

An Assurance ought to be drawn according to the Covenant; it was agreed 22 Jan. 28 Eliz. That the Defendant should make an Indenture of Bargain and Sale of all the Lands which the Defendant then had in Yarmouth, and on 14 Sept. 29 Eliz. the Plaintiff tendered to the Defendant an Indenture of Bargain and Sale of all the said Lands which he then had in Yarmouth, *Habend'* to him and his Heirs, *secundum conclusionem & agreementum præd'*; which the Defendant refused to seal. The Indenture of Bargain and Sale is not warranted by the Agreement, because it may be he had other Lands on the 14th of Sept. 39 Eliz. than he had at the Time of the Agreement, so needs not to seal it, tho' in Truth he had not any more Lands; tho' Popham said he had more Lands: He ought to have shewed it. Cro. Eliz. 660.

If the Assurance drawn agrees in Substance with the Covenants, tho' they vary in Words, it is not material; as if it were covenanted to assure all his Lands in *D.* and the Assurance is drawn by particular Names, it is good. *Ibid.*

First Act.

If *A.* leases to *B.* for twenty-one Years, and covenants at any Time during the Life of *B.* upon Surrender of the old Lease, to make a new Lease for the Residue of the Term, and after *A.* leases to a Stranger: Tho' *B.* by the Words of the Indenture ought to do the first Act, *viz.* make a Surrender, yet because *A.* has disabled himself to make a new Lease, *B.* shall not be obliged to surrender his old Lease without Possibility of a new Lease, but may bring Covenant without making any Surrender. 5 Co. 20, 21.

So if a Man covenants to enfeoff *J. S.* upon Request, and after enfeoffs another, *J. S.* may have Covenant without Request. 5 Co. 21. a.

A Covenantor covenanted with the Covenantee, that he at the Costs of the Covenantee would assure such Lands to him before such a Day; the Covenantor ought to do the first Act, *viz.* to give Notice what Assurance he will make, so as the other may know what Costs he is to tender; *aliter* if he covenants to make some certain Assurance, as Fine, Feoffment, &c. Cro. Eliz. 517. Owen 157. Moor 157. 5 Co. 22. And it is all one when the Covenant is general and when it is particular; as to make a Feoffment, the Covenantor ought to do the first Act there if he will have it by Parol or Indenture.

Cov

One covenants to make an Estate in Fee at the Costs of the Covenantee; the Covenantor is to do the first Act, viz. to let him know what Conveyance he will make: So *Twiford and Buckley's Case*, upon an Indenture of Covenants, wherein one of the Parties did covenant to make a Lease for the Life of the Covenantee, and for two other Lives as he should name, and the Covenantor was to give Possession. The Breach assigned was, that the Defendant had not made Livery and Seisin, and upon Performance pretended, the Plaintiff did demur; and upon great Debate, it was resolved that the Covenant was not broken, for that the Plaintiff had not done that which was first to be performed on his Part, viz. to name the Lives. 2 Mod. 75.

Covenant or Statute with Defeasance, to make such good Assurance of an House to W. with such Covenants which he should accept and signify under his Hand to be reasonable, or should pay to him before the first of August 350 l. He surmisseth he was always ready to make the Assurance, and that the said W. had not signified what Assurance he would accept, nor required any. Per Cur', He is not bound to devise any Assurance or Estate; but it is in his Election to accept an Estate tendered, or the Money, and there cannot be an Acceptance but where there is a Tender on the other Party, and therefore the other Party ought to have devised the Estate, and procured W. to accept thereof, otherwise he ought to pay the Money. Cro. Eliz. 718.

A Condition or Covenant to make a sufficient Lease to the Obligee or Covenantee before such a Day, the same to be made at the Costs of the Obligee: It is a good Plea, that the Plaintiff did not tender the Costs to him, and if then, that he was ready. Moor, pl. 72.

If the Assurances are to be made at the Costs of him to whom they ought to be made, he may require the Assurance to be made by Parcels; aliter when the Covenantor is to be at the Charges: Yet there, if the Party requires an Assurance of Parcel, the Covenantor must do it, but then he is discharged from making any Assurance of that which remains. Cro. Eliz. 681.

When I am obliged that J. S. who is a Stranger, shall levy a Fine to the Obligee, the Obligee is bound to sue forth a Writ of Covenant, for it is no Reason to compel the Obligor, who is a Stranger to the Estate that passeth by a Fine, to sue a Writ of Covenant; but if I am obliged to you that J. S. shall levy a Fine to J. N. in such Case the Fine ought to be levied at my Peril tho' J. N. will not sue a Writ of Covenant. Winch 29.

If one covenants generally to levy a Fine of Lands, he is not bound thereby to go before Commissioners by *Dedimus*. Stile's Pract. Reg. 75.

A covenants at the Costs of B. to assure him such Lands before such a Day; the Day was past, and no Assurance tendered by the Covenantor, nor Costs by the Covenantee: The Covenantor is to make the Assurance, and that may be what he pleaseth, by Fine, Feoffment, &c. and therefore he ought to notify his Readiness to do it, and what he will do, so as the other may know what Cost to tender: But if he had covenanted to make some certain Assurance, as Fine, Feoffment, Recovery, &c. aliter. Cro. Eliz. 517. pl. 42. The Covenantor ought to do the first Act, viz. notify to the Covenantee what Estate he will make, so that the Covenantee may know what Sum to tender, and it is all one whether the Covenant is general or particular, as to make a Feoffment. Moor 457. 5 Co. 22. b.

A Covenant was, that the Covenantor would make such Assurance before such a Day to the Covenantee, at the Covenantee's Charge (but there was no Request mentioned in the Covenant on either Part): Here the Obligor hath his Election of what Manner of Assurance he will make, and then the Obligee is to provide the Costs for it. Moor 454.

Thirdly, To save harmless and indemnified.

A Man sold his Land, and covenants to save the Vendee harmless on Request: It was said, if the Land be extended by Force of a Statute before the Request, the Covenant is not broken, for that now the Covenant is become impossible by the Negligence of the Covenantee himself. Moor 67.

A Covenant was, that the Covenantee, his Heirs and Assigns, shall and may lawfully enjoy and hold a Messuage, &c. without the Let, &c. of the Covenantor or his Heirs, or of every other Person discharged, or upon reasonable Request, saved harmless by the said Covenantor from all former Gifts. Defendant pleads, no Request was made to save him

him harmless. Judgment *pro Quer'*, because the Defendant hath not answered to all the Covenants, viz. to the enjoying of the Lands; for there were two Covenants, the enjoying and saving harmless. *Moor 591. pl. 797.*

A Covenant was, *whereas J. F. claimed to have a Lease for Tears of the Manor of Dale, made to him by W. that the Defendant would keep without Damage from all Claim and Interest to be challenged by J. F. de tempore in tempus, during the Tears, &c.* The Defendant pleaded, that after the making of the Obligation until the Action brought the Plaintiff was not damnified *Ratione dimissionis*: The Plea is good, for if he were not damnified *Ratione dimissionis*, then he was not damnified by Reason of any Claim or Interest. *3 Lev. 118.*

Covenant was brought upon Indenture of Lease for nine Years, dated 1 June 16 Car. 2. which was to save the Plaintiff harmless of all Evictions during the Term; and the Breach assigned was Eviction, 26 June 16 Car. 2. Defendant pleads, that the said Deed was *Primo deliberat'* 1 July 17 Car. 2. which was after the Breach assigned; and pleads further, that the Plaintiff was not ejected after the Delivery of the Deed; upon which the Plaintiff demurs. *Et per Cur'*, These Words during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it commenceth in Point of Interest; and so Judgment given for the Plaintiff. *Sid. 374. Cro. Jac. 263.*

Covenant to save harmless and indemnify the Plaintiff and his Lands in Sale from an annual Rent of such a Lease during the said Term. Defendant pleads, *Quod a tempore confectio' scrip' præd' bucusq; exoneravit & conservavit* the Plaintiff and all his said Lands from the said Rent; *Et hoc, &c.* Plaintiff demurs, he ought to shew *Quomodo exoneravit*, it being a Plea in the Affirmative; had he pleaded *Non damnificat'*, it had been good. *Cro. Jac. 634.*

In Debt on Bond to save harmless from lawful Eviction; Dower being recovered after Bar by Fine and Non-claim, without Exception to it, which might have been taken: It was held no lawful Eviction, and so the Defendant found Not guilty, for the Plaintiff must sufficiently intitle himself. *1 Keb. 379.*

Covenant to save harmless from Suits and lawful Evictions. Defendant pleads Performance. Plaintiff replies, that *J. S.* took out a Writ of *Hab' fac' possession'* out of *B. R. Debito modo execut'*; and by Virtue thereof entered on the Possession of the Plaintiff, and did expel and amove him. Defendant demurs; Judgment *pro Defendant*. *Debito modo* is not sufficient without shewing Particulars: *Contra* in the Spiritual Court; as in Debt for Rent to say *A.* did demand *debito modo*, it is ill; the *Hab' fac' possession'* doth always recite the Term of the Judgment, and that must at least be shewed, but not the Title of him that evicted. *Per Windham, 1 Keb. 379, 413. 1 Lev. 83.*

In Consideration of a Promise of *7l. per Ann.* for five Years, the Defendant promised to save harmless against all; but *P.* the Plaintiff shewed, that one *M.* entered: Here is no Lease as there was in the Cases of *Brocham* and *Cham*, and *Gotier's Case*, *Dyer 328. Hob. 35.* And so no lawful Title of Entry need to be shewed, the Debate not being concerning the Title, but only concerning the Occupation. *3 Keb. 755. 2 Lev. 194.*

If a Man enters into a Bond with another for his Debt, with Condition to pay Money at a Day, and the Principal assumes to discharge and save him harmless from the said Obligation, and after he does not pay the Money at the Day, by which the Bond is forfeited, and the Surety to avoid Suits pays the Money: He may have an Action on the Case against the Principal, for the *Assumpsit* is broke; and the Court said it is a stronger Case by Reason of the Word *Discharge*. *H. 14 Jac. B. R. 1 Roll. Abr. 433. But,*

If a Lessee of a Term, rendring Rent, assigns it to *B.* and *B.* covenants to keep *A.* without Damage of all Rents payable to the Lessor, and after *B.* lets Parcel of the Land to *A.* and after the Hay of *A.* is there distrained for Rent in Arrear, yet the Covenant is not broken, for that the Distress for the Hay is unlawful, and a Trespass, and the Sufferance of the Rent to be in Arrear without actual Damages, is no Breach of the Covenant. *1 Roll. Abr. 433.*

If *A.* and *B.* are bound in an Obligation to perform certain Covenants contained in an Indenture, whereof one is to pay certain Monies, and *C.* covenants with *A.* and *B.* to save them harmless of all Things contained in the said Indenture, and after the Money is not paid according to the Indenture, whereby the Obligation is forfeited;

yet it seems C. is not bound to save them harmless from the Bond, for it is a Thing collateral to the Indenture. *Mic. 5 Jac. Scot and Pope v. Griffin.*

Condition of a Bond, reciting, that whereas the Plaintiff and one H. were bound in another Bond for Performance of Covenants: If the said H. should perform the Covenants in that Indenture, and should save the Plaintiff harmless of the said Bond, then, &c. The Defendant on Oyer of the Condition pleaded, that H. had performed the Covenants in that Indenture, and that he had saved the Plaintiff harmless of that Bond. Upon a general Demurrer the Plea is ill in Substance, both because the Covenants in the Indenture were not set forth, and some of them might be in the Negative, &c. and also because he hath not shewed how he saved the Plaintiff harmless. *Allen 72.*

The Plaintiff declared that the Defendant let to him such Land, and covenanted to save him harmless against all Suits, Evictions or Expulsions. Defendant pleads, *J. S.* ousted him by an *Hab' fac' possession'*. Plaintiff demurs: The Plea is ill for two Causes; First, Because he pleads Expulsion by an Execution, without shewing any Judgment: He ought to have said, that *J. S.* brought Ejectment upon which *taliter processum fuit quod consideratum fuit*, that he shall recover; and upon this sued an *Hab' fac' possession'*. Secondly, He ought to have shewed that *J. S.* had legal Time before the Lease, upon which he brought the Action; for the Covenant doth not extend but to Expulsions upon *eigne droit*, and perhaps in this Case *J. S.* might recover by Virtue of a Lease made to him by the Plaintiff himself. *1 Lev. 83. 2 Keb. 379.*

Fourthly, Concerning Marriages and Portions.

T. in Consideration the Plaintiff would marry his Daughter Sarah, promised to give him as much in Marriage with her as he gave in Marriage with any of his other Daughters, and alledgeth he had three Daughters, Alice, Anne and Sarah; that Plaintiff married Sarah; and that Alice married E. and that T. gave 100*l.* and a Bond of 100*l.* to pay to E. 50*l.* more at three Months End after his Decease, if the said Alice, or any Issue of her Body, were then living; and assigns for Breach, that he had only paid him 40*l.* in his Life-time, and that he had requested of the Defendant's Executors 60*l.* more, and a Bond for the Payment of 50*l.* and avers that Alice had such Issue alive. *Per Cur'*, He ought to have averred that Sarah, or some Issue of her Body, was then alive; but the Judges agreed not, whether the Covenant or Promise extends only to Money given, and not to the Bond. *Cro. Car. 186.*

In Consideration of Marriage the Defendant promiseth or covenants he would pay for the Wedding Apparel. Plaintiff alledgeth he married her, and provided for her two Gowns and two Petticoats, and the Defendant had not paid; and it was moved for Error, that he ought to pay for one Gown and one Petticoat, and no more; *sed non allocatur*; Wedding Apparel to be taken according to common Parlance, &c. on the Wedding-Day, and used sometime after, the Declaration is good. *Cro. Car. 53.*

If A. covenants with B. whereas there is a Marriage intended to be solemnized between A. and C. the Daughter of B. at or before the 14th Day of August next; and whereas the said B. hath paid A. 1000*l.* Portion, &c. the said A. in Consideration thereof doth covenant with B. that he within one Year of the Day of the Marriage will assure Lands of the Value of 400*l.* per Ann. Altho' the Marriage be not before that Day, yet the Covenant must be performed. *Trin. 21 Jac. B. R. Gregory and Lane.*

Upon Marriage the Plaintiff covenants to pay to his Son-in-law and Daughter 20*l.* per Ann. and upon Demurrer the Question was, if 20*l.* by the Year shall be intended for one Year only, or for their Lives: It shall be for their Lives, and the Maintenance shall be as lasting as the Marriage; it is in Lieu of a Portion, and shall be taken strongly against the Covenantor. *1 Sid. 151. 1 Lev. 102.*

If one covenants to pay 10*l.* to the Covenantor at the Day of Marriage of the Covenantor, the Covenantor is not bound to give Notice to the Covenantor before his Marriage, at what Day he will be married; but the Covenantor ought to take Notice of it at his Peril, inasmuch as he has taken upon him to pay it at the Day. *1 Roll. Rep. 355. Cro. Jac. 404.* So if it were a Covenant to pay so much within a Year after B. shall marry C. *1 Roll. Abr. 463.*

If *A.* seised of Lands in Trust for *B.* covenants with *J. S.* that in Consideration that he would marry his Daughter, that he himself would stand seised of the Land to the Use of *J. S.* for Life, Remainder to *D.* in Fee; the Marriage takes Effect. *J. S.* not having Notice of the Trust, it seems that the Estate for the Life of *J. S.* nor the Remainder of *D.* are not subject to the Trust, because they come in under a valuable Consideration, viz. the Marriage, and have not Notice of the Trust. 2 Roll. Abr. 781.

In *Assumpsit*, about the Communication of the Marriage of the Plaintiff's Daughter, the Defendant promised him, that if he would hasten the Marriage, and have a Son within twelve Months then next following, he would give him 100*l.* He sets forth he did hasten the Marriage, and had a Son within twelve Months after the Marriage; and a Verdict *pro Quer'*; and it was moved in Arrest of Judgment, that the Plaintiff had not set forth he had a Son within the Time, the Words, then next following, shall be referred to the Time of the Communication. But *per Cur' contra.* 1 Vent. 262.

If I covenant with a Man that I will marry his Daughter, and he covenants with me, that for the same Cause he will make an Estate to me and his Daughter, and to the Heirs of our two Bodies begotten, of his Manor of *D.* he shall not make it till we are married. Godb. 8.

Defendant covenanted that if the Plaintiff, *ad instantiam defendentis*, would marry the Defendant's Daughter, he would pay him 20*l.* and give him twenty French Pieces towards his Wedding Dinner; and alledgeth in Fact, he married the Defendant's Daughter, and had required him to pay the 20*l.* and he had not paid it; and that twenty French Crowns amounted to six Pounds in our English Money, and the Defendant had not paid them. Object. 1. He avers not that he married her *ad instantiam defendentis*: But *per Cur'*, It shall be intended so; and twenty French Pieces is not twenty French Crowns, for it may be any other Pieces. But *per Cur'*, French Crowns are the common Coin of France, and here known, and it shall be intended according to the usual Speech. Cro. Car. 195.

Covenant to pay 300*l.* in Consideration of a Marriage between the Plaintiff and his Daughter; which 300*l.* was to be paid within three Months after that he shall come to the Age of eighteen Tears, or within eighteen Days of the Marriage, after Notice made, which shall first happen. *Per Cur'*, The Notice shall relate to both, because it is uncertain which of them shall happen first. Latch 158.

Covenant was to assure such a Copyhold to the Plaintiff if he married his Daughter. *Per Cur'*, It is sufficient for the Plaintiff to alledge *licet sapius requisitus*, without giving Notice of the Marriage, and he need not shew a Court to be holden. Cro. Jac. 102.

A Marriage Portion to be laid out, &c. is not Assets. 2 Keb. 841.

Settlement of Lands on precedent Agreement and Treaty of Marriage and Portion paid, is sufficient against the Purchaser tho' there were no Article. 3 Keb. 6.

Bond for Performance of Covenants; one was to marry *S.* the Daughter; another that Sir *E. S.* and his Wife should levy a Fine of such Lands to the Defendant, and to the Plaintiff's Daughter *S.* and to the Heirs of their Bodies. 3. That the Inheritance of the Premises should remain in the said Sir *E. S.* or himself, until the Fine levied. 4. Whereas he had granted a Lease for Years to *S.* the Plaintiff's Daughter, that he had not made any former Grant, nor would make any Grant thereof without the Plaintiff's Assent. The Defendant, *quoad* the last Covenant in the Negative, pleads that he had not made any former Grant of the Lease, nor had made any Grant after the Obligation without the Plaintiff's Assent. *Et quoad omnes alias conventiones*, that he had performed them. Plaintiff demurs:

1. Because the Covenant to levy a Fine is an Act to be performed by a Stranger, and it is an Act to be performed on Record, in both which Cases he ought to plead how he had performed it; and it is not sufficient to plead general Performance, for Acts of Record ought to be shewed specially, and the Answer to them is only *Nihil Record*, and no other Issue can be taken.

2. Because the Covenant being in the Disjunctive, he ought to shew specially which of them, and not generally.

3. He pleads he did not grant without the Plaintiff's Assent, which is a Negative pregnant, and so not good; and all allowed *per Curiam.* Cro. Jac. 559. 2 Roll. Rep. 159.

Fifthly, Concerning building Houses, &c. Vide Repairs ante.

Lessee covenanted to build a House upon the Land within ten Years. Lessee assigned his Term. Action is brought against the Assignee. Assignee pleads, that the Lessor entered, and had the Possession for Part of the ninth Year. *Per Cur'*, He ought to have shewed that he held him out with Force, and would not suffer him to build, (for it may be entered by Right for Non-payment of Rent) as indeed it was. Godb. 69, 20.

In Covenant to build a House, *juxta regulas præscript'* in the Stat. 19 Car. 2. c. 23. the Breach was assigned in not covering with Cantilevers with Lead, *juxta regulas præscript'* in the aforesaid Act of Parliament; to which the Defendant demurred. *Per Twisden*, It should be recited that the Statute doth so prescribe. *Wild contra*: This is not issuable, but confessed by the Demurrer not to be done. *juxta regulas præscript'* in prædict' actu; but the other is a sufficient Averment. But C. J. Hale gave Judgment, because the very Covenant itself stops to say it was otherwise in the Act of Parliament; but were this not the Covenant itself the Breach were too short, unless it be averred that the Act of Parliament is to cover with Cantilevers, &c. 3 Keb. 142, 151. 2 Lev. 85.

If A. covenants with B. to build a House by a Day, and B. doth forbid him, and thereupon he forbears to do it; in this Case the Covenant is broken: But if he by actual Impediment hinders him, or be the Cause why the Thing is not done, then the not doing it is no Breach of Covenant.

Covenant for not building of a House; Defendant covenanted that he would erect three Houses upon such Land demised to him, unless he were restrained by the King's Proclamation. Defendant pleaded, such a Day and Year the King made a Proclamation to restrain building. Plaintiff demurs, because a Proclamation was pleaded, and no Place expressed where the Proclamation was made, and so no Venue, if Issue should be joined; also because it is not pleaded to have been *sub magno sigillo Angliæ*, for a Proclamation binds not unless it be under the Great Seal; and if it be denied, there can be no Issue thereupon, (but only *Nul tiel Record*) which cannot be unless he pleads it to be *sub magno sigillo*. Cro. Car. 180.

Sixthly, To permit Things to be done.

Plaintiff demised two Houses in Mark-lane in the Parish of St. M. W. with all Ways, Passages, &c. for twenty-one Years, at 24 l. Rent. The Defendant covenants that she would permit at his own Costs to make a Drain to convey the waste Water from the demised Houses and the main Shore in Six-Bell Yard; he shews he entered, and that the Defendant had broke the Covenant, *eo quod*, that she being possessed of a Term for Years then and yet to come of a certain Parcel of Land and two Stables lying between the demised Premises and the said main Shore in Six-Bell Yard, and by which the Drain ought to run; and then sets forth, the Defendant had assigned all her Term in the said Piece of Ground and Stables to T. who entered and died possessed; and M. his Wife, as Administratrix, possessed herself of it, and married to B. and the said B. and his Wife *non permiserunt* to make a Drain, but refused. Defendant pleads, the said Passage being in the demised Premises, is situate in the Parish of St. James aforesaid, and leads from the demised Houses in Six-Bell Yard, and such a Drain might have been made, and still may be; and the Defendant did permit the Plaintiff to make a Drain, and the Plaintiff might have done it. Plaintiff demurs. *Per Cur'*, There shall not be Election to make the Passage thro' the Stables, &c. if other proper Ways may be.

But there were Exceptions to the Declaration:

1. There is no certain Place for the Houses demised, which are said to be lying and being in the Parish præd', whereas there are two named before, St. Margaret's and St. James's.
2. The Breach, *eo quod*, they did not permit, is no positive Affirmation.
3. The Covenant is, that the Defendant, her Executors, Administrators and Assigns, shall permit: And the Breach is laid in the Assignees not permitting. And it appears in the Pleading that this Assignment was made to Tomlinson divers Years before this Demise to the Plaintiff; and this Covenant cannot be extended but only to the Assignees of the Defendant after the Demise made.

4. It is said *Quod non permiserunt*, but no special Disturbance, which ought to have been particularly set forth for the Court to judge of.

Per Cur', All these Exceptions but the second are fatal, especially because the Disturbance is laid to be by an Assignee who came in before the Demise. 1 *Sand.* 116. 2 *Vent.* 277.

A Man makes a Lease for Years, and a Bond with Condition that he shall suffer the Lessee peaceably and quietly to enjoy during the Term, and that without Trouble or Eviction of the Lessor, or any other Person, then the Obligation to be void. *Per Cur'*, The Word suffer shall rule all the Residue of the Sentence; so that by the Entry of a Stranger on the Lessee, without Procurement of the Lessor, the Obligation is not forfeited. *Dyer* 255.

In Covenant the Plaintiff declared that he had and held the Office of Chamberlain to the Queen Dowager, and that by Deed produced in Court he agreed with the Defendant for the Sale of the said Office, and that the Defendant should hold it with the Consent of the Queen; but by the said Writing the Defendant obliged himself that the Plaintiff should have, receive and enjoy, during the Life of the Plaintiff, divers Pensions and Salaries belonging to the said Office, and that the Defendant should receive no Part of them. Then he shews, that the Defendant at his Procurement, and with the Approbation of the Queen, was admitted, and enjoyed it, and ten Years were in Arrear of a Salary due to the Plaintiff, which the Plaintiff had not received, and the Defendant had not paid him, *licet sapius requisitus*. Defendant pleads, that he from the Time of the Agreement to the Time of the Writ brought, permitted the Plaintiff to receive yearly the Profits according to the said Agreement, *absq; hoc*, that the Defendant received any Part of the Profits of the said Office. *Per Cur'*, The Plea is good, and that upon the Agreement the Defendant was not bound to pay the Money due, but only restrained from intermeddling. 2 *Vent.* 79.

Where no Act is to be done but only a Permittance, Defendant needs not plead it specially, *Et non permisit*, or *permisit*, is a good Plea.

One is bound to permit his Tenants to use the Common, and that he shall not alter the Course of the Common, *quod permisit*, and that he did not alter, &c. is a good Plea generally. *Dyer* 279. pl. 6.

A Covenant that the Plaintiff to such of the said Lands as by the Custom of the Country *Tunc jacebant friscæ*, should have free Ingress, &c. The Defendant pleads, *Quod permisit querentem intrare*, &c. *in tales terras quales tunc jacebant friscæ secundum consuetudinem patriæ*; he needs not shew what Lands did lie fresh, for here is no Act to be done, but a Permittance, and it was in the Negative, and not a Disturbance, in which Case Permission is a good Plea. 1 *Leon.* 136.

L. covenants with S. that he would suffer him and his Assigns to have free Ingress, &c. into his House and Shop, without Let or Interruption of the said L. and that S. *appunctuavit* one T. *ut servientem suum in messuagium*, &c. *intrare*, *Et præd' L. expulit*. It was moved in Arrest; 1. It is alledged that L. expelled the Servant, but this was the Expulsion of the Master. 2. *Appunctuavit intrare*, and saith not what Time, for perhaps his Licence to enter might be determined. 3. It is not said at what Time he entered, but *super quo intravit*; but all these Exceptions were over-ruled. 2 *Roll. Rep.* 78.

A. and B. are Executors of C. and A. alone covenants with N. that if N. marries the Daughter of C. it should be lawful for N. to view and search all such Accounts as concerned the Estate of C. payable to that Daughter. N. marries her, and after N. requested A. and also B. the other Executor, who had those Accounts to view the same: B. refuseth to shew them; by this A. hath broken his Covenant, for thereby in Law A. undertook that any Person that had such Accounts should suffer N. to view and search them. 1 *Roll. Abr.* 431.

If A. (being a common Brewer) covenants that B. shall have seven Parts of all his Grains made in his Brewbouse for seven Years; and after A. puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are spoiled: This is a Breach, because in all Contracts the Intention of the Parties is to be considered; and here it was the Intention of the Parties, that B. should have the Grains for the Use of his Cattle; and they will not eat them when Hops are put into them. *T. Raym.* 464.

Seventhly, *To account.*

The Covenantor, who was Bailiff of a Manor of the Covenantee, covenants to render a just Account before such a Day of all the Rents of the Manor which he hath received: He pleads to an Action against him, that before the said Day he had made an Account of all the Rents which he had received, and because he did not shew what Sums he received, the Plea was ill. *Cro. Eliz.* 749.

Debt on Bond wherein the Testator did acknowledge himself to be indebted in 40 l. to the Plaintiff, which he did covenant to pay when such a Bill of Costs should be settled by two Attornies, indifferently to be chosen. *Per Cur'*, It is not a *solvend'*, but a Covenant, which did not take away the Duty ascertained by the Obligation; and if it should not be a Covenant, but an intire Bond, then it would be in the Power of the Obligor whether ever it should be payable; and the Plaintiff having named an Attorney, ought to recover. *2 Mod.* 266.

The Plaintiff being possessed of a Term for six Years of a Tavern in Gracechurch-street, let the same by Indenture, with Plate and divers Utensils in the House to the Defendant for three Years. The Defendant in Consideration thereof covenanted with him and his Assigns, *that de mense in mensem mensatim* he would upon Request render to him and his Assigns, an Account for every Tun of Wine he did sell there, and pay him for every Tun sold 30 s. And there were divers other Covenants on his Part, (some in the Affirmative and some in the Negative); he pleaded Covenants performed (which was ill in that). The Plaintiff replieth, that upon the last Day of July he required the Defendant to give him an Account of a Tun of Wine sold at such a Time, which he refused to do. The Defendant rejoined, that before that Time the Plaintiff being possessed of a Term in the Tavern for divers Years, Part whereof were yet to come, (but shews not what Time in certain, nor the Commencement of it, and therefore it was agreed by all it was ill in that) granted the Residue of the said Term then to come to B. to which Grant he attorned, after which Time he did not refuse. Plaintiff demurs. This is a Rent reserved, and in Nature and Lieu of the Rent; but the Request of an Account was to be within the Month, and this Request, as appears by Computation, was the Day after the Month, which the Secondary certified, and for that Cause Judgment against the Plaintiff. *Cro. Eliz.* 62.

In Action of Covenant to account for Money received during the Lunacy of Sir B. W. The Plaintiff shewed there was 800 l. received, and saith not during the Lunacy, which *per Cur'* is ill; *præter Windham*, who conceived this ought to be shewed by the Defendant in Discharge. It is said the Defendant had laid out the 800 l. in Reparations of Fences, and doth not shew he had accounted, which *per Cur'* he ought to do. And it is no Plea to say the Plaintiff did not assign Auditors, as it is in Account against Bailiff. Judgment *pro Quer'*, as to this Breach upon the want of Account. *2 Keb.* 145. *1 Saund.* 47.

In Action of Covenant the Plaintiff declared, that whereas it was covenanted between the Plaintiff and Defendant, *that each of them upon Request should be accountable to the other for all the Corn growing upon such a Place, and that upon such Account the one of them should deliver to the other the Moiety of the Corn, or the Profit of it*: And whereas the Defendant had taken all the said Corn, *viz.* twenty Loads of Wheat, &c. growing upon the said Land, and had been required to render Account of the said Corn, which he refused to do. The Defendant traversed the Request, and it was demurred to. It was moved that the Traverse was not good; but the Defendant ought to say, that the Plaintiff did not require him *modo & forma*, but the Exception was not allowed; but *per Cur'*, The Traverse was held good. *2 Leon.* 5.

Debt on Bond or Covenant to give an Account of all such Monies which should come to his Hands, and to pay them to the Plaintiff. Defendant pleads, no Monies came to his Hands. Plaintiff replies, such a Sum came to his Hands. Defendant demurs. *Per Cur'*, The Replication is ill, in not mentioning that he refused to come to an Account, and that Breach ought to be assigned. *1 Lev.* 226. *1 Sid.* 340. *1 Saund.* 122.

Covenant to pay so much out of the Profits of an Office which shall be clear beyond such Sum: The Declaration shews not the Place of Account, nor the Sum clear, it is ill. *1 Sid.* 304. *Bucknall's Case.* *2 Keb.* 92.

Covenant in Writing sealed, by which the Defendant Testator acknowledged himself to be accountable to the Plaintiff for all such Money that shall be charged by him upon

A. to be paid to B. and saith, he charged so much upon A. to be paid to B. and that he had not paid it, for which he brought this Action against the Executors; Covenant well lies; tho' Cro. Car. 128. Geary and Reason's Case was cited to the contrary; and so it will lie upon Words in a Deed purporting an Agreement for Payment of Money. It was moved, there is not any Notice given what the Money was, and that was not paid over: But *per Cur'*, He having taken it upon him, and the Person being certain, so that he might inform himself, and the Agreement not being to pay it upon Notice, the Defendant is bound to take Notice himself. Judgment *pro Quer'*. 1 Lev. 47.

Upon a special Agreement that the Plaintiff shall enjoy and receive the Profits and Salary of an Office during Life: Upon Covenant brought the Defendant pleaded, that he suffered the Plaintiff to enjoy and receive the Profits, &c. And *per Cur'*, It is good, for it is not a personal Warranty or Engagement to pay the Salary. The Defendant is not bound by this Agreement to pay the Money, but only restrained from intermeddling with the Profits and Salary. 4 Mod. 43.

A Condition recited, that the Defendant served the Plaintiff as Clerk to a Brewer, and that if he performed such Covenants, &c. The Defendant pleaded, *Performatum omnia*. Plaintiff replies, one Covenant was to give the Plaintiff a true Account of all such Monies as the Defendant should receive when requested; and alledged that 30*l.* came to his Hands, and he requested, and he refused. The Defendant rejoins, and confesseth the Receipt; but saith, that before the Request made by the Plaintiff he laid it up in the Plaintiff's Warehouse, and that certain Malefactors (to the Defendant unknown) stole it away; *Et hoc paratus*, &c. Plaintiff demurs generally:

1. Because it is a Departure.

2. He ought to have concluded to the Country. Plaintiff alledgeth, the Defendant received 30*l.* and gave no Account. Defendant in his Rejoinder sets forth he did give Account; and there was an Issue; both were over-ruled.

First, It is no Departure, but a Fortification of the Bar; for shewing that he was robbed, is giving an Account.

Secondly, The Conclusion is proper, because the Defendant alledgeth new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Rejoinder; he doth not say he gave an Account, but setteth forth the special Matter how. 1 Vent. 121. 2 Lev. 5.

Debt by a Brewer on a Bond to perform Articles against his Clerk: One was, that the Defendant should deliver such Ale and Beer Weekly as should be delivered unto him to such Customers as he had in his Charge, and to receive the Monies due for the same, and should account with the Plaintiff every Saturday Weekly for such Money he should receive: For Breach the Plaintiff assigns, that the Defendant did not account with him for such Monies as he had received on Saturday the 25th, &c. Verdict *pro Quer'*. Judgment was arrested; for the Breach was uncertainly alledged, because the Plaintiff doth not shew the Defendant had any Customers in his Charge, or who they were, or that he had delivered Ale or Beer to them, or received any Money of them. Stile 473, 476.

Eighthly, Concerning Apprentices and Servants.

An Infant by Custom of the Land may bind himself Apprentice by Indenture, and it shall be good. 2 Bulst. 192.

Action by Apprentice.

An Action of Covenant was brought by an Apprentice, who assigned for Breach, that the Testator of the Defendant had covenanted to instruct the Plaintiff in the Art of a Sadler for seven Years, and to find him Meat and Drink during this Term; and that the Defendant after the Death of the Testator did put the Plaintiff out of his House, and so kept him from Meat and Drink. It was agreed, that *Et sic* is a sufficient Averment of the Breach, and that is not but Matter of Form: And as for the Law, the Opinion of the Court was, that the Apprentice remains an Apprentice to the Executor; for tho' he cannot instruct him, yet he may find him Meat and Drink, &c. *Per Hide*, This general Covenant to instruct is not gone by his Death, tho' there be no particular Custom, as in London, especially since the Stat. 5 Eliz. 1 Sid. 216. 1 Keb. 761, 820.

Covenant by Infant *per Gard. suos*, for that he was bound Apprentice to the Defendant by Indenture, and he did keep him with Meat: And Defendant pleads he was a Citizen and Freeman of Bristol, and that at the General Sessions of the Peace it was ordered that he should be discharged from his Master for disorderly Living.

Living, and this Order inrolled by the Clerk of the Peace. *Per Cur'*, *præter Hale*, They had Power to discharge him, and it is frequent at Sessions so to do.

1 Vent. 174.

An Action of Covenant was brought by an Apprentice; the Master covenanted to find and allow the Plaintiff Meat, Drink, Lodging, & alia necessaria, during such a Time; and the Breach was as general as the Covenant, viz. That he did not find him Meat, Drink, Lodging, & alia necessaria. The Plaintiff had Judgment by *Nihil dicit*, and on Inquiry intire Damages were given against the Defendant. Error was brought, that the Breach is too general, and intire Damages were given, amongst other Things, for alia necessaria, and doth not say for what: And in *Cro. Jac.* 486. *Astell* and *Mill's* Case, Judgment was reversed for that Reason, but that Case has since been adjudged not to be Law; a Breach may be assigned as general as the Covenant. *Curia*: In a *Quantum meruit* they formerly set out the Matter at Length, but now it is in general Words, *Pro diversis aliis bonis*, and held good: There are indeed many Instances where Breaches have been generally assigned, and held ill; that in *Croke* is so, but the latter Opinions are otherwise. *Affirmetur judicium.*

3 Mod. 69.

Covenant was brought against an Apprentice on Indenture. Defendant pleads, he was within Age. The Plaintiff in his Replication maintained his Action by the Custom of London, that he may bind himself at the Age of fourteen: The Question in 4 *Leon.* 77. and in *Cro. Eliz.* *Walker* and *Nicholson's* Case, was, whether this was Departure in Pleading? And it was much doubted there; and the Case in 19 R. 2. was cited, how that an Infant brought an Action against his Guardian in Socage; who pleaded, that the Plaintiff was within Age; the Plaintiff did maintain his Declaration, that by the Custom of such a Place an Infant of eighteen Years might bring an Account against his Guardian in Socage; and it was held it was no Departure: So it was much argued in *Bold* and *Wallis's* Case, 14 & 15 Car. 2. B. R. because he brought his Action as at Common Law generally, and maintained it by a Custom. Some argued that it was a Departure, and cited *Co. Lit.* 304. It seemed to be agreed by all the Court, that where one alledgeth a general Custom in a Count, and replies by a special Custom, that this is not good; but by *Windham*, This is no Departure in the principal Case, being no Matter varying from the Count, that being but Supposal, and always general, this special Matter is a good Support; and that this is no Departure from the Title, but an Answer to a Disability pleaded in Bar. *Foster* held it to be no Departure, the Gift of the Action being laid in London, and the Title is the same still, only the Person enabled. But by *Twissden*, All the Precedents are to count on the Custom, as being the Ground of the Action; and he was of Opinion that it was a Departure; but the Court gave Leave to the Plaintiff to discontinue his Action, and to declare on the Custom of London, that an Infant may bind himself. *Winch* 63.

Covenant against Apprentice and those bound with him.

In Covenant Plaintiff declared that the Defendant, by his Deed shewed in Court, did covenant to satisfy the Plaintiff all such Sums of Money as J. his Son, the Plaintiff's Apprentice, should imbezil from him, within three Months after Request; and then lays the Imbeziling and Request, &c. The Defendant prays Oyer of the Deed, which was entered in *hæc verba*; and there the Covenant was to satisfy within three Months after Request, and due Proof made of such imbeziling. The Issue was, whether he imbeziled? and found *pro Quer'*. Judgment was arrested, because it appears by the Entry of the Deed that the Plaintiff ought not to have brought this Action until the three Months were incurred, as well after Proof as after Request: Whereas the Plaintiff had averred no Proof in the Declaration, and the Word *Proof* generally laid shall be understood Proof judicial, by Jury, Confession or Demurrer in Court; but if the Form of Proof were by Writing otherwise appointed, that shall prevail, as by Witnesses before two Aldermen, by Certificate, &c. which Proof shall be set down in the Plea, with all the Circumstances, and then it shall be in the Discretion of the Court, whether the Proof were competent according to the Meaning of the Writing; but in this Case Proof may be made in Court judicially, in Action brought against the Apprentice, before the Action brought on the Covenant made by another; and so it may well be taken for Proof by Trial in Court. *Hob.* 217.

Collateral Covenants shall not bind an Infant, as in Action of Covenant brought against the Infant, on Covenant to serve his Master faithfully as an Apprentice in the Mystery of a Draper; and he lays in the Action, that he defrauded him of his Goods. *Per Cur'*, The Stat. 5 *Eliz.* is not so strong against Infants as to make collateral Cove-

nants good. An Infant is not bound by those Words at Common Law, and no collateral Covenant shall be maintainable upon that Statute. Action on the Case lies on the Covenant in Law, but not on the Covenant in Fact, and for that he ought to have collateral Security; and the Retainer is for the Benefit of the Infant to learn his Trade, but the Covenant is to his Disadvantage; but *Winch* thought the Covenant to be good, being incident to the Retainer. There is no Remedy but by Action on the Case. *Winch* 63. *Heth* 63.

Covenant was brought upon Indenture of Apprenticeship, containing the usual Covenants in such Indenture, and he ran away with his Master's Money in London; and two Exceptions were taken to the Declaration:

1. In the Indenture the Words are, that the Infant *shall be loyal and faithful, & secreta sua velare, &c.* without any Words of Covenant express; but it was resolved that the Words imply a Covenant.

2. It was excepted, that where Infants shall be bound by Covenant, it is pleadable no where but in London; the Custom is that Infant shall not wage his Law upon Covenant for Tabling; *sed non allocat*; it is pleadable at any Place. This Covenant is allowable at Law, and the Words of the Statute are, that the Covenants shall become of such Effect and Efficacy as if he had been at full Age at the Time of the Sealing the Indenture, and then he shall be bound in every Place within the Realm. The Court seemed to be of Opinion that the Action was well brought. *Moor, Stanton's Case*. *T. Raym.* 60. *1 Lev.* 81.

Against the
Executor of
the Master.

Covenant against an Executor upon the Covenant of the Testator to teach an Apprentice his Trade. It was moved, that the Covenant was personal to the Testator, and bind not the Executors, but only binds the Master during his Life to teach him. But *per Cur*, It binds the Executors also, and they ought to see the Apprentice taught his Trade; and if they are not of the Trade, they ought to assign him to another who is of the Trade. *1 Lev.* 177.

If a Man covenants with me to serve me for a Year, and I covenant to pay him 10*l.* altho' he does not serve me, he shall have an Action for the 10*l.* But *contra*, if I covenant to give him 10*l.* for his Service. *15 H. 7. 10. per Fineux.* *Mod. Ca. in Law and Equity* 41. *Poph.* 198.

Ninthly, To do Things.

If I covenant to deliver so many Yards of Cloth, and I cut it in Pieces, and then deliver it: This is a Breach; for the Law regards the real and faithful Performance of Contracts, and discountenances all such Acts as are done *in fraudem Legis*.

Covenant to do any Thing upon Request; the Plaintiff assigned for Breach, the Defendant could not be found. After he made Proclamation at the Church, and in several Markets, giving Notice of the Request; yet this is not any Request, inasmuch as it ought to be made to his Person. *M. 8 Car. B. R. Gruit and Pinnell*.

If A. covenants with B. that A. or his Son C. or either of them, shall work with B. at the Grinding and Polishing of Glass, B. paying to each of them so much, &c. and B. requests C. to work with him, &c. if he does not, the Covenant is broke, for B. had the Election to require both, or any one of them, to work with him. *2 Sid.* 107.

Error of Judgment in *Northampton* in a Writ of Covenant; the Error assigned was, that the Declaration there was ill, because he declares of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel, and other Necessaries, and doth not shew in particular what other Things were Necessaries; and the Breach was assigned as general as the Covenant, *viz.* That he did not find him with Meat, Drink, Apparel, and other Necessaries; and doth not shew in particular what other Things were necessary, or not: And *per Cur*, The Declaration was ill. *Cro. Jac.* 486.

If a Man covenants with me to collect my Rents in such a Town: If I interrupt him in the collecting thereof, this excuses the Covenant. *13 H. 7. 1 Roll. Abr.* 454

Tenthly, Of Covenants determining with the Estate, and of suing on Covenants after the Estate determines.

It is commonly said in our Books, that Covenants in a void Deed are void. In *Sopran and Skurri's Case*, *Yelv.* 18. the Declaration doth not express that Z did demise the House, and if there be no Demise there is no Term; and the Indenture was sealed

sealed on the Part of the Lessee, and not on the Part of the Lessor (for any Thing that appears); and if Lessee seals his Part, and not the Lessor, *nihil operatur*, neither in Respect of the Interest nor in Respect of the Covenants, for the Covenants depend upon the Lease, and the Bond on the Covenants; and if the Lease had been made, and after surrendered, all the Covenants and Bonds for the Performance thereof had been void also; but yet in some Cases the Acceptance of the Surrender shall not dispense with the Covenant, as in *Noy* 118. *Austin* and *Moyle*. 1 *Leon*. 179.

Austin and *Moyle*'s Case was, *A.* leases by Deed to *M.* for ten Years, and *M.* covenants at the End of the Term to leave four Acres of the Land fallowed and ploughed; and in it also there was a Proviso, that if *M.* mislike his Bargain, that upon a Year's Warning he may surrender his Estate; and *M.* surrendered, but left not any fallowed: The Acceptance of the Surrender hath not dispensed with the Covenant, but upon a void Lease the Covenants are void, as in *Capenburst*'s Case, 1 *Keb.* 131, 164, 182. Bond for Performance of Covenants, that the Grantee shall quietly enjoy a Term; but the Grant was of so much of the said Term as shall be unexpired at his Death, which as *Chedington* and *Grosvenor*'s Case, *Dyer* 7. is void, and so the Covenants depending thereupon are void also. *Windham* put a Difference, and it was agreed, where a Deed is void in the Fabrick, there the Covenants on it are void; as when a Freehold is to commence *in futuro*, and where there is only want of Interest in the Party Grantor, but that Deed is good; which the Court agreed, if the Intent is that the Covenant shall go with the Lease, which if void, that falls.

Lease of Tenant *pro Life* for twenty-one Years, with Covenant to enjoy during the Term, and Bond accordingly; by his Death the Bond falls. In *Dyer* there was an Opinion, that Debt lay on Bond notwithstanding a Release of Covenants in an Indenture to which the Obligation relates; but that Case is settled, that the Bond and Covenants to which it relates are but one Assurance, and the one being made void, the other falls. *Vide* 1 *Sid.* 307. 2 *Keb.* 116.

In Covenant the Plaintiff declared, that whereas the Queen by her Letters Patent granted Licence to him, his Deputies and Assigns, to buy *Spanish Wool*, and to transport it hither, &c. He by Indenture granted to the Defendant and to *R. N.* the said Licence for eight Years; in Consideration whereof the Defendant did covenant and grant to pay him 100 *l.* every Year at two Feasts, *viz.* the *Annunciation* and *Michaelmas*; and further, that every Year at the Feast of the *Annunciation*, or within twenty Days after, he would make a new Obligation of 150 *l.* for the Payment of said 100 *l.* the next Year; and alleges *in facto*, that the Defendant had not paid him the 50 *l.* due to him at *Michaelmas*, 28 *Eliz.* and that he did not make an Obligation at the *Annunciation*, &c. and for those Covenants broken he brought the Action. The Defendant pleaded, that in the Indenture is contained, *Proviso semper*, that if the Defendant doth not every Year make the Bond at the Feast of the *Annunciation*, or failed in the Payment of the Money at the Day, that then and from thenceforth the said Indenture, and every Clause, Article and Sentence therein, should be void and of none Effect; and shewed that he failed in making the Obligation at the first Day, and so the Indenture is void. Judgment *si actio*. The Action lies, for this Covenant broken before the Indenture became void; but the Court agreed, that for the Covenant for Payment of the Money no Action did lie, because the Indenture was void half a Year before by not making the Obligation; and the Intent of the Party was, that it should be void only to have Benefit of Covenants broken *in futuro*, but for Covenants broken before it was never their Intent, but that the Party should have Advantage of them. But by *Wray*, The Thing that makes the Indenture void is the breaking of the Covenant, so they are both at one Time, and so he hath had all his Bargain and all his Benefit of the Indenture, and so the other Party is at large. Judgment *pro Quer.* *Cro. Eliz.* Dr. *Man v. Gee*.

Debt on Bond conditioned for Performance of Covenants in an Indenture, by which the Defendant's Testator, being Lessee for Years of a long Term, assigned so much of the Term as shall be to come at the Time of his Death to the Plaintiff, and covenants that he shall enjoy it; and he makes the Defendant Executor, and dies; and assigns a Breach, that the Defendant after the Death of the Testator ousted him; and after Verdict *pro Quer.*, it was moved in Arrest of Judgment, that the Assignment of so much of the Term as should be to come after his Death was void, and so is the Covenant also; for the Covenant cannot subsist without an Estate, and that the Assignment was void, were cited 1 *Co.* Rector of *Chedington*'s Case, and *Gravenor*'s Case in *Dyer*, and *Cro. Jac.* *Child* and *Baylie*'s Case; and so is the Covenant, *Telv.*

18. *Sopranie's Case*; and of that Opinion was the Court: But it was further moved, that then the Obligation is single; for if the Condition refer to a Thing that is not, it is all one as if there were not any Condition, and to this the Court inclined; but afterwards the Covenant and Obligation being both for the Corroboration of a Grant which was void, they are also both void; and the Court gave Judgment *pro Defendant*. 1 *Lev.* 45.

Tenant for Life makes a Lease for Years; Lessee by Indenture grants and sells all his Estate, *Hab. in tam amplis modo & forma*, as he ought to hold it. Lessee for Life dies, he in Reversion enters; Bargainee brought Covenant against the Bargainor, it lies not. Here is no Warranty in Deed or Law, but only an Assignment; and if there were a Warranty, yet the Covenant determines with the Estate; as Tenant in Tail makes a Lease for Years, and dies without Issue, the Covenant doth determine with the Estate. *Cro. Eliz.* 157. 1 *And.* 12.

But let the Lease be good or void, yet when there is an Eviction, Covenant lies tho' the Lease be originally void.

Covenants in Law extend to lawful Evictions, and to Estate in Being, and not where an Estate is determined; as Lessee for Life makes a Lease for Years, and dies, Lessee shall not have Action of Covenant or Covenant in Law. *Dyer* 2. 2 *Brownl.* 163, 164.

R. brought Covenant against H. Parson of D. the Case was, that H. let to the Plaintiff Parcel of the Glebe and Tithes for Term of the Life of H. if he should continue so long Parson, rendering 26 s. 8 d. Rent; and covenants by another Deed that the Lessee shall peaceably and quietly have and enjoy the said Land and Tithes; and covenants likewise that he had not done any Act or Acts by which the Plaintiff shall be interrupted in the said Lease, where *revera* he had made another Lease before of them to J. S. and the Plaintiff being ousted by J. S. brought this Action against the Defendant, who pleads the Statute of 13 *Eliz.* c. 10. that Leases made by Parsons, otherwise than is therein limited and expressed, shall be void; and he pleads over the Statute of 14 *Eliz.* c. 11. that Covenants shall be of the same Validity, and not otherwise, as Leases by the same Persons: And inasmuch as the Lease is void, there being another more antient Lease *in esse*, so the Covenant shall be also. *Gawdy*, The Statute of 14 *Eliz.* doth not intend to avoid any Covenants but such as were made to corroborate Leases made void by *Stat.* 13 *Eliz.* before, and not to defeat Covenants made upon void Leases by the Common Law; *Quod nota adjorn*. *Hil.* 37 *Eliz.* *Rot.* 161.

M. brought Action of Covenant against A. Defendant demurs upon the Count, and the Case was this: Lease for seven Years to A. by Indenture of Land, who covenants to leave Part of the Land *ad finem dicti Terminii* fallowed and stirred, fit for Wheat Season, Proviso that it shall be lawful for the Lessee at any Time within the said Term, giving Warning to the Lessor at the Feast of *St. Michael*, to depart, &c. and he doth not leave it fallow according to the former Covenant: The Question was, if the Lessee be bound to leave it fallow or not when he departs within the Term? for this Power of Departure upon Warning is limited with this performing of Covenants; *adjorn*; *nota per Telverton and Tanfield*, that the End of the Term of seven Years, and the End of the Term, are all one, for both refer to the Interest of the Term, and to the Determination, be it by Surrender or otherwise; but if it were at the End of seven Years, this is not before the seven Years incurred without Respect to the Term. *Vide Bro. Exposition of Terms* 44. 35 *H.* 8. *Pager's Case* in the Rector of *Cbedington's Case*, *Dyer* 177. And after comes *Croke*, who said that the Plaintiff shall not have this Action; for after the Covenant broken it appears that he had accepted the Surrender of the Term, whereby he is concluded. *Per tot' Cur*, Tho' he had accepted of a Surrender of the Term, yet he may have Covenant for Covenant broken before; but Action of Waste he may not have, for he accepts of the Land, which is Parcel of the Thing to be recovered by the Action; for which Judgment was given *pro Quer*. *Hill* 4 *fac.* *B. R.*

What Covenants are good in a void Lease.

If the Covenant depend on the Interest of a Lease, as a Covenant to pay Rent, it is void if the Lease is void; but where the Covenant is for a Thing collateral, as a Covenant that the Lessor is Owner at the Time of the Lease, or that the Lessee shall enjoy it; these Covenants being collateral to the Lease and Interest, are good tho' the Lease be void. *Nichols cont.* Covenant to save the Plaintiff harmless against J. in a void Lease, the Lessee is disturbed by J. the Covenant is good; for when an Estate is created in which is implied a Covenant in Law, there if the Estate be void, the

the Covenant is void also; but when there is an express Covenant in Deed, *aliter*, altho' the Lease be void or voidable; as if he covenants that the Lessee shall enjoy during the Term, and the Lessee resigns, yet is the Covenant good altho' the Term is gone. *Owen* 136.

Where a Person makes a Lease for Years in which were divers Covenants, and after he became Non-resident, by which the Indenture became void, yet he may maintain an Action of Covenant for a Covenant broken before his Non-residency. *Cro. Eliz.* 244.

Condition to perform Covenants in a Lease; the Defendant pleads Covenants performed; the Plaintiff by Replication shews the Covenants, whereof one was, that he should enjoy such Lands let to him quietly, &c. and shewed *in facto*, that the Defendant had disturbed him. Defendant by Rejoinder sheweth, that in the Indenture was a Proviso, that if he paid 10*l.* the 31st of *March* 30 *Eliz.* that then the said Indenture and all therein contained shall be void, and alledged he paid the 10*l.* at the Day; it was adjudged, that by the Covenant broken before the Condition performed the Bond was forfeited. *Cro. Eliz.* 244.

Covenant for that the Defendant 35 *Eliz.* let to him the Lands for six Years, and covenanted that he should enjoy it without Interruption during the Term, and discharged from Tithes and other Duties: And further covenanted, that if Tithes were demanded and recovered against him during the Term, that he should recoup so much in his Hands of the Rent as the Tithes amounted to; and for Breach sheweth, that the Parson 42 *Eliz.* sued him for the Tithes of Corn growing there in the Years 38, 39 *Eliz.* and so brought this Action; and thereupon it was demurred. *Per tot' Cur'*, This Suit after the Determination of the Term is a Breach of Covenant, for he did not enjoy it discharged, &c. which is not intended of a real Discharge, for that appears not by the Intent of the Parties, because it is agreed, that if he were sued he should recoup as much Rent in his Hands; but their Meaning was, he should be freed from Suit and Payment of it; and he is as greatly prejudiced by a Suit after the Term, as if he had been sued before the Expiration of the Term: But it was not alledged that this Suit was lawful, or that the Tithes were due, (for he was not bound to discharge him from illegal Suits) so the Breach was not well assigned. *Cro. Eliz.* 916.

Obligation for Performance of Covenants upon a Lease void *per Statute-Law* is void also; as where the *Stat.* 32 *H.* 8. makes void Leases made of Houses to alien Artificers. 1 *Sid.* 309. And on Bond to perform Covenants which way soever, the Lease becomes void *per Release*, Surrender, &c. the Obligation is void also.

S E C T. IX.

Of a Warrant (or Letter) of Attorney to make Livery of Seisin.

THE next Part to the Covenants in some Deeds (as Feoffments, Gifts in Tail, or Leases for Life) is what is usually called a *Letter of Attorney to make Livery of Seisin*, tho' I think it more properly called a *Warrant of Attorney to make Livery of Seisin*, especially where the Deed is by Indenture, for then it wants the *Direction*, which a Letter of Attorney commonly has, *viz.* *To all People to whom these Presents shall come*, or the like. And tho' a Letter of Attorney is equal to a Warrant to authorize a Person to act in the Stead of him who makes it, yet every Warrant of Attorney is not a Letter of Attorney, for the Difference of Form gives us different Ideas as to the Name, altho' of the same Nature and Purport; for which Reasons I conclude that this Part of a Deed is more properly called a *Warrant of Attorney to make Livery of Seisin*, which begins in this Manner: *And this Indenture further witnesseth, that the saith A. B. hath made, ordained, &c.*

Livery of Seisin may be made either by the Feoffor, &c. himself, or by his Deputy or Attorney; and when it is to be by Attorney, a Warrant must be made, which may either be in the Deed of Feoffment itself, whether it be indented or Poll, altho' the Attorney be no Party to the Deed; or it may be made by another and single Deed of itself.

The Livery of Seisin that is made by Letter of Attorney, must be a Livery in Fact and not a Livery in Law, for a Livery in Law cannot be made by Attorney.

And in making such Livery of Seisin the Attorney should take care,

First, That there be a good Deed for a Foundation, otherwise the Letter of Attorney, and the making of Livery upon it, will signify nothing.

Secondly, That there be a good Letter of Attorney in Writing to warrant the making of Livery of Seisin.

Thirdly, That he pursues the Authority given him by the Deed, at least in the Substance thereof; and therefore if it be given to two Attornies jointly, one of them cannot do it; if to three Attornies jointly and severally, it is not safe for any two of them to do it.

Fourthly, That it be done in the Life-time of the Parties, for it cannot be done after their Deaths.

Fifthly, That he acts in the Name of him who makes the Letter of Attorney.

Sixthly, That in the making of it as an Attorney he should do it after the same Manner as the Party himself should do it.

Seventhly, That a Memorandum thereof be endorsed upon the Back of the Deed. N. B. This is advisable, but not necessary where Proof (on Occasion) may be had.

For the Forms thereof, see the Second Part; and for more concerning Livery of Seisin, see the next Chapter, Title Feoffment.

S E C T. X.

Of the Conclusion of a Deed, or the in cujus rei Testimonium.

NOW we are come to the Conclusion of a Deed, which in an Indenture is usually in these Words: *In Witness whereof the said Parties have bereunto interchangeably set their Hands and Seals on the Day and Tear first above written.* And in a Deed Poll in these Words: *In Witness whereof I have bereunto set my Hand and Seal this—Day of—in the Tear, &c.*

The Date in an Indenture is usually in the Beginning of it, and in a Deed Poll at the End, but either of them is good, whether the Date be in the Beginning or End.

And a Deed is good that is without a Date, or with a false or impossible Date, as the 30th of Feb. or the like: And altho' it be dated before or after the Time of the Delivery of it, yet it is good enough: Nor is it needful to express the Time of the Delivery of it, but in Pleading it must be shewed. 2 Co. 5. Dyer 19, 28. Kelw. 70. Perk. §. 120. Co. Lit. 7. Latch 59. Yelv. 138. 3 Leon. Case 144. Nor is it needful to mention any Place or Time of the Sealing and Delivery of it.

If a Deed has no Date, or bears Date after the Delivery of it, and he that delivers it dies before the Time of the Date, it is good enough; but one may not plead the Delivery of the Deed before the Time of the Date of the Deed. 2 Co. 4. Stile 97.

And yet a Jury may find the Delivery to be before the Date. Hetley 175.

The Delivery makes it a Deed, and he that pleads it, and against whom it is pleaded; may vary from the Date in the Time of the Delivery, and say it was delivered at another Time. Perk. §. 146, 147, 148, 149, 150.

If a Lease for Years be made by Indenture bearing Date the 26th of May, To have and to hold for twenty-one Years from the Date, or from the Day of the Date, it shall begin on the 27th of May. Quere. 5 Co. 1, 94. Co. Lit. 46. b. 2 Inst. 674. contra. 1 Roll. Abr. 849, 850. contra. 2 Roll. Abr. 520. Cro. Jac. 135, 258. Cro. Car. 388. 3 Lev. 438. Salk. 413.

If the Lease bears Date the 26th of May, To have and to hold from the making thereof, or from henceforth; it shall begin on the Day on which it was delivered.

But every Deed shall be intended to be delivered on the same Day it bears Date, unless the contrary is proved.

But if a Deed is dated at four o'Clock in the Afternoon on the 20th of June, the whole Day is to be taken in; for the Law in this Computation rejects all Fractions and Divisions of a Day for the Incertainty. 2 Inst. 674.

As to a Place, if it bears Date at a Place out of the Realm, it is good; by averring that the Place mentioned in the Deed is in some County in England. For here the Place is not traversable.

But if this is not averred, and it appears that it was dated beyond Sea, it is otherwise, and the Deed cannot be tried.

A Deed is good without the Words *In cujus rei Testimonium, &c.* Owen 5. Case 33. Cro. Jac. 456. If it be duly sealed and delivered. Bulst. 300, 301, 302. 1 Leon. 25. Bendl. 155.

Yet if the Deed says, that the Party *batb put his Hand and not his Seal to it*; if he does put his Seal to it, it is good enough. Hetley 29.

And yet in Hetley 88. it is said, that a Serjeant said, that if the Words *In cujus rei Testimonium* were wanting in a Deed, that the Deed is not good, and that all Covenants, Grants and Agreements, which came after those Words in a Deed are not of Force, nor may be pleaded as Parcel of the Deed; but the Law is now taken to be otherwise. Hetley 136, 137. Dyer 19.

S E C T. XI.

Which of these formal or constituent Parts of Deeds are essential or not.

HAVING now gone thro' the several formal and constituent Parts of Deeds, it is necessary to observe,

That altho' they are the orderly and formal Parts of a Deed, yet they are not all essential Parts; for if a Deed of Feoffment is without *Premisses, Habendum, Tenendum, Reddendum, Clause of Warranty and Date*, yet the Deed is good. Co. Lit. 7. a.

For if one by Deed gives Lands to another and to his Heirs, without saying any Thing more, and puts his Seal to the Deed, and delivers it, and makes a Livery where necessary, it is good. *Ibid.*

Nor is it necessary where all the formal and ordinary Parts of a Deed are in a Deed, that they be set down in Order, or in any orderly Place or Way, for if any Thing be written in the Deed, after the Close of it after *In cujus rei Testimonium*, or on the Back of the Deed before the Sealing and Delivery of the Deed, it is as good a Part of the Deed, and of as great Force, as any Part of the Deed that is within it. Bendl. 1, 2. Moor 5. Telv. 1, 2. 5 Co. 117. Style 97. Hetley 175. 2 Brownl. 107.

S E C T. XII.

Of the Ceremonies used on the Execution of Deeds.

(A) *Reading Deeds to blind or illiterate Men.*

IF a Party to a Deed be blind or illiterate, and desires to hear it read before he seals it, it must be read truly to him; for if such a Man be to seal a Deed, and he desires to hear it read, or to have the Contents of it declared to him, and this be not done, and he afterwards seals and delivers it, this is not a good Deed; for he that is unlearned must, if he desires it, have the Deed he is to seal read to him in such Language as he understands. 2 Co. 9. 11 Co. 27. 14 H. 8. 20.

So if the Deed, or Effect of it, be otherwise declared to him than in Truth it is, it makes the Deed void. 2 Co. 9.

And therefore if the Parties to a Deed shall agree upon a Release to discharge the Arrearages of an Annuity, and one of the Standers by takes it whilst it is reading, and says to him that is to seal it, *You will better understand it by hearing than by reading*; and takes it in his Hand, and saith, *It is but a Release of the Arrearages*; and he says, *If it be so, I am contented*. And the Deed is a Release of all his Right in the Land, the Deed is void. Moor, Case 294. And. Case 175.

If he that is to seal the Deed can write and read, but is so old that he cannot see, and he directs what shall be written, and it is declared to him falsely and deceitfully, otherwise than it is, this will make it void. 12 Co. 90.

But if the Party that is to seal the Deed can read himself, and does not, or being an illiterate or blind Man, doth not require to have the Deed read, or the Contents of it declared: In these Cases, altho' the Deed be contrary to his Mind, yet it is good and unavoidable. 2 Co. 93. 11 Co. 27. 14 H. 8. 26. 1 And. 129.

And

And if upon or without the Party's Request that is to seal a Deed, the Party himself to whom it is made, or a Stranger, shall read the Deed, or declare the Contents thereof falsely, or otherwise than the Truth is; by this the Deed (at least for so much as is mis-read or mis-declared) will lose its Force. 2 Co. 6. 11 Co. 24.

If there be two absolute and distinct Cases in a Deed, and the one of them is read to the illiterate Party, and not the other, the Deed is good for that Clause, and void for the other, *ab initio*.

So if 20 l. be in an Obligation, and but 20 s. is read to him; and if he pays this, he is to be discharged of the Obligation. 14 H. 8. 26. 9 H. 5. 15. 11 Co. 27.

And if the Party himself that is to seal and deliver a Deed, shall (before it be done) cause a Stranger covinously to read it, or to declare the Contents of it falsely to him on Purpose to make the Deed void; this will not hurt the Deed.

If three distinct Obligations are written on a Piece of Parchment, and one of them is only read to the Obligor, being an illiterate Man, and he seals the Deed; this will be good for that which is read, and void for the Rest: But if the Obligation be for 20 l. and he reads 20 s. this is void for all. 11 Co. 27. 14 H. 8. 27, 28, 29.

If a Deed be read, as of a Grant or Gift of an Estate-tail, and a Letter of Attorney to give Livery of Seisin, and so the Party seals it, but it is a Feoffment in Fee: In this Case, altho' the Letter of Attorney be truly read, yet the Deed is void for all, because of the Dependence one Part hath with another. 11 Co. 27. *Kelw.* 70.

If one owes me two Debts, and pays me one of them, and I am to release it, and the Release is read to me as such, but it is a general one; it seems to be good only for so much as was read. 11 Co. 28. *Fitz. Feoffments* 57.

Illiterature is not an Excuse for not sealing of a Writing tendered in due Time, where he is bound to seal a Deed. 2 Co. 3. *Moor, pl.* 284.

A Deed read amiss to him that cannot read, or mis-reported or mis-read to him that is blind, binds not. *Hob.* 96.

As if a Lease or an Obligation be read to an unlearned Man thus: *If J. S. and his Wife convey unto you their Estate, then you shall make a Lease or Bond, &c.* and in Truth the Condition is, *If the Husband does it without naming the Wife*, it is void. *Hob.* 226, 230. So if it be a Lease with Power of Revocation, and is read, or the Contents declared to be otherwise than it is. 12 Co. 90.

(B) Of signing Deeds.

THE subscribing of the Parties Names that make the Deed to the Deed, is not necessary; for the Deed, if it be sealed and delivered, is good, altho' the Party that makes it never puts his Hand or Mark to it. But it is the best and surest Way notwithstanding to have the Name or Mark of the Party to be subscribed to the Deed; for by this Means the Deed may be the better proved when the Witnesses are dead. *Terms de la Ley*, Tit. *Fait*, 9 Jac. *Scot's Case*.

(C) Of sealing Deeds.

WHEN a Deed is signed, the next Thing to be done is the Sealing of it. Sealing is necessarily incident to a Deed, for it cannot be good without it, tho' it may be good without signing.

The Sealing is comprehended in these or the like Words, (*viz.*) *In Witness whereof I have set my Seal.* Tho' if these Words are wanting, the Sealing of the Deed is sufficient.

The Seal is an essential Part of the Deed; if a Writing is not sealed, it cannot be a Deed. If the Print of the Seal be utterly defaced, the Deed is insufficient; so that it cannot be pleaded, tho' it may be given in Evidence.

A Bargain and Sale of the Term to the Assignee of the Term, when the Bargainor is out of Possession, will not pass the Estate unless the same is sealed upon the Land, and to that Purpose, if the Grantor cannot be upon the Land to deliver the Deed himself, then he must sign and seal (but not deliver) the Deed of Assignment, and then make a Letter of Attorney of the same Date, to some Person to enter upon the Land and take Possession for him, and then being in Possession, the Attorney to deliver the Deed upon the Ground, as the Act and Deed of the Grantor.

So also it is of a Bargain and Sale of an Estate of Inheritance. 3 Lev. 387, 388,

312. 1 Lev. 270, 271, 272.

The Deed must be only indorsed at the first thus: Signed and sealed, but not delivered, by the within written *A.B.* If the Deed is signed, sealed and delivered off from the Land, the Delivery upon the Land afterwards by the Attorney will signify nothing. *Cro. Eliz.* 483. *pl.* 19.

A Deed is made, and in the End thereof these Words: *In Witness whereof I have hereunto set my Hand.* And he writes his Name, and puts his Seal; this is a good Deed altho' no Mention be made of his putting of his Seal to it. *Hetley* 75.

See more concerning sealing Deeds in Page 248, 249. *ante.*

(D) Of delivering Deeds.

AFTER a Deed is read, signed and sealed, it must be delivered.

For if it be never so well written and sealed, it is of no Force if it is not delivered by the Party himself, or his special Attorney, to whom it is made, or to his Use. *Co. Lit.* 35. *b.* 2 *Co. 5.* 5 *Co. 1.*

A Delivery is a necessary Incident to every Deed; and then when it is delivered, it shall bind him that delivers it tho' dated before, and tho' another wrote or sealed the same. *Noy's Max.* 55.

The Delivery of the Deed may be absolutely or conditionally.

When you deliver a Deed absolutely, Words are not necessary; for then a Man that is mute could not deliver a Deed. It is sufficient if it is delivered.

And as a Deed may be delivered to the Party without Words, so may a Deed be delivered by Words, without any Act of Delivery; as if the Writing sealed lieth upon the Table, and the Feoffor, &c. saith to the Feoffee, &c. *take that as my Deed*, it is a sufficient Delivery. 9 *Co. 137.* *Co. Lit.* 36. *a.* 49. *b.*

In Case of the King's Letters Patent, or of Grants under the Seal of the Duchy of Lancaster, the Seal is Matter of Record, and the Deeds need no Delivery: So the Deeds of a Corporation needs no Delivery, the common Seal is perfect without it.

Inst. 209. 2 *Roll. Abr.* 23, 24. *Dav.* 44.

When a Deed is delivered conditionally, it is called an Escrow; as where one seals a Deed, and delivers it to a Stranger until certain Conditions are performed, and then to be delivered to him to whom the Deed is made, to take Effect as the Deed of him who so delivered it; for it shall have Relation to that first Delivery.

In the Delivery of a Deed as an Escrow, you must use Words, and say, *I deliver this as my Escrow, to deliver to the Party as my Deed, upon Condition that, &c.* or to the like Effect.

For here a bare Act of Delivery to a Stranger without Words signifies nothing, it must be delivered to a Stranger; for if it is delivered to the Party himself, it is an absolute Delivery, tho' Words mention it only as an Escrow.

See more concerning delivering Deeds, at Page 249. *ante.*

(E) Of Witnesses to the Execution of Deeds.

THERE must be Witnesses to testify the Sealing and Delivery of the Deed: Their Names should either be underwritten or indorsed by them. *Co. Lit.* 7. *b.*

10 *Co. 93.*

A Deed is good without the Words, *sealed and delivered in the Presence*; if it be sealed and delivered, and there are Witnesses to prove it: And altho' the Witnesses Names be not indorsed, if they can prove the Sealing and Delivery, it is well enough. *Co. Lit.* 6.

(F) Of indorsing the Receipt for the Consideration Money.

Notwithstanding there is a Receipt for the Consideration Money, and a Release of the same in a Deed, which is commonly in the Premises, (*vide p. 257.*) yet it is usual for a Receipt to be written on the Back of the Deed, and signed (but not sealed) by the Person that received the Money; and witnessed by the Witnesses to the Deed.

(G) *Other Ceremonies necessary to perfect a Deed.*

ALTHO' a Deed be never so well written, honestly intended, lawfully grounded, orderly and legally drawn and contrived, read, sealed, delivered and attested; yet for want of some additional Ceremony, or other Act required in the Case, it may be ineffectual; as,

1. In some Cases it is requisite for the Perfecting of a Deed, and the Estate made by it, that the Party to whom it is made *agrees to it*.
2. In other Cases that *Livery of Seisin* be made. Or,
3. That *Attornment* be made. Or,
4. That *actual Entry* be made into the Thing given or granted. Or,
5. That an *Election* be made upon the Gift or Grant; for want whereof the Deed will be defective not only for what will not, but for what will pass without it. Or,
6. That the Deed be *inrolled* in due Time. Or,
7. That it be registred.

First, *As to the Agreement of him to whom a Deed is made.*

Where a Deed is made for a Man's Advantage, the Law presumes he accepts it, unless the contrary be shewn. *Cro. Eliz.* 138.

But a Disagreement will make a Nullity of a Thing which before had an Essence; as, If a Deed be made to a Feme Covert, and the Husband afterwards disagrees to it, this will make the Deed void.

If an Estate be made in Fee-simple or Fee-tail to a Man and his Wife, and he dies, and has not disagreed to it; this is an Agreement in Law, and vests the Estate in her: And if after his Death she enters into the Land and takes the Profits thereof; this is an actual Agreement, and good to bind her, tho' she says never a Word, or does it never so secretly. 3 Co. 26. 4 Co. 4, 62, 64. 5 Co. 36, 40. 5 Co. 119. *Hob.* 204.

If there be Lord and Tenant, and the Tenant enfeoffs the Lord and a Stranger, and gives Livery to the Stranger in the Name of both, and after the Lord enters and takes the Profits; this is a good Agreement in Law. 10 Ed. 4. 3 Co. 26.

If an Infant or Parcener who has divided the Land, after he is of Age takes the Profits of his Part allotted to him: This is a good Agreement, affirming the Division, but taking the Profits of a Moiety does not so. *Co. Lit.* 171.

But an Agreement or Disagreement to an Interest must be made to the Party himself. *Moor*, Case 93. *Hob.* 204.

Secondly, *As to Livery of Seisin.*

Whenever a Feoffment is made, whether it be by or without Deed, there must be Livery of Seisin; for it is of the Essence of a Feoffment, and cannot be perfected till it be made, for till then the Feoffee has only an Estate at Will in the Land, liable to be put out whenever the Feoffor pleases. And if either of the Parties dies before Livery of Seisin made, the Feoffment is void.

And no Warrant of Attorney to make Livery can be executed after the Death of the Feoffor or Feoffee; neither is there any Remedy in this Case to get the Assurance made perfect but in a Court of Equity.

But in Case there are many Feoffees, there the Death of one, or some of them, will not hinder the Livery; but it may be made to him or them who survive.

For more relating to this Matter, see before concerning Letter of Attorney to make Livery of Seisin, and Title Feoffment in the next Chapter.

Thirdly, *As to Attornment.*

See the next Chapter Title Grants, where this Subject is particularly treated.

Fourthly, *As to actual Entry.*

Where a Lease for Years may be made, it may be good to some Purposes, for the Lessee may forfeit or grant it before his Entry into the Thing let and granted; and yet to some other Purposes it is *not perfect* till the Lessee makes his *Entry* into the Land let; for if the Lessor, after he makes such a Lease, still continues the Possession of the Land let, he may not have, sue for or recover the Rent reserved upon the Lease. Nor is the Lessor said to have any Reversion of the Land, so as by that Name to be able to grant it, till the Entry of the Lessee. *Plowd. 432, 433.*

But where a Man is to enter, there in most Cases the Entry will serve for many who have Interest, and the Entry into Part will gain the Possession of the Whole.

He who enters into Land, must be sure that he has a Right or Title of Entry, and that thereby he may bring the Possession and Right together: For if he has not a Right or a Title to the Land, he shall have no Property in it in any Case, but in the Case of an Occupancy, whereby the Freehold is gained.

Altho' upon a Fine, which is a Feoffment on Record, the Conusee has a Freehold in Law in him before his Entry, yet in other Cases it is otherwise; for upon an Exchange (be it with or without a Deed) the Parties have neither Freehold in Deed or in Law before they enter.

So upon a Partition the Freehold is not removed until an Entry upon a Livery; within the View no Freehold is vested before an Entry: But if Tenant for Life, by the Agreement of him in Reversion, surrenders, he in Reversion has a Freehold in him in Law before he enters.

And if one bargains and sells his Land by Deed indented and inrolled, the Freehold in Law passes presently.

And so when Uses are raised by Covenant upon a good Consideration. *Co. Lit. 266. Vide 11 H. 4. 61. 21 H. 7. 12. 38 E. 3. 12. 41 Aff. 2. 10 H. 6. 14, &c.*

For more concerning *Title Entry*, see before Chap. 2.

Fifthly, *As to Election.*

In Cases where a Gift or Grant is by Deed, and at first incertain, there it may in many Cases be made good by Election; as,

If one gives me one of the two Horses in his Stable, and there be in the Stable two Horses, I may take which of them I will, and having so done, the Gift or Grant is good. *Perk. Tit. Grants.*

For more relating to Election, *vide post. Tit. Grant.*

Sixthly, *As to inrolling Deeds.*

This Head, tho' necessary to be mentioned here, is more properly treated of under the Title *Bargain and Sale* in the next Chapter.

Seventhly, *As to the Registring Deeds and Wills, &c.*

I shall now conclude this Chapter with an Abridgment of those excellent Statutes concerning Registring Deeds, Laws worthy of an universal Extent! tho' at present limited only to the East and West Ridings of *Yorkshire*, and the County of *Middlesex*.

An Abridgment of the *Stat. 2 & 3 Ann. c. 4.* "For the publick Registring of all Deeds, Conveyances and Wills, that shall be made of any Honours, Manors, Lands, Tenements or Hereditaments, within the West-Riding of the County of *Tork*, after the nine and twentieth Day of September 1704.

This Statute recites, That whereas the West-Riding of the County of *Tork* is the principal Place in the *North* for the Cloth Manufacture, and most of the Traders in *Yorkshire* therein are Freeholders, and have frequent Occasions to borrow Money upon their Estates for managing their said Trade; but for want of a Register find it difficult to give Security to the Satisfaction of the Money Lenders (altho' the Security they offer be really good) by Means whereof the said Trade is obstructed, and many Families ruined; for the Remedy whereof, at the humble Request of the Justices of the Peace, Gentlemen and Freeholders of the said West-Riding, It is enacted,

1. That

A Memorial
to be registred.

1. That a Memorial of all Deeds and Conveyances which from and after the 29th of September 1704. shall be made and executed, and of all Wills and Devises in Writing, made or to be made and published, where the Devisor or Testatrix shall die, after the said 29th of September, of or concerning, or whereby any Honours, Manors, Lands, Tenements or Hereditaments in the said West-Riding, may be any ways affected in Law or Equity, may, at the Election of the Party or Parties concerned, be registred in such a Manner as herein after directed; and that every Deed or Conveyance that shall at any Time after any Memorial is so registred, be made and executed of the Honours, Manors, Lands, Tenements or Hereditaments, or any Part thereof, comprized or contained in any such Memorial, shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee for valuable Consideration, unless such Memorial thereof shall be registred, as by this Act is directed, before the Registering of the Memorial of the Deed or Conveyance under which such subsequent Purchasor or Mortgagee shall claim: And that every Devise by Will of the Honours, Manors, Lands, Tenements or Hereditaments, or any Part thereof, mentioned or contained in any Memorial so registred as aforesaid, that shall be made and published after the Registering of such Memorial, shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee for valuable Consideration, unless a Memorial of such Will be registred in such Manner as is herein after directed.

Register's Office,
where to
be kept.

2. And for settling and establishing a certain Method, with proper Rules and Directions for Registering such Memorials as aforesaid, it is further enacted, That one publick Office for Registering such Memorials of and concerning any Honours, Manors, Lands, Tenements and Hereditaments, that are situate, lying and being within the said West-Riding, shall be established and kept in Wakefield, the nearest Market-Town to the Center or Middle of the said West-Riding, to be managed and executed by a fit and able Person, to be from Time to Time elected and appointed in Manner herein after directed, or his sufficient Depury, and to continue in the said Office so long as he shall well demean himself therein.

Register, how
elected.

3. And that all Elections of a Register to be made or appointed by Virtue of this Act, shall be performed by balloting in Manner following, (that is to say) All the Freeholders that at the Time of any such Election have an Estate of Freehold of or in any Lands, Tenements and Hereditaments within the said West-Riding, of the yearly Value of 100 l. (to be determined by the Oath of the Elector, before the Scrutators herein after mentioned, if any Doubt arise touching the same, which Oath they are hereby impowered to administer) shall be Electors of the said Register; and that the Justices of the Peace for the said West-Riding in that Behalf assembled, or the major Part of them, or any five of such Justices, to be appointed by such major Part, shall be Scrutators of the Ballot; who shall meet on the Day and Place of Election, and there in the Presence of the Electors shall place one or more Glass Vessels, to be provided for that Purpose, into which each Elector present shall put one open Paper, containing the Name of such Person as he approves of to be Register; which Papers shall be taken out again in the Presence of the said Scrutators, by a Person by them in that Behalf appointed; and in the Name or Names of every Person therein, shall be once transcribed in distinct Columns, and under each Name shall be set down the Number of their Electors, which shall be deliberately cast up by the said Scrutators, and the same shall be read over in the Hearing, and fix'd up in the View of the Electors present; and the Person upon whom the Majority shall fall shall be declared Register.

When chosen.

4. The Election of the first Register to be made at the next General Quarter-Sessions of the Peace to be holden for the said West-Riding, after the Feast of Easter in 1704. in open Court, on the said second Day of the said Sessions, between nine in the Morning and three in the Afternoon.

On his Death,
when another
to be chosen.

5. And when and as often as the said Office shall become vacant by the Death, Forfeiture or Surrender of any such Register, the Justices of the Peace for the said West-Riding, assembled at the General Quarter-Sessions of the Peace next after such Vacancy shall happen, or the major Part of them, shall in open Court declare the said Vacancy, and by Order of the same Sessions shall appoint and prefix a certain Day and Time within the Space of one Kalendar Month, and above three Weeks ensuing the End of such General Quarter-Sessions, for the Electors to assemble at Wakefield aforesaid, to chuse a fit and able Person, in the Manner aforesaid, to supply the said Vacancy: And to the Intent that all Persons qualified to be Electors may have due Notice of such Vacancy and Time of Election of a succeeding Register,

the Clerk of the Peace for the Time Being of the said West-Riding shall forthwith cause Copies of such Order for the prefixing the Time of such Election, to be delivered to the respective chief Constables of the several Wapentakes within the said West-Riding, who shall and hereby are required to publish the same in full Market in every Market-Town within their respective Wapentakes, on the next Market-Day after the Receipt thereof, and to affix the same in the most publick Place of Resort there.

6. And upon the Death of any such Register, and until another Election of a Person to execute that Office shall be made in Manner aforesaid, the Executors and Administrators of the Register deceased, together with the Sureties for the said Register, or their Executors and Administrators, shall appoint a proper Person to execute the Office of Register, for whose Demeanor in the Execution of the said Office, the Security given for such Register deceased shall be answerable.

Who to supply the Vacancy.

7. And all and every Memorials so to be entred or registred shall be in Writing, in Vellum or Parchment, and directed to the Register of the said Office; and in Case of Deeds and Conveyances, shall be under the Hand and Seal of some or one of the Grantors, or some or one of the Grantees, his or their Guardians or Trustees, attested by two Witnesses, one whereof to be one of the Witnesses to the Execution of such Deed or Conveyance; which Witness shall upon his Oath before the said Register, or his Deputy, prove the Signing and Sealing of the said Memorial, and the Execution of the Deed or Conveyance mentioned in such Memorial; and in Case of Wills, the Memorials shall be under the Hand and Seal of some or one of the Devisors, his or their Guardians or Trustees, attested by two Witnesses, one whereof shall upon his Oath before the said Register, or his Deputy, prove the Signing and Sealing of such Memorial; which respective Oaths the said Register, or his Deputy, is hereby impowred to administer.

How Memorials shall be written, &c. Of Deeds.

Wills.

8. And every Memorial of any Deed, Conveyance or Will, shall contain the Day of the Month and the Year when the Deed, Conveyance or Will bears Date, and the Names and Additions of all the Parties to such Deed or Conveyance, and of the Devisor or Testatrix of such Will, and of all the Witnesses to such Deed, Conveyance or Will, and the Places of their Abode; and shall express or mention the Honours, Manors, Lands, Tenements and Hereditaments contained in such Deed, Conveyance or Will, and the Names of all the Parishes, Townships, Hamlets, Precincts or Extraparochial Places within the said West-Riding, where any such Honours, Manors, Lands, Tenements or Hereditaments are lying or being, that are given, granted, conveyed, devised, or any way affected or charged by any such Deed, Conveyance or Will, in such Manner as the same are expressed or mentioned in such Deed, Conveyance or Will, or to the same Effect; and that every such Deed, Conveyance and Will, or Probate of the same, of which such Memorial is to be registred as aforesaid, shall be produced to the said Register, or his Deputy, at the Time of entring such Memorial, who shall endorse a Certificate on every such Deed, Conveyance and Will, or Probate thereof, and therein mention the certain Day, Hour and Time on which such Memorial is so entred and registred, expressing also in what Book, Page and Number the same is entred; and that the said Register, or his Deputy, shall sign the said Certificate when so endorsed, which Certificate shall be taken and allowed as Evidence of such respective Registries in all Courts of Record whatsoever; and that every Page of such Register-Books, and every Memorial that shall be entred therein shall be numbred, and the Day of the Month, and the Year and Hour, or Time of the Day when every Memorial is so registred, shall be entred in the Margents of the said Register-Books, and of the said Memorial; and that every such Register shall keep an Alphabetical Kalendar of all Parishes, Extraparochial Places and Townships within the said West-Riding, with Reference to the Number of every Memorial that concerns the Honours, Manors, Lands, Tenements or Hereditaments in every such Parish, Extraparochial Place or Township respectively, and of the Names of the Parties mentioned in such Memorials; and that such Register shall duly file every such Memorial in Order of Time, as the same shall be brought to the said Office, and enter or register the said Memorials in the same Order that they shall respectively come to his Hand.

What the Memorial shall contain.

The Register's Certificate to be endorsed on the Deed;

which shall be Evidence in Courts of Record.

Alphabetical Kalendar.

9. And every such Register, before he enters upon the Execution of the said Office, shall be sworn before the Justices of Peace for the said Riding, or any three or more of them that shall be present at his Election, in these Words:

Register's
Oath.

You shall truly and faithfully perform and execute the Office and Duty that is directed and required by Act of Parliament in registering Memorials of Deeds, Conveyances and Wills, within the West-Riding of the County of York, so long as you shall continue in the said Office; and that you have not given nor promised, directly nor indirectly, nor authorized any Person to give or promise, any Money, Gratuity or Reward whatsoever, for procuring or obtaining the said Office for you.

So help you God.

Register's De-
puty.

Register to
give Security.

10. And when and as often as the said Register shall appoint any Deputy to execute the said Office, such Deputy shall, before he enters upon the Execution thereof, take the said Oath appointed to be taken by the Register, before two or more Justices of the Peace for the said Riding; and every Register at the Time of his being sworn into the said Office, shall also enter into a Recognizance with two or more sufficient Sureties, to be approved of by five or more of the Justices of the Peace of the said Riding that were present at his said Election, by Writing under their Hands and Seals, to be registred at the next General Quarter-Sessions of the Peace for the said Riding, of the Penalty of two Thousand Pounds unto her Majesty, her Heirs and Successors, to be taken by the same Justices of the Peace that approved of his Security, conditioned for his true and faithful Performance of his Duty in the Execution of his said Office: The same to be transmitted by the same Justices of the Peace within one Month next after the Date thereof, into the Office of her Majesty's Remembrancer of the Exchequer, there to remain amongst the Records of the said Court.

When Secu-
rity to be
void.

11. Provided that when any Register shall die, or surrender his Office, and that within the Space of three Years from and after such Death or Surrender no Misbehaviour appears to have been committed by such Register in the Execution of his said Office, then and in such Case, at the End of the said three Years after his Death or Surrender, the said Recognizance shall become void.

Attendance in
the Office.

12. And it is further enacted, That every such Register, or his sufficient Deputy, shall give due Attendance at his Office every Day in the Week, (except Sundays and Holydays) between nine and twelve in the Forenoon, and two and five in the Afternoon, for the Dispatch of all Business belonging to the said Office; and that every such Register, or his Deputy, as often as required, shall make Searches concerning all Memorials that are registred as aforesaid, and give Certificates concerning the same under his Hand, if required by any Person.

What shall be
paid for en-
tering Memo-
rials;

and for Certi-
ficates.

and for
Searches.

Penalty on
Register, &c.

13. And that every such Register shall be allowed for the Entry of every such Memorial as is by this Act directed, the Sum of one Shilling, and no more, in Case the same do not exceed 200 Words; but if such Memorial shall exceed 200 Words, then after the Rate and Proportion of 6 *d.* an 100 for all the Words contained in such Memorial, over and above the first 200 Words: And the like Fees for the like Number of Words contained in every Certificate or Copy given out of the said Office, and no more; and for every Search in the said Office, one Shilling, and no more.

14. And that if any such Register, or his Deputy, shall neglect to perform his or their Duty in the Execution of the said Office, according to the Rules and Directions in this Act mentioned, or commit, or suffer to be committed, any undue or fraudulent Practice in the Execution of the said Office, and be thereof lawfully convicted, that then such Register shall forfeit his said Office, and pay treble Damages with full Costs of Suit to every such Person or Persons that shall be injured thereby; to be recovered by Action of Debt, &c.

In Vacancy,
Oath to be
taken.

15. And that the Person to be nominated as aforesaid, upon the Death of any Register, to execute the said Office during the Time the same shall be vacant as aforesaid, shall, before he enter upon the Execution thereof, take the Oath herein before appointed to be taken by such Register and his Deputy, before two or more Justices of the Peace for the said Riding: And that if such Person so nominated shall be lawfully convicted of any Neglect, Misdemeanor, or fraudulent Practice in the Execution of the said Office during such Vacancy, he shall be liable to pay treble Damages, with full Costs of Suit, to every Person that shall be injured thereby; to be recovered as aforesaid.

16. Provided that this Act shall not extend to any Copyhold Estates, or to any Leases at a Rack-Rent, or to any Lease not exceeding one and twenty Years, where the actual Possession and Occupation goeth along with the Lease.

Copyhold or
Leasehold Es-
tates.

17. Provided that where there are more Writings than one for making and perfecting any Conveyance or Security which do name, mention, or any ways affect or concern the same Honours, Manors, Lands, Tenements or Hereditaments, it shall be a sufficient Memorial and Register thereof, if all the said Honours, Manors, Lands, Tenements and Hereditaments, and the Parishes, Townships, Hamlets, or Extraparochial Places where the same lie, be only once named or mentioned in the Memorial, Register and Certificate of any one of the Deeds or Writings made for the Perfecting of such Conveyance or Security; and that the Dates of the Rest of the said Deeds or Writings relating to the said Conveyance or Security, with the Names and Additions of the Parties and Witnesses, and the Places of their Abodes, be only set down in the Memorials, Registers and Certificates of the same, with a Reference to the Deed or Writing whereof the Memorial is so registred, that contains or expresses the Parcels mentioned in all the said Deeds, and Directions how to find the Registring of the same.

Manors, &c.
to be once
named in the
Memorial,
&c.

18. And that a Memorial of such Deeds, Conveyances and Wills, as shall be made and executed, or published in London, or in any other Place not within forty Miles of the said West-Riding, which do or may concern or affect any Honours, Manors, Lands, Tenements or Hereditaments in the said West-Riding, shall be entred or registred by the aforesaid Register, or his Deputy, in Case an Affidavit sworn before any one of the Judges at Westminster, or a Master in Chancery, be brought with the said Memorial to the said Register, or his Deputy, wherein one of the Witnesses to the Execution of such Deeds and Conveyances shall swear he or she saw the same executed, and the Memorial signed and sealed as abovesaid, or wherein one of the Witnesses to the Memorial of any Will shall swear he or she saw such Memorial signed and sealed as abovesaid; and the same shall be a sufficient Authority to the said Register, or his Deputy, to give the Party that brings such Memorial and Affidavit a Certificate of the Registering such Memorial; which Certificate signed by the said Register, or his Deputy, shall be taken and allowed as Evidence of the Registries of the same Memorials in all Courts of Record whatsoever.

Deeds made
in London, &c.
of Lands in
the West-
Riding, how
to be registred.

19. And that if any Person or Persons shall at any Time forge or counterfeit any such Memorial or Certificate as are herein before mentioned and directed, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to the Penalties in Stat. of 5 Eliz. against all Forgers of false Deeds and Writings: And that if any Person or Persons shall at any Time forswear himself before the said Register, or his Deputy, or before any Judge or Master in Chancery, in any of the Cases aforesaid, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to the same Penalties as if the same Oath had been made in any of the Courts of Record at Westminster.

Of forging
Memorials or
Certificates.

Penalty on
Persons for-
swearing
themselves.

20. Provided that all Memorials of Wills that shall be registred in Manner as aforesaid within the Space of six Months after the Death of every respective Devisor or Testatrix dying in England, Wales, and Town of Berwick upon Tweed, or within the Space of three Years after the Death of every respective Devisor or Testatrix dying upon or in any Parts beyond the Seas, shall be as valid and effectual against subsequent Purchasers, as if the same had been registred immediately after the Death of such respective Devisor or Testatrix.

Memorials of
Wills when to
be valid.

21. Provided that in Case the Devisee, or Person or Persons interested in the Honours, Manors, Lands, Tenements or Hereditaments devised by any such Will as aforesaid, by reason of the contesting such Will, or other inevitable Difficulty, without his, her or their wilful Neglect or Default, shall be disabled to exhibit a Memorial for the Registry thereof within the respective Times herein before limited; then and in such Case the Registry of the Memorial within the Space of six Months next after his, her or their Attainment of such Will, or a Probate thereof, or Removal of the Impediment, whereby he, she or they are disabled or hindered to exhibit such Memorial, shall be a sufficient Registry within the Meaning of this Act.

Of Wills con-
tested.

22. And no Member of Parliament for the Time being shall be capable of being chosen Register, or of executing by himself, or any other Person, the said Office; or have, take or receive any Fee, or other Profit whatsoever, for or in Respect thereof: Nor shall any Register, or his Deputy for the Time being, be capable of being chosen a Member to serve in Parliament.

Who is not to
be Register.

23. This

Publick Act. 23. This Act shall be taken as a publick Act; and all Judges and Justices are hereby required as such to take Notice thereof, without special Pleading the same.

An Abridgment of the *Stat. 6 Ann. c. 35.* "For the publick Registering of all Deeds, Conveyances, Wills, and other Incumbrances that shall be made of or that may affect any Honours, Manors, Lands, Tenements or Hereditaments within the East-Riding of the County of *Tork*, or the Town and County of the Town of *Kingston upon Hull*, after the nine and twentieth Day of *September 1708.* and for rendering the Register in the West-Riding more compleat.

East-Riding
in *Yorksire.*

This Statute recites, That whereas the Lands in the East-Riding of the County of *Tork*, and in the Town and County of the Town of *Kingston upon Hull*, are generally Freehold, which may be so secretly transferred or conveyed from one Person to another, that such as are ill-disposed have it in their Power to commit Frauds, and frequently do so, by Means whereof several Persons (who thro' many Years Industry in their Trades and Employments, and by great Frugality, have been enabled to purchase Lands, or to lend Monies on Land Security) have been undone in their Purchases and Mortgages, by prior and secret Conveyances and fraudulent Incumbrances, and not only themselves but their whole Families thereby utterly ruined: For Remedy whereof, (at the humble Request of the Justices of the Peace, Gentlemen and Freeholders of the said East-Riding, and of the said Town and County of the Town of *Kingston upon Hull*) It is enacted,

A Memorial
to be registred.

1. That a Memorial of all Deeds and Conveyances, which after the 29th of *September 1708.* shall be made and executed, and of all Wills and Devises in Writing made, or to be made and published, where the Devisor or Testatrix shall die, after the said nine and twentieth Day of *September*, of or concerning, and whereby any Honours, Manors, Lands, Tenements or Hereditaments in the said East-Riding, or in the said Town and County of the Town of *Kingston upon Hull*, may be any ways affected in Law or Equity, may be registred in such Manner as is herein after directed; and that every such Deed or Conveyance that shall at any Time after the said nine and twentieth Day of *September* be made and executed, shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee for valuable Consideration, unless such Memorial thereof be registred, as by this Act is directed, before the Registering of the Memorial of the Deed or Conveyance under which such subsequent Purchasor or Mortgagee shall claim: And that every such Devise by Will shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee for a valuable Consideration, unless a Memorial of such Will be registred in such Manner as is herein after directed.

Method for
Registering
such Memo-
rials.

Where Re-
gister-Office
to be.

Register, how
elected.

2. And for settling and establishing a certain Method, with proper Rules and Directions for Registering such Memorials as aforesaid, it is further enacted, That one publick Office for Registering such Memorials of and concerning any Honours, Manors, Lands, Tenements and Hereditaments, that are situate, lying and being within the said East-Riding, or the said Town and County of the Town of *Kingston upon Hull*, shall, (at the publick Charge of the said East-Riding, to be raised by the Justices of the Peace thereof at their General Quarter-Sessions of the Peace, in such Manner as they are empowered to raise Money for the Repairs of Publick or County Bridges) be erected and established at *Beverley*, the nearest Market-Town to the Center or Middle of the said East-Riding, to be managed and executed by a fit and able Person, to be from Time to Time elected and appointed in Manner herein after directed, or his sufficient Deputy, and so continue in the said Office for so long Time as he shall well demean himself therein.

3. And it is further enacted, That all Elections of a Register to be made or appointed by Virtue of this Act, shall be performed by balloting in Manner following: that is to say, All the Freeholders that at the Time of any such Election have an Estate of Freehold of or in any Lands, Tenements or Hereditaments within the said East-Riding, and the said Town and County of the Town of *Kingston upon Hull*, or in either of them, of the yearly Value of one hundred Pounds, to be determined by the Oath of the Elector, before the Scrutators herein after mentioned, if any Doubt arise touching the same, shall be Electors of the said Register; and that the Justices of the Peace for the said East-Riding, in that Behalf assembled, or the major Part of them, or any five of such Justices, to be appointed by such major Part, shall be Scrutators of the Ballot, who shall meet on the Day and Place of Election, and there in the Presence of the Electors shall place one or more Glass Vessels, to be provided for

for that Purpose, into which each Elector present shall put one open Paper, containing the Name of such Person as he approves of to be Register; which Papers shall be taken out again in the Presence of the said Scrutators, by a Person by them in that Behalf appointed; and the Name or Names of every Person therein shall be once transcribed in distinct Columns, and under each Name shall be set down the Number of their Electors, which shall be deliberately cast up by the said Scrutators, and the same shall be read over in the Hearing, and fixed up in the View of the Electors then present, and the Person upon whom the Majority shall fall shall be declared Register.

4. The Election of a Person to be the first Register shall be made at *Beverley* aforesaid, upon the 13th of *July* in the said Year 1708. in open Court, between nine in the Morning and three in the Afternoon.

Time and
Place of
Election.

5. When and as often as the said Office shall become vacant by the Death, Forfeiture or Surrender of any such Register, the Justices of the Peace for the said East-Riding, assembled at the General Quarter-Sessions of the Peace next after such Vacancy shall happen, or the major Part of them, shall in open Court declare the said Vacancy, and by Order of the same Sessions shall appoint and prefix a certain Day and Time within the Space of one Kalendar Month, and above three Weeks ensuing the End of such General Quarter-Sessions, for the Electors to assemble at *Beverley* aforesaid, to chuse a fit and able Person in the Manner aforesaid to supply the said Vacancy: And to the Intent that all Persons qualified to be Electors may have due Notice of such Vacancy and Time of Election of a succeeding Register, the Clerk of the Peace for the Time being for the said East-Riding, shall forthwith cause Copies of such Order, for the prefixing the Time of such Election, to be delivered to the respective chief Constables of the several Wapentakes within the said East-Riding, who shall and are hereby required to publish the same in full Market in every Market-Town within their respective Wapentakes on the next Market-Day after the Receipt thereof, and to affix the same in the most publick Place of Resort there.

On Register's
Death another
to be chosen.

6. And every such Register, before he enters upon the Execution of the said Office, shall be sworn before the Justices of the Peace for the said Riding, or any three or more of them that shall be present at his Election, in these Words:

Who shall be
sworn.

You shall truly and faithfully perform and execute the Office and Duty that is directed and required by you to be done by Act of Parliament, intituled, An Act for the publick Registering of all Deeds, Conveyances, Wills, and other Incumbrances that shall be made of, or that may affect any Honors, Manors, Lands, Tenements or Hereditaments within the East-Riding of the County of York, or the Town and County of the Town of Kingston upon Hull, after the nine and twentieth Day of September one Thousand seven Hundred and eight; and that you have not given or promised, directly or indirectly, nor authorized any Person to give or promise any Money, Gratuity or Reward whatsoever, for procuring or obtaining the said Office for you.

Register's
Oath.

So help you God.

7. And when and as often as the said Register shall appoint any Deputy to execute the said Office, such Deputy shall, before he enters upon the Execution thereof, take the said Oath appointed to be taken by the said Register, before two or more of the Justices of the Peace for the said Riding.

Register's Deputy to take
the same
Oath.

8. And upon the Death of any such Register, and until another Election of a fit Person to execute that Office, shall be made in Manner aforesaid, the Executors and Administrators of the Register deceased, together with the Sureties for the said Register, or their Executors or Administrators, shall appoint a proper Person to execute the Office of Register, for whose Demeanor in the Execution of the said Office, the Security given for such Register deceased shall be answerable.

Who to execute the Office on Vacancy.

9. The Person to be appointed as aforesaid, upon the Death of any Register, to execute the said Office during the Time the same shall be vacant as aforesaid, shall, before he enters upon the Execution thereof, take the Oath herein before appointed to be taken by such Register and his Deputy, before two or more Justices of the Peace for the said Riding; and if such Person so appointed shall be lawfully convicted of any Neglect, Misdemeanor, or fraudulent Practice in the Execution of the said Office during such Vacancy, he shall be liable to pay treble Damages, with full Costs of Suit, to every Person that shall be injured thereby, to be recovered as is herein after directed.

To take the said Oath.

Penalties on Neglects.

How Memorials shall be written.

10. All and every Memorial so to be entred and registred shall be put into Writing in Vellum or Parchment, and brought to the said Office; and in Case of Deeds and Conveyances, shall be under the Hand and Seal of some or one of the Grantors, or some or one of the Grantees, his or their Heirs, Executors or Administrators, Guardians or Trustees, attested by two Witnesses, one whereof to be one of the Witnesses to the Execution of such Deed or Conveyance; which Witness shall upon his Oath before the said Register, or his Deputy, prove the Signing and Sealing of such Memorial; and in Case of Wills, the Memorials shall be under the Hand and Seal of some or one of the Devisees, his or their Heirs, Executors or Administrators, Guardians or Trustees, attested by two Witnesses, one whereof shall, upon his Oath before the said Register, or his Deputy, prove the Signing and Sealing of such Memorial.

What every Memorial shall contain.

11. Every Memorial of any Deed, Conveyance or Will, shall contain the Day of the Month and the Year when such Deed, Conveyance or Will bears Date, and the Names and Additions of all the Parties to such Deed, Conveyance or Will, and the Places of their Abode; and shall express or mention the Honors, Manors, Lands, Tenements and Hereditaments contained in such Deed, Conveyance or Will, and the Names of all the Parishes, Townships, Hamlets, Precincts or Extraparochial Places within the said East-Riding, and the said Town and County of the Town of *Kingston upon Hull*, or either of them, where any such Honors, Manors, Lands, Tenements or Hereditaments are lying or being, that are given, granted, conveyed, devised, or any way affected or charged by any such Deed, Conveyance or Will, in such Manner as the same are expressed or mentioned in such Deed, Conveyance and Will, or to the same Effect; and that every such Deed, Conveyance and Will, or Probate of the same, of which such Memorial is so to be registred as aforesaid, shall be produced to the said Register, or his Deputy, at the Time of entring such Memorial, who shall endorse a Certificate on every such Deed, Conveyance and Will, or Probate thereof, and therein mention the certain Day, Hour and Time on which such Memorial is so entred or registred, expressing also in what Book, Page and Number the same is entred; and the said Register, or his Deputy, shall sign the said Certificate when so endorsed, which Certificate shall be taken and allowed as Evidence of such respective Registries in all Courts of Record whatsoever; and every Page of such Register-Books, and every Memorial that shall be entred therein, shall be numbred, and the Day of the Month, and the Year and Hour, or Time of the Day when every Memorial is registred, shall be entred in the Margents of the said Register-Books, and of the said Memorial; and that every such Register shall keep an Alphabetical Kalendar of all Parishes, Extraparochial Places and Townships within the said East-Riding, and the said Town and County of the Town of *Kingston upon Hull*, with Reference to the Number of every Memorial that concerns the Honors, Manors, Lands, Tenements or Hereditaments in every such Parish, Extraparochial Place or Township respectively, and of the Names of the Parties mentioned in such Memorials; and that such Register shall duly file every such Memorial in Order of Time, as the same shall be brought to the said Office, and enter or register the said Memorials in the same Order that they shall respectively come to his Hand.

Certificate of registring Memorial.

Alphabetical Kalendar.

Of Memorials made in London, &c. concerning Lands, &c. in the East-Riding.

12. And that a Memorial of such Deeds, Conveyances and Wills, as shall be made and executed, or published in *London*, or in any other Place not within forty Miles of the said East-Riding, which do or may concern or affect any Honors, Manors, Lands, Tenements or Hereditaments in the said East-Riding, or the said Town and County of the Town of *Kingston upon Hull*, shall be entred and registred by the aforesaid Register, or his Deputy, in Case an Affidavit sworn before one of the Judges at *Westminster*, or a Master in Chancery, ordinary or extraordinary, be brought with the said Memorial to the said Register, or his Deputy, wherein one of the Witnesses to the Execution of such Deeds and Conveyances shall swear he or she saw the same executed, and the Memorial signed and sealed as aforesaid; and the same shall be a sufficient Authority to the said Register, or his Deputy, to give the Party that brings such Memorial and Affidavit a Certificate of the Registring such Memorial; which Certificate signed by the said Register, or his Deputy, shall be taken and allowed as Evidence of the Registries of the same Memorials in all Courts of Record whatsoever.

13. Provided that where there are more Writings than one for making and perfecting any Conveyance or Security which do name, mention, or any ways affect or concern the same Honours, Manors, Lands, Tenements or Hereditaments, it shall be a sufficient Memorial and Register thereof, if all the said Honours, Manors, Lands, Tenements or Hereditaments, and the Parishes, Townships, Hamlets, or Extraparochial Places wherein the same lie, be only once named or mentioned in the Memorial, Register and Certificate of any one of the Deeds or Writings made for the Perfecting of such Conveyance or Security; and that the Dates of the Rest of the said Deeds or Writings relating to the said Conveyance or Security, with the Names and Additions of the Parties and Witnesses, and the Places of their Abodes, be only set down in the Memorials, Registers and Certificates of the same, with a Reference to the Deed or Writing whereof the Memorial is so registred, that contains or expresses the Parcels mentioned in all the said Deeds, and Directions how to find the Registering the same.

How Memorials to be when several Deeds of Conveyance.

14. Provided also that all Memorials of Wills that shall be registred in Manner as aforesaid within six Months after the Death of every respective Devisor or Testatrix dying within the Kingdom of *Great Britain*, or within three Years after every respective Devisor or Testatrix dying upon or in any Parts beyond the Seas, shall be as valid and effectual against subsequent Purchasors, as if the same had been registred immediately after the Death of such respective Devisor or Testatrix.

Memorials of Wills when to be registred.

15. Provided always that in Case the Devisee, or Person or Persons interested in the Honours, Manors, Lands, Tenements or Hereditaments devised by any such Will as aforesaid, by reason of the contesting such Will, or other inevitable Difficulty, without his, her or their wilful Neglect or Default, shall be disabled to exhibit a Memorial for the Registry thereof within the respective Times herein before limited; and that a Memorial shall be entred in the said Office of such Contest or other Impediment within the Space of six Months after the Decease of such Devisor or Testatrix who shall die within the Kingdom of *Great Britain*, or within the Space of three Years next after the Decease of such Person who shall die upon or beyond the Seas; then and in such Case the Registry of the Memorial of such Will within six Months next after his, her or their Attainment of such Will, or a Probate thereof, or Removal of the Impediment, whereby he, she or they are disabled or hindered to exhibit such Memorial, shall be a sufficient Registry within the Meaning of this Act.

Of Wills contested.

16. And whereas by an Act of Parliament made in the 27th Year of the Reign of King *Henry the 8th*, intituled, An Act for Inrolments of Bargains and Sales, it is enacted, That no Manors, Lands, Tenements or other Hereditaments, shall pass, alter or change from one to another, whereby any Estate of Inheritance or Freehold shall be made by Reason only of any Bargain and Sale thereof, except the said Bargain and Sale be made by Writing indented, sealed and inrolled in one of the King's Courts of Record at *Westminster*, or else within the same County or Counties where the same Manors, Lands, Tenements or Hereditaments so bargained and sold lie or be, before the *Custos Rotulorum*, and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at the least, whereof the Clerk of the Peace to be one; which Act hath been found by Experience to be of little or no Use within the said East-Riding, or the said Town and County of the Town of *Kingston upon Hull*, for that the Clerks of the Peace thereof respectively for the Time being, who have the Keeping of the said Inrolments within the said respective Places, are not by the said Act enjoined to give any Security for the safe Keeping, nor under any Penalty for the negligent Keeping of the said Inrolments, nor is there by the said Act any certain Place appointed for the Keeping thereof: And whereas by this present Act a publick Office is intended to be erected and established at *Beverley* aforesaid, at the publick Charge of the said East-Riding, for Registering and safe Keeping Memorials of all Deeds, Conveyances and Wills as aforesaid, and a publick Register to be chosen, who, according to the Directions hereafter mentioned, is to give sufficient Security for the due Execution of the said Office: For rendering therefore the said Act made in the 27th of King *Henry the 8th* more effectual and beneficial to the Inhabitants of the said East-Riding, and of the Town and County of the Town of *Kingston upon Hull*, it is further enacted, That after the said 29th Day of September 1708. all Bargains and Sales of any Manors, Lands, Tenements and Hereditaments, situate, lying and being within the said East-Riding, or the said Town and County of the Town of *Kingston upon Hull*, which shall be inrolled by the said Register, or his Deputy for the Time being, in the said publick Office at *Beverley*, shall be

Recital of Stat. 27 H. 8.

And its Effect in the East-Riding.

Publick Office, where to be erected.

Of inrolling Lands at *Beverley*.

be as good, effectual and available, to all Intents and Purposes whatsoever, as if the same had been inrolled in one of the Queen's Courts of Record at *Westminster*, or before the *Custos Rotulorum*, and two Justices of the Peace, and the Clerk of the Peace of the said East-Riding, or of the said Town and County of the Town of *Kingston upon Hull*, or two of them, according to the aforesaid Act of the 27th of King Henry the 8th, or any other Act now in Force: And one or more Justice or Justices of the Peace of the said Riding for the Time being shall have Power to take and enter an Acknowledgment of the Bargainor, if but one, or one of the Bargainors, if more, in such Bargains and Sales; and the said Register, or his Deputy for the Time being, shall well and sufficiently inrol by ingrossing in Parchment Books all such Bargains and Sales as shall for that Purpose be acknowledged as aforesaid; and shall indorse a Certificate on such Bargains and Sales of the Times of inrolling thereof, and sign the same, and the Books thereof shall safely keep in the said publick Office, there to remain upon Record amongst the Memorials of Deeds there registred.

Certificate of Deeds registred to be sufficient Evidence.

17. And that all Deeds of Bargain and Sale so inrolled in the said publick or Register-Office as aforesaid which shall appear to be so inrolled by an Indorsement or Certificate on the said Deeds of Bargain and Sale, signed by the said Register, or his Deputy; and that all Copies of the Inrolments thereof remaining on Record in the said Register-Office shall be allowed in all Courts where such Bargains and Sales, or Copies, shall be produced, to be as good and sufficient Evidence as any Bargains and Sales inrolled in any of the Courts at *Westminster*, and the Copies of the Inrolments thereof.

Inrolment to be deemed the Entering the Memorial.

18. And that every such Inrolment of every such Deed in the said Register-Office as aforesaid, shall be deemed and adjudged to be the Entering of a Memorial thereof pursuant to this Act, and shall have the same Force and Effect upon the Estate therein mentioned, in Relation to all subsequent Deeds, Conveyances and Wills, and to all other Intents and Purposes, as if a Memorial of such inrolled Deed had been entred in the said Register-Office as aforesaid pursuant to this Act.

Judgments, &c. when to affect Lands in the East-Riding.

19. And that no Judgment, Statute or Recognizance (other than such as shall be entred into in the Name and upon the proper Account of her Majesty, her Heirs and Successors) which shall be obtained or entred into after the said 29th of September in the said Year 1708. shall effect or bind any Honors, Manors, Lands, Tenements or Hereditaments, situate, lying and being in the said East-Riding, or in the said Town and County of the Town of *Kingston upon Hull*, but only from the Time that a Memorial of such Judgment, Statute or Recognizance, shall be entred at the said Register-Office, expressing and containing, in Case of such Judgment, the Names of the Plaintiffs; and the Names and Additions therein of the Defendants, the Sums thereby recovered, and the Times of the Signing thereof; and in Case of Statutes and Recognizances expressing and containing the Date of such Statute or Recognizance, the Name and Additions of the Cognizers and Cognizees therein, and for what Sums, and before whom the same were acknowledged; and that in Order to the Making and Entry of such Memorials, Judgments, Statutes and Recognizances as aforesaid, the Party and Parties desiring the same, shall produce to and leave with the said Register, or his Deputy, to be filed in the said publick or Register-Office, a Memorial of such Judgment, Statute or Recognizance, signed by the proper Officer, or his Deputy, who shall sign such Judgment, or his Successor in the same Office, or by the proper Officer in whose Office such Statute or Recognizance shall be inrolled, together with an Affidavit, sworn before one of the Judges at *Westminster*, or a Master in Chancery, that such Memorial was duly signed by the Officer whose Name shall appear to be thereunto set, which Memorial such respective Officer is hereby required to give such Plaintiff or Plaintiffs, Cognizee or Cognizees, or his, her or their Executors or Administrators, or Attorney, or any of them, he, she or they paying for the same the Sum of one Shilling, and no more.

Memorials of Judgments what to contain, &c.

Register to enter the Memorial and give a Certificate.

20. And that the said Register, or his Deputy, shall make an Entry, and likewise (if required) shall give a Certificate in Writing under his Hand, testified by two credible Witnesses, of every such Memorial of any Judgment, Statute or Recognizance brought to him to be so registred as aforesaid, and therein mention the certain Day on which such Memorial is so registred or entred, expressing also in what Book, Page and Number the same is entred.

Fees for entering Memorials.

21. And that every such Register shall be allowed for the Entry of every such Memorial as is by this Act directed, the Sum of one Shilling, and no more, in Case the same do not exceed 200 Words; but if such Memorial shall exceed 200 Words,

then after the Rate and Proportion of 6 *d.* a 100 for all the Words contained in such Memorial, over and above the first 200 Words: And the like Fees for the like Number of Words contained in every such Bargain and Sale as aforesaid; and in every Certificate or Copy given out of the said Office, and no more; and for every Search in the said Office, one Shilling, and no more.

22. And that every such Register, or his sufficient Deputy, shall give due Attendance at his Office every Day in the Week (except *Sundays* and *Holydays*) between nine and twelve in the Forenoon, and two and five in the Afternoon, for the Dispatch of all Business belonging to the said Office; and that every such Register, or his Deputy, as often as required, shall make Searches concerning all Memorials that are registred as aforesaid, and give Certificates concerning the same under his Hand (if required by any Person) testified by two credible Witnesses.

Attendance at the Office.

23. And that every Register at the Time of his being sworn into the said Office as aforesaid, shall enter into a Recognizance, with two or more sufficient Sureties, (to be approved of by five or more of the Justices of the Peace of the said Riding that were present at his Election, by Writing under their Hands and Seals, to be registred at the next General Quarter-Sessions of the Peace for the said Riding) of the Penalty of two Thousand Pounds unto her Majesty, her Heirs and Successors, to be taken by the same Justices of the Peace that approved of his Security, conditioned for his true and faithful Performance of his Duty in the Execution of his said Office, in all Things directed and required by this Act: The same to be transmitted by the same Justices of the Peace within one Month next after the Date thereof, into the Office of her Majesty's Remembrancer of the Exchequer, there to remain amongst the Records of the said Court.

Register to give Security.

24. That if any such Register, or his Deputy, shall neglect to perform his or their Duty in the Execution of the said Office, according to the Rules and Directions in this Act mentioned, or commit, or suffer to be committed, any undue or fraudulent Practice in the Execution of the said Office, and be thereof lawfully convicted, then such Register shall forfeit his said Office, and pay treble Damages with full Costs of Suit to every such Person or Persons as shall be injured thereby; to be recovered by Action of Debt, &c. in any of her Majesty's Courts of Record at *Westminster*.

Penalty on Neglect of Duty.

25. Provided nevertheless that when any Register dies or surrenders his Office, and that within the Space of three Years after his Death or Surrender no Misbehaviour appears to be committed by such Register in the Execution of the said Office, then at the End of the said three Years after his Death or Surrender, the said Recognizance so entred into by him shall become void and of none Effect to all Intents and Purposes.

When Recognizance to be void.

26. That if any Person or Persons shall at any Time forge or counterfeit any Entry of the Acknowledgment of any Bargainor in any such Bargain and Sale as aforesaid, or any such Memorial, Certificate or Indorsement as is herein mentioned or directed, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to such Pains and Penalties, as in and by an Act made in the fifth Year of Queen *Elizabeth*, intituled, An Act against Forgers of false Deeds and Writings, are imposed upon Persons for forging and publishing of false Deeds, Charters or Writings sealed, Court-Rolls or Wills, whereby the Freehold or Inheritance of any Person or Persons, of, in or to any Lands, Tenements or Hereditaments, shall or may be molested, troubled or charged: And that if any Person or Persons shall at any Time forswear himself before the said Register, or his Deputy, or before any Judge or Master in Chancery, in any of the Cases herein mentioned, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to the same Penalties as if the same Oath had been made in any of the Courts of Record at *Westminster*.

Of forging Entry.

27. That in Case of Mortgages, Judgments, Statutes and Recognizances, whereof Memorials shall be entred in the said Register-Office, pursuant to this Act, if at any Time afterwards a Certificate shall be brought to the said Register, or his Deputy, signed by the respective Mortgagors and Mortgagees in such Mortgage, Plaintiffs and Defendants in such Judgment, Cognizor and Cognizees in such Statute or Recognizance, their respective Executors, Administrators or Assigns, and attested by two Witnesses, whereby it shall appear that all Monies due upon such Mortgage, Judgment, Statute or Recognizance respectively, have been paid or satisfied in Discharge thereof; which Witnesses shall, upon their Oath before the said Register, or his Deputy, prove such Monies to be satisfied or paid accordingly, and that they saw such

Certificate of Mortgages discharged.

Certificate signed by the said Mortgagors and Mortgagees, Plaintiffs and Defendants, Cognizors and Cognizees respectively, their respective Executors, Administrators or Assigns, that then and in every such Case the said Register, or his Deputy, shall make an Entry in the said Margents of the said Register-Books against the Registry of the Memorial of such Mortgage, Judgment, Statute or Recognizance respectively, that the same was satisfied and discharged according to such Certificate, to which the same Entry shall refer, and shall after file such Certificate, to remain upon Record in the said Register-Office.

When Judgments, &c. to be registered.

28. Provided nevertheless, that if any Judgment, Statute or Recognizance be registered in the said Register-Office within thirty Days after the Acknowledgment or Signing thereof, all the Lands that the Defendants or Cognizors had at the Time of such Acknowledgment or Signing shall be bound thereby.

This Act not to extend to Copyhold Estates, &c.

29. Provided always that this Act shall not extend to any Copyhold Estates, or to any Leases at a Rack-Rent, or to any Lease not exceeding twenty-one Years, where the actual Possession goeth along with the Lease.

How Bargains and Sales of Fee-simple Estates shall be construed.

30. That in all Deeds of Bargain and Sale hereafter inrolled in Pursuance of this Act, whereby any Estate of Inheritance in Fee-simple is limited to the Bargainee and his Heirs, the Words *grant, bargain and sell*, shall amount to, and be construed and adjudged in all Courts of Judicature to be express Covenants to the Bargainee, his Heirs and Assigns, from the Bargainor, for himself, his Heirs, Executors and Administrators; that the Bargainor, notwithstanding any Act done by him, was at the Time of the Execution of such Deed seised of the Hereditaments and Premises thereby granted, bargained and sold, of an indefeasible Estate in Fee-simple, free from all Incumbrances, (Rents and Services due to the Lord of the Fee only excepted) and for quiet Enjoyment thereof against the Bargainor, his Heirs and Assigns, and all claiming under him; and also for further Assurance thereof to be made by the Bargainor, his Heirs and Assigns, and all claiming under him, unless the same shall be restrained and limited by express particular Words contained in such Deed, and that the Bargainee, his Heirs, Executors, Administrators and Assigns respectively, shall and may, in any Action to be brought, assign a Breach or Breaches thereupon, as they might do in Case such Covenants were expressly inserted in such Bargain and Sale.

Register-Books how signed.

31. That every Lease of the aforesaid Register-Books and Inrolment-Books shall be signed by two Justices of the Peace of the said Riding (to be from Time to Time appointed by the Justices of the Peace thereof, or the major Part of them, at their General Quarter-Sessions of the Peace assembled) who are hereby required to sign the same accordingly; and that an Entry thereof shall be made from Time to Time, by the Clerk of the Peace of the said Riding for the Time being, in the Order-Book of the said Sessions, and signed by the same Justices of the Peace that shall from Time to Time sign the said Register-Books and Inrolment-Books, to remain upon Record amongst the Records of the said Sessions; and that a like Entry shall be made upon Record, and signed as aforesaid, of the Number of the same Books, and how called or marked, and how many Pages each of them contains, that are at any Time and from Time to Time used in the said Register-Office.

Who not to be Register.

32. That no Member of Parliament for the Time being shall be capable of being chosen Register, or of executing by himself, or any other Person, the said Office; or have, take or receive any Fee, or other Profit whatsoever, for or in Respect thereof: Nor shall any Register, or his Deputy for the Time being, be capable of being chosen a Member to serve in Parliament.

This a publick Act.

33. That this Act shall be taken and allowed in all Courts within this Kingdom as a publick Act; and all Judges, Justices, and other Persons therein concerned, are hereby required as such to take Notice thereof, without special Pleading the same.

Recital of Stat. 2 Ann. c. 4. 5 Ann. c. 18.

34. And whereas an Act of Parliament made in the second Year of her present Majesty's Reign, intituled, An Act for the publick Registering of all Deeds, Conveyances and Wills, that shall be made of any Honors, Manors, Lands, Tenements or Hereditaments within the West-Riding of the County of York, after the 29th Day of September 1704. And also one other Act made in the (a) fifth Year of her present Majesty's Reign, intituled, An Act for Inrolment of Bargains and Sales within the West-Riding of the County of York, in the Register-Office there lately provided; and for making the said Register more effectual, were of very good Design, but have been found by Experience to be defective in several Particulars, for which apt Remedy is provided by the Method of this Act, in and for the said East-Riding of the County

(a) See this Act Tit. Bargain and Sale, post.

County of *York*, and the Town and County of the Town of *Kingston upon Hull*; It is enacted, That from and after the said 29th Day of *September 1708*. all and every the Provisions, Clauses, Articles, Matters and Things in this present Act contained, concerning the said East-Riding, and the Town and County of the Town of *Kingston upon Hull*, and not provided for or contained in the said recited Acts, or either of them, shall extend unto and affect all Honors, Manors, Lands, Tenements and Hereditaments, situate, lying and being within the said West-Riding, (the Mortgage or Purchase whereof shall exceed the Sum of fifty Pounds) as effectually as if the same and every of them were respectively inserted and contained in the said recited Acts; and that from and after the said 29th Day of *September 1708*. all and every Person and Persons in the Execution of the said recited Acts respectively within the said West-Riding, shall conform unto and duly observe the Alterations, additional Provisions, Orders, Rules and Directions of this present Act, as to the Honors, Manors, Lands, Tenements and Hereditaments, situate, lying and being within the said West-Riding, and every Matter and Thing relating thereunto, in like Manner as by this Act required and enjoined to be done within the said East-Riding, as to the Honors, &c. within the said East-Riding, and Town and County of the Town of *Kingston upon Hull*, or any Matter or Thing relating thereunto.

West-Riding.
The Clauses
in this Act
not contained
in the said re-
cited Acts, to
affect all Ho-
nors, &c. in
the West-
Riding.

An Abridgment of the *Stat. 7 Ann. c. 20*. "For the publick Registering of Deeds, Conveyances and Wills, and other Incumbrances that shall be of, or that may affect any Honors, Manors, Lands, Tenements or Hereditaments within the County of *Middlesex*, after the 29th Day of *September 1709*.

Whereas by the different and secret Ways of conveying Lands, Tenements and Hereditaments, such as are ill-disposed have it in their Power to commit Frauds, and frequently do so, by Means whereof several Persons (who thro' many Years Industry in their Trades and Employments, and by great Frugality, have been enabled to purchase Lands, or to lend Monies on Land Security) have been undone in their Purchases and Mortgages, by prior and secret Conveyances and fraudulent Incumbrances, and not only themselves but their whole Families thereby utterly ruined: For Remedy whereof, (at the humble Request of the Justices of the Peace, Gentlemen and Freeholders of the County of *Middlesex*) It is enacted,

Of Registering
Deeds and
Wills, &c. in
Middlesex.

That a Memorial of all Deeds and Conveyances, which from and after the 29th Day of *September* in the Year of our Lord 1709. shall be made and executed, and of all Wills and Devises in Writing made, or to be made and published, where the Devisor or Testatrix shall die, after the said 29th Day of *September*, of or concerning and whereby any Honors, Manors, Lands, Tenements or Hereditaments in the said County, may be any way affected in Law or Equity, may be registred in such Manner as is herein after directed; and that every such Deed or Conveyance that shall at any Time after the said 29th Day of *September* be made and executed, shall be adjudged fraudulent and void against any subsequent Purchaser or Mortgagee for valuable Consideration, unless such Memorial thereof be registred, as by this Act directed, before the Registering of the Memorial of the Deed or Conveyance under which such subsequent Purchaser or Mortgagee shall claim: And that every such Deed or Will shall be adjudged fraudulent and void against any subsequent Purchaser or Mortgagee for valuable Consideration, unless a Memorial of such Will be registred at such Times and in such Manner as is herein after directed.

A Memorial
to be made.

And for settling and establishing a certain Method, with proper Rules and Directions for Registering such Memorials as aforesaid, it is further enacted, That one publick Office for Registering such Memorials of and concerning any Honors, Lands, Tenements or Hereditaments, that are situate, lying and being within the said County, shall be erected and established in Manner following; that is to say, That for the better and more effectual putting in Execution the Matters and Things in this Act contained, the sworn Clerk to execute the Office of Inrolment in the High Court of Chancery, who is appointed to inrol for the County of *Middlesex*, the Chief Clerk to inrol Pleas in the Queen's Bench, the Clerk of the Warrants in the Court of Common Pleas, and the Queen's Remembrancer, or his Deputy, in the Court of Exchequer, shall be the Registers or Masters of the Office for the Matters and Things in this Act contained; and also shall and may from Time to Time nominate and appoint one or more able and sufficient Person or Persons, for whom they shall be accountable, to be their Deputy or Deputies; which said Registers, or their Deputies, shall well and truly do and perform all and every the Matters and Things intended by this

Register-Of-
fice erected.

Who to be
Registers.

Deputies.

(a) The Office is in the upper End of Bell Yard near Lincoln's Inn.

this Act to be done and performed; in some convenient Office or Place, to be provided by the said Clerks or Registers in or (a) near some of the Inns of Court or Chancery, whereto all Persons may have free Resort at the Times appointed by this Act: And that the said Clerks or Registers shall present such Deputy or Deputies to the Lord High Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal of Great Britain, to the Chief Justice of the Queen's Bench, to the Chief Justice of the Common Pleas, and to the Chief Baron of the Court of Exchequer for the Time being, to be by them, or any three of them, approved of, before such Deputy or Deputies shall enter upon the Execution of the said Office; and that such Deputy or Deputies shall and may be displaced and removed by the said Lord High Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal, the Chief Justices of the Queen's Bench and Common Pleas, and Chief Baron, or any three of them, by any Writing under their Hands and Seals; and that the said Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal, the two Chief Justices and Chief Baron, or any three of them, shall from Time to Time have full Power and Authority to make such Rules and Orders for the better Managing and Government of the said Office, agreeable to the Form and true Intention of this Act, as they shall find convenient and necessary.

Register to be sworn.

And that every such Register or Master, before he enter upon the Execution of the said Office, shall be sworn before the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal of Great Britain, or the Chief Justice of the Queen's Bench, Chief Justice of the Common Pleas, and Chief Baron of the Court of Exchequer, or any one of them, in these Words:

You shall swear, that you will truly and faithfully perform and execute the Office and Duty that is directed and required by you to be done by Act of Parliament, intituled, An Act for the publick Registering of Deeds, Conveyances and Wills, and other Incumbrances that shall be made of, or that may affect any Honors, Manors, Lands, Tenements or Hereditaments within the County of Middlesex, after the 29th Day of September 1709. and that you have not given or promised, directly or indirectly, nor authorized any Person to give or promise, any Money, Gratuity or Reward whatsoever, for procuring or obtaining the said Office for you.

So help you God.

Misdemeanors.

And that if such Person so appointed Register or Master shall be lawfully convicted of any Neglect, Misdemeanor, or fraudulent Practice in the Execution of the said Office, he shall be liable to pay treble Damages, with full Costs of Suit, to every Person that shall be injured thereby; to be recovered as is herein after directed.

Memorials how written.

And that all and every Memorial so to be entred and registred shall be put into Writing, in Vellum or Parchment, and brought to the said Office; and in Case of Deeds and Conveyances, shall be under the Hand and Seal of some or one of the Grantors, or some or one of the Grantees, his or their Heirs, Executors or Administrators, Guardians or Trustees, attested by two Witnesses, one whereof to be one of the Witnesses to the Execution of such Deed or Conveyance; which Witness shall upon his Oath before one of the said Registers or Masters, or before a Master in Chancery, ordinary or extraordinary, prove the Signing and Sealing of such Memorial; and the Execution of the Deed or Conveyance mentioned in such Memorial; and in Case of Wills, the Memorials shall be under the Hand and Seal of some or one of the Devisees, his or their Heirs, Executors or Administrators, Guardians or Trustees, attested by two Witnesses, one whereof shall, upon his Oath before the said Registers or Masters, or before such Master in Chancery as aforesaid, prove the Signing and Sealing of such Memorial; and shall indorse a Certificate thereof on every such Memorial, and sign the same.

Certificate.

What Memorials shall contain.

And that every Memorial of any Deed, Conveyance or Will, shall contain the Day of the Month and the Year when such Deed, Conveyance or Will bears Date, and the Names and Additions of all the Parties to such Deed or Conveyance, and of the Devisee or Testatrix of such Will, and of all the Witnesses to such Deed, Conveyance or Will, and the Places of their Abode; and shall express or mention the Honors, Manors, Lands, Tenements or Hereditaments contained in such Deed, Conveyance or Will, and the Names of all the Parishes, Townships, Hamlets, Precincts or Extraparochial Places within the said County, where any such Honors, Manors, Lands, Tenements or Hereditaments are lying or being, that are given, granted, conveyed

devised, or any way affected or charged by any such Deed, Conveyance or Will, in such Manner as the same are expressed or mentioned in such Deed, Conveyance or Will, or to the same Effect; and that every such Deed, Conveyance and Will, or Probate of the same, of which such Memorial is so to be registred as aforesaid, shall be produced to the said Registers or Masters at the Time of entring such Memorial, who shall indorse a Certificate on every such Deed, Conveyance and Will, or Probate thereof, and therein mention the certain Day, Hour and Time on which such Memorial is so entred or registred, expressing also in what Book, Page and Number the same is entred; and that the said Registers or Masters shall sign the said Certificate when so indorsed, which Certificate shall be taken and allowed as Evidence of such respective Registries in all Courts of Record whatsoever; and that every Page of such Register-Books, and every Memorial that shall be entred therein, shall be numbred, and the Day of the Month, and the Year and Hour, or Time of the Day when every Memorial is registred, shall be entred in the Margents of the said Register-Books, and in the Margents of the said Memorial; and that every such Register or Master shall keep an Alphabetical Kalendar of all Parishes, Extrapa-
Alphabetical
Kalendar.
 rochial Places and Townships within the said County, with Reference to the Number of every Memorial that concerns the Honors, Manors, Lands, Tenements or Hereditaments in every such Parish, Extraparochial Place or Township respectively, and of the Names of the Parties mentioned in such Memorials; and that such Register or Master shall duly file every such Memorial in Order of Time, as the same shall be brought to the said Office, and enter or register the said Memorials in the same Order that they shall respectively come to his Hands.

Provided always that where there are more Writings than one for making and per-
How Memo-
rial to be
where there
are many
Deeds, &c.
 fecting any Conveyance or Security which do name, mention, or any ways affect or concern the same Honors, Manors, Lands, Tenements or Hereditaments, it shall be a sufficient Memorial and Register thereof, if all the said Honors, Manors, Lands, Tenements and Hereditaments, and the Parishes, Townships, Hamlets, or Extraparochial Places wherein the same lie, be only once named or mentioned in the Memorial or Register of any one of the Deeds or Writings made for the Perfecting of such Conveyance or Security; and that the Dates of the Rest of the said Deeds or Writings relating to the said Conveyance or Security, with the Names and Additions of the Parties and Witnesses, and the Places of their Abodes, be only set down in the Memorials and Registers of the same, with a Reference to the Deed or Writing whereof the Memorial is so registred, that contains or expresses the Parcels mentioned in all the said Deeds, and Directions how to find the Registring the same.

Provided also that all Memorials of Wills that shall be registred in Manner as afore-
Wills when
valid.
 said within the Space of six Months after the Death of every respective Devisor or Testatrix dying within *Great Britain*, or within three Years after the Death of every respective Devisor or Testatrix dying upon the Sea, or in any Parts beyond the Seas, shall be as valid and effectual against subsequent Purchasors, as if the same had been registred immediately after the Death of such respective Devisor or Testatrix.

Provided always that in Case the Devisee, or Person or Persons interested in the Honors, Manors, Lands, Tenements or Hereditaments devised by any such Will as aforesaid, by reason of the Concealment or Suppression, or Contesting such Will, or other inevitable Difficulty, without his, her or their wilful Neglect or Default, shall be disabled to exhibit a Memorial for the Registry thereof within the respective Times herein before limited; and that a Memorial shall be entred in the said Office of such Contest or other Impediment within the Space of two Years after the Death of such Devisor or Testatrix who shall die within the Kingdom of *Great Britain*, or within the Space of four Years next after the Decease of such Person who shall die upon the Sea, or beyond the Seas; then and in such Case the Registry of the Memorial of such Will within the Space of six Months next after his, her or their Attainment of such Will, or a Probate thereof, or Removal of the Impediment, whereby he, she or they are disabled or hindred to exhibit such Memorial, shall be a sufficient Registry within the Meaning of this Act.

Provided nevertheless, that in Case of any Concealment or Suppression of any Will or Devise, any Purchasor or Purchasors shall not be disturbed or defeated in his or their Purchase, unless the Will be actually registred within five Years after the Death of the Devisor or Testatrix.

Register's
Fees.

And it is further enacted, That every such Register or Master shall be allowed for the Entry of every such Memorial as is by this Act directed, the Sum of one Shilling, and no more, in Case the same do not exceed 200 Words; but if such Memorial shall exceed 200 Words, then after the Rate and Proportion of Six-pence an 100 for all the Words contained in such Memorial, over and above the first 200 Words: And the like Fees for the like Number of Words contained in every Certificate or Copy given out of the said Office, and no more; and for every Search in the said Office, one Shilling, and no more.

Attendance at
the Office.

And it is further enacted, That every such Register or Master shall give due Attendance at his Office every Day in the Week, (except *Sundays* and *Holydays*) between the Hours of nine and twelve in the Forenoon, and the Hours of two and five in the Afternoon, for the Dispatch of all Business belonging to the said Office; and that every such Register or Master, as often as required, shall make Searches concerning all Memorials that are registred as aforesaid, and give Certificates concerning the same under his Hand, (if required by any Person) testified by two credible Witnesses.

Register to
give Security.

And that each of the said Registers or Masters at the Time of his being sworn into the said Office as aforesaid, shall enter into a Recognizance, with two or more sufficient Sureties, (to be approved of by the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal of *Great Britain*, or the Chief Justice of the Queen's Bench, Chief Justice of the Common Pleas, and Chief Baron of the Court of Exchequer, or any one of them) of the Penalty of two Thousand Pounds unto her Majesty, her Heirs and Successors, to be taken by one of the said Chief Justices, conditioned for his true and faithful Performance of his Duty in the Execution of his said Office, in all Things directed and required by this Act: The same to be transmitted by such Chief Justice within one Month next after the Date thereof, into the Office of her Majesty's Remembrancer of the Exchequer, there to remain amongst the Records of the said Court.

And that the Damages before mentioned to be forfeited by any such Register or Master for any Neglect, Misdemeanor, or fraudulent Practice in the Execution of his Office, shall be recovered by Action of Debt, &c. in any of her Majesty's Courts of Record at *Westminster*.

Of forging
Entries.

And that if any Person or Persons shall at any Time forge or counterfeit any Entry of the Acknowledgment of any such Memorial, Certificate or Indorsement as is herein mentioned or directed, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to such Pains and Penalties as in and by an Act made in the fifth Year of Queen *Elizabeth*, intituled, *An Act against Forgers of false Deeds and Writings*, are imposed upon Persons for forging and publishing of false Deeds, Charters or Writings sealed, Court-Rolls or Wills, whereby the Freehold or Inheritance of any Person or Persons, of, in or to any Lands, Tenements or Hereditaments, shall or may be molested, troubled or charged: And that if any Person or Persons shall at any Time forswear himself before the said Registers or Masters, or before any Judge or Master in Chancery, in any of the Cases herein mentioned, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to the same Penalties as if the same Oath had been made in any of the Courts of Record at *Westminster*.

Certificate of
Mortgages
discharged.

And that in Case of Mortgages, whereof Memorials shall be entred in the said Register-Office pursuant to this Act, if at any Time afterwards a Certificate shall be brought to the said Registers or Masters, signed by the Mortgagee or Mortgagees in such Mortgage, his, her or their Executors, Administrators or Assigns, and attested by two Witnesses, whereby it shall appear that all Monies due upon such Mortgage have been paid or satisfied in Discharge thereof; which Witnesses shall, upon their Oaths, before the said Registers or Masters, or before a Master in Chancery, ordinary or extraordinary, prove such Monies to be satisfied or paid accordingly, and that they saw such Certificates signed by the said Mortgagee or Mortgagees, his, her or their Executors, Administrators or Assigns; that then and in every such Case the said Registers or Masters shall make an Entry in the Margents of the said Register-Books against the Registry, of the Memorial of such Mortgage, that such Mortgage was satisfied and discharged according to such Certificate, to which the same Entry shall refer, and shall after file such Certificate, to remain upon Record in the said Register-Office.

What this Act
shall not extend to.

Provided always that this Act shall not extend to any Copyhold Estates, or to any Leases at a Rack-Rent, or to any Lease not exceeding twenty-one Years, where the actual

actual Possession and Occupation goeth along with the Lease, or to any of the Chambers in *Serjeants-Inn*, the Inns of Court, or Inns of Chancery.

And it is further enacted, That no Judgment, Statute or Recognizance (other than such as shall be entred into in the Name and upon the proper Account of her Majesty, her Heirs and Successors) which shall be obtained or entred into after the said 29th Day of *September* in the Year of our Lord 1709. shall effect or bind any Honors, Manors, Lands, Tenements or Hereditaments, situate, lying and being in the said County of *Middlesex*, but only from the Time that a Memorial of such Judgment, Statute or Recognizance, shall be entred at the said Register-Office, expressing and containing, in Case of such Judgment, the Names of the Plaintiffs, and the Names, Additions and Places of Abode (if any such be in such Judgment) of the Defendants, the Sums thereby recovered, and the Time of the Signing thereof; and in Case of Statutes and Recognizances expressing and containing the Date of such Statute or Recognizance, the Names Additions and Places of Abode of the Cognizers and Cognizees therein, and for what Sums, and before whom the same were acknowledged; and that in Order to the making an Entry of such Memorials of Judgments, Statutes and Recognizances as aforesaid, the Party and Parties desiring the same, shall produce to and leave with the said Registers or Masters, to be filed in the said publick or Register-Office, a Memorial of such Judgment, Statute or Recognizance, signed by the proper Officer, or his Deputy, who shall sign such Judgment in the same Office, or by the proper Officer, or his Deputy, who shall sign such Judgment in the same Office, or by the proper Officer in whose Office such Statute or Recognizance shall be inrolled, together with an Affidavit, sworn before one of the Judges at *Westminster*, or a Master in Chancery, that such Memorial was duly signed by the Officer whose Name shall appear to be thereunto set, which Memorial such respective Officer is hereby required to give such Plaintiff or Plaintiffs, Cognizee or Cognizees, or his, her or their Executors or Administrators, or Attorney, or any of them, he, she or they paying for the same the Sum of one Shilling, and no more.

When Judgments, &c. to affect Lands, &c. in *Middlesex*.

Memorials of Judgments, &c.

And that the said Register or Master shall make an Entry, and likewise (if required) shall give a Certificate in Writing under his Hand, testified by two credible Witnesses, of every such Memorial of any Judgment, Statute or Recognizance brought to him to be registred as aforesaid, and therein mention the certain Day on which such Memorial is so registred or entred, expressing also in what Book, Page and Number the same is entred.

And that this Act shall be taken and allowed in all Courts within this Kingdom as a publick Act; and that all Judges, Justices, and other Persons therein concerned, are hereby required as such to take Notice thereof, without special Pleading the same.

This a publick Act.

And that no Member of Parliament shall be capable of being Register, or of executing by himself, or any other Person or Persons, the said Office; or to have, take or receive any Fee, or other Profit whatsoever issuing out of the said Office, or for or in Respect thereof: Nor shall any such Register, or his Deputy, or any Person or Persons receiving Profits out of the said Office, be at any Time hereafter capable of being, or being chosen a Member to serve in Parliament.

Who not to be Register.

An Abridgment of "An Act for the publick Registering of all Deeds, Conveyances, Wills, and other Incumbrances that shall be made of, or that may affect any Honors, Manors, Lands, Tenements or Hereditaments, within the North-Riding of the County of *York*, after the 29th Day of *September* 1736.

North-Riding of *Yorkshire*.

This Act recites, That whereas the Lands in the North-Riding of the County of *York* are generally Freehold, which may be so secretly transferred or conveyed from one Person to another, and incumbered, that such Persons as are ill-disposed have it in their Power to commit Frauds, and frequently do so, by Means whereof several Persons, who thro' many Years Industry in their Trades and Employments, and by great Frugality, have been enabled to purchase Lands, or lend Monies on Land Security, have been undone in their Purchases and Mortgages, by prior and secret Conveyances and fraudulent Incumbrances, and not only themselves but their whole Families thereby utterly ruined: For Remedy whereof, (at the humble Request of the Justices of the Peace, Gentlemen and Freeholders of the said North-Riding) It is enacted,

Preamble.

1. That a Memorial of all Deeds and Conveyances, which from and after the 29th Day of *September* 1736. shall be made and executed, and of all Wills and Devises in Writing

Memorials to be registred.

Writing made, or to be made and published, where the Devisor or Testatrix shall die, after the said 29th Day of *September* 1736. and of all Judgments, Statutes and Recognizances (other than such as shall be entred into in the Name and upon the proper Account of his Majesty, his Heirs and Successors) which shall be obtained or entred into after the said 29th Day of *September* 1736. of or concerning or whereby any Honors, Manors, Lands, Tenements or Hereditaments in the said North-Riding, may be any way affected in Law or Equity, may be registred in such Manner as is herein after directed; and that every such Deed or Conveyance, Judgment, Statute or Recognizance that shall at any Time after the said 29th Day of *September* 1736. be made and executed, obtained or entred into, shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee, Plaintiff or Cognizee, for or upon valuable Consideration, unless such Memorial thereof be registred, as by this Act is directed, before the Registering of the Memorial of the Deed or Conveyance, Judgment, Statute or Recognizance, under which such subsequent Purchasor or Mortgagee, Plaintiff or Cognizee, shall claim: And that every such Devise by Will shall be adjudged fraudulent and void against any subsequent Purchasor or Mortgagee, Plaintiff or Cognizee, for or upon valuable Consideration, unless a Memorial of such Will be registred in such Manner as is herein after directed.

Where Register's Office to be.

2. And for the better settling and establishing a certain Method, with proper Rules and Directions for Registering such Memorials as aforesaid, it is enacted, That one publick Office for Registering such Memorials of and concerning any Honors, Manors, Lands, Tenements and Hereditaments, that are situate, lying and being within the said North-Riding, shall be erected and established at such Market-Town as the Justices of the Peace, or the major Part of them, assembled at their General Quarter-Sessions in and for the said North-Riding, which shall be held at *Northallerton* on the 17th Day of *June* 1735. shall agree and adjudge to be the nearest Market-Town to the Center or Middle of the said North-Riding, to be managed and executed by a fit and able Person, to be from Time to Time elected and appointed in Manner herein after directed, or his sufficient Deputy, and to continue in the said Office for so long Time as he shall well demean himself therein.

Charges, how paid.

3. Provided that the Costs and Charges of procuring and passing of this Act of Parliament, and in erecting and establishing of the said publick Register, shall be at the publick Charge of the said North-Riding; which Costs, Charges and Expences, shall be raised by the Justices of the Peace of the said North-Riding at their General Quarter-Sessions of the Peace, in such Manner as they are empowered to raise Money for Repairs of Publick or County Bridges.

Register, how chosen.

4. And it is enacted, That all Elections of a Register, to be made or appointed by Virtue of this Act, shall be performed by balloting in Manner following; that is to say, All the Freeholders of the Age of twenty-one Years, that at the Time of any such Election have an Estate of Freehold of or in any Lands, Tenements or Hereditaments, within the said North-Riding, of the yearly Value of 100 *l.* to be determined by the Oath of the Elector, or solemn Affirmation of such Elector, being of the Persuasion of the People called Quakers, before the Scrutators herein after mentioned, if any Doubt arise touching the same, shall be Electors of the said Register; and that the Justices of the Peace for the said North-Riding, in that Behalf assembled, or the major Part of them, or any five of such Justices, to be appointed by such major Part, shall be Scrutators of the Ballot, who shall meet on the Day and Place of Election, and there in the Presence of the Electors shall place one or more Glasse Vessel or Vessels, to be provided for that Purpose, into which each Elector present shall put one open Paper, containing the Name of such Person as he approves of to be Register; which Papers shall be taken out again in the Presence of the said Scrutators, by a Person by them in that Behalf appointed; and the Name or Names of every Person therein shall be once transcribed in distinct Columns, and under each Name shall be set down the Number of their Electors, which shall be deliberately cast up by the said Scrutators, and the same shall be read over in the Hearing, and fixed up in the View of the Electors then present; and the Person upon whom the Majority shall fall shall be declared Register.

The Time and Place of choosing the first Register.

5. And that the Election of a Person to be the first Register shall be made at *Northallerton* aforesaid, upon the 18th Day of *July* 1735. in open Court, between the Hours of eight in the Morning and six in the Afternoon.

The Election of future Registers.

6. And that when and as often as the said Office shall become vacant by the Death, Forfeiture or Surrender of any such Register, the Justices of the Peace for the said North-

North-Riding, assembled at the General Quarter-Sessions of the Peace next after such Vacancy shall happen, or the major Part of them, shall in open Court declare the said Vacancy, and by Order of the same Sessions shall appoint and prefix a certain Day and Time within the Space of one Kalendar Month, and not less than three Weeks, ensuing the End of such General Quarter-Sessions, for the Electors to assemble at such Place where the Office shall be erected as aforesaid, to chuse a fit and able Person in the Manner aforesaid to supply the said Vacancy; and that all Persons qualified to be Electors may have due Notice of such Vacancy, and Time of Election of a succeeding Register, the Clerk of the Peace for the Time being for the said North-Riding shall forthwith cause Copies of such Order, for the prefixing the Time of such Election, to be delivered to the respective chief Constables of the several Wapentakes within the said North-Riding, who shall and are hereby required to publish the same in full Market, in every Market-Town within their respective Wapentakes, on the next Market-Day after the Receipt thereof, and to affix the same in the most publick Place of Resort there.

7. That every such Register, before he enters upon the Execution of the said Office, shall be sworn before the Justices of the Peace for the said Riding, or any three or more of them that shall be present at his Election, who are hereby empowered and required to administer such Oaths in the Words following:

You shall truly and faithfully perform and execute the Office and Duty that is directed and required by you to be done by Act of Parliament, intituled, An Act for the publick Registering of all Deeds, Conveyances, Wills, and other Incumbrances that shall be made of, or that may affect any Honors, Manors, Lands, Tenements or Hereditaments within the North-Riding of the County of York, after the nine and twentieth Day of September 1736. and that you have not given or promised, directly or indirectly, nor authorized any Person to give or promise any Money, Gratuity or Reward whatsoever, for procuring or obtaining the said Office for you.

The Register's Oath.

So help you God.

8. And that when and as often as the said Register shall appoint any Deputy to execute the said Office, such Deputy shall, before he enter upon the Execution thereof, take the said Oath appointed to be taken by the said Register, before two or more of the Justices of the Peace for the said Riding.

Register's Deputy to take the said Oath.

9. And that upon the Death of any such Register, and until another Election of a fit Person to execute that Office shall be made in the Manner aforesaid, the Executors and Administrators of the Register deceased, together with the Sureties for the said Register, or their Executors and Administrators, shall appoint a proper Person to execute the Office of Register, for whose Demeanor in the Execution of the said Office the Security given for such Register deceased shall be answerable.

How the Office of Register is to be executed during a Vacancy.

10. And that the Person to be appointed as aforesaid, upon the Death of any Register, to execute the said Office during the Time the same shall be vacant as aforesaid, shall, before he enters upon the Execution thereof, take the Oath herein before appointed to be taken by such Register and his Deputy, before two or more Justices of the Peace for the said Riding; and that if such Person so appointed shall be lawfully convicted of any Neglect, Misdemeanor or fraudulent Practice in the Execution of the said Office during such Vacancy, he shall be liable to pay treble Damages, with full Costs of Suit, to every Person that shall be injured thereby; to be recovered as is herein after directed.

Penalty on Misdemeanor of the Person acting during such Vacancy.

11. And that all and every Memorial of such Deeds, Conveyances and Wills so to be entred and registred, shall be put into Writing in Vellum or Parchment, and brought to the said Office; and in Case of Deeds and Conveyances, shall be under the Hand and Seal of some or one of the Grantors, or some or one of the Grantees; his, her or their Heirs, Executors or Administrators, Guardians or Trustees, * at- * Sic in recordo. *tested by two Witnesses to the Execution of such Deed or Conveyance, which Witnesses shall upon his Oath, or being a Quaker, on his solemn Affirmation, before the said Register or his Deputy, prove the Signing and Sealing of such Memorial, and the Execution of the Deed or Conveyance mentioned in such Memorial, (or else the Persons so Signing and Sealing the said Memorial as aforesaid, or one of them, shall, before the said Register or his Deputy, acknowledge his or their Signing and Sealing of the said Memorial, and the Execution of the Deed or Conveyance mentioned in such Memorial) and in Case of Wills, the Memorials shall be under the Hand and Seal of some*

The Method of Registering.

or one of the Devisees, his or their Heirs, Executors or Administrators, Guardians or Trustees, attested by two Witnesses, one whereof shall upon his Oath, or being a Quaker, on his solemn Affirmation, before the said Register or his Deputy, prove the Signing and Sealing of such Memorial, or the same shall be acknowledged in like Manner before the said Register or his Deputy by the Persons so Signing and Sealing the same Memorial as aforesaid, or one of them: And the said Register, or his Deputy, is hereby also empowered to take the said respective Acknowledgments as aforesaid, and shall enter a Memorandum of the taking the same respectively upon the said respective Memorial within the Time when the same was so taken; and the said Memorandum shall be signed by the Register, or his Deputy, and also by the Party so acknowledging the same respectively.

The Contents
of the Memo-
rials to be re-
gistered.

The Certifi-
cate of Re-
gistering.

12. That every Memorial of any Deed, Conveyance or Will, shall contain the Day of the Month and the Year when such Deed, Conveyance or Will bears Date, and the Names and Additions of all the Parties to such Deed or Conveyance, and of the Devisor or Testatrix of such Will, and of all the Witnesses to such Deed, Conveyance or Will, and the Places of their Abode; and shall express or mention the Honors, Manors, Lands, Tenements or Hereditaments contained in such Deed, Conveyance or Will, and the Names of all the Parishes, Townships, Hamlets, Precincts or Extraparochial Places within the said North-Riding, where any such Honors, Manors, Lands, Tenements or Hereditaments are lying or being, that are given, granted, conveyed, devised, or any way affected or charged by any such Deed, Conveyance or Will, in such Manner as the same are expressed or mentioned in such Deed, Conveyance or Will, or to the same Effect; and that every such Deed, Conveyance and Will, or Probate of the same, of which such Memorial is so to be registered as aforesaid, shall be produced to the said Register, or his Deputy, at the Time of entering such Memorial, who shall indorse a Certificate on every such Deed, Conveyance and Will, or Probate thereof, and therein mention the certain Day, Hour and Time on which such Memorial is so entered or registered, expressing also in what Book, Page and Number the same is entered; and that the said Register, or his Deputy, shall sign the said Certificate so indorsed, (which Certificate shall be taken and allowed as Evidence of such respective Registries in all Courts of Record whatsoever); and that every Page of such Register-Books, and every Memorial that shall be entered therein, shall be numbred, and the Day of the Month, and the Year and the Hour, or Time of the Day when every Memorial is registered, shall be entered in the Margin of the said Register-Books, and of the said Memorial; and that every such Register shall keep an Alphabetical Kalendar of all Parishes, Extraparochial Places and Townships within the said North-Riding, with Reference to the Number of every Memorial that concerns the Honors, Manors, Lands, Tenements or Hereditaments in every such Parish, Extraparochial Place or Township respectively, and of the Names of the Parties mentioned in such Memorials.

On what Con-
dition such
Certificate
shall be
granted.

13. That a Memorial of such Deeds, Conveyances and Wills, as shall be made and executed in any Place not within forty Miles of the said publick Register-Office, which do or may concern or affect any Honors, Manors, Lands, Tenements or Hereditaments in the said North-Riding, shall be entered or registered by the aforesaid Register, or his Deputy, in Case an Affidavit sworn, or a solemn Affirmation of a Person of the Persuasion of the People called Quakers, made in Writing before one of the Judges at *Westminster*, or a Master in Chancery, ordinary or extraordinary, be brought with the said Memorial to the said Register, or his Deputy, wherein one of the Witnesses to the Execution of such Deeds and Conveyances shall swear, or being a Quaker, shall affirm that he or she saw the same executed, and the Memorial signed and sealed as aforesaid, or wherein one of the Witnesses to the Memorial of any such Will shall swear, or being a Quaker, shall affirm that he or she saw such Memorial signed and sealed as aforesaid, and the same shall be sufficient Authority to the said Register, or his Deputy, to give the Party that brings such Memorial and Affidavit, or Affirmation, a Certificate of the Registering such Memorial; which Certificate signed by the said Register, or his Deputy, shall be taken and allowed as Evidence of the Registries of the same Memorials in all Courts of Record whatsoever.

In Case of se-
veral Wri-
tings the Par-
ticulars may
be only men-
tioned once.

14. Provided always that where there are more Writings than one for making and perfecting any Conveyance or Security which do name, mention, or any ways affect or concern the same Honors, Manors, Lands, Tenements or Hereditaments, it shall be a sufficient Memorial and Register thereof, if all the same Honors, Manors, Lands, Tenements and Hereditaments, and the Parishes, Townships, Hamlets, or Extraparochial

rochial Places wherein the same lie, be only once named or mentioned in the Memorial, Register and Certificate of any one of the Deeds or Writings made for the Perfecting of such Conveyance or Security; and the Dates of the Rest of the said Deeds or Writings relating to the said Conveyance or Security, with the Names and Additions of the Parties and Witnesses, and the Places of their Abodes, be only set down in the Memorials, Registers and Certificates of the same, with a Reference to the Deed or Writing whereof the Memorial is so registred, that contains or expresses the Parcels mentioned in all the said Deeds, and Directions how to find the Registering the same.

15. Provided also that all Memorials of Wills that shall be registred in Manner as aforesaid within the Space of six Months after the Death of every respective Devisor or Testatrix dying within the Kingdom of *Great Britain*, or within three Years after the Death of every respective Devisor or Testatrix dying upon or in any Parts beyond the Seas, shall be as valid and effectual against subsequent Purchasors, Judgments, Statutes and Recognizances, as if the same had been registred immediately after the Death of such respective Devisor or Testatrix. Memorials of Wills.

16. Provided always that in Case the Devisee, or Person or Persons interested in the Honors, Manors, Lands, Tenements or Hereditaments, devised by any such Will as aforesaid, by reason of the Contesting such Will, or other inevitable Difficulty, without his, her or their wilful Neglect or Default, shall be disabled to exhibit a Memorial for the Registry thereof within the respective Times herein before limited; and that a Memorial shall be entred in the said Office of such Contest or Impediment within the Space of six Months after the Decease of such Devisor or Testatrix who shall die within the Kingdom of *Great Britain*, or within the Space of three Years next after the Decease of such Person who shall die upon or beyond the Seas; then and in such Case the Registry of the Memorial of such Will within the Space of six Months next after his, her or their Attainment of such Will, or a Probate thereof, or Removal of the Impediment, whereby he, she or they are disabled or hindered to exhibit such Memorial, shall be a sufficient Registry within the Meaning of this Act. Wills contested.

17. Provided nevertheless, that in Case of any Concealment or Suppression of any Will or Devise, no Purchasor or Purchasors, for valuable Consideration, shall be defeated or disturbed in his or their Purchase; nor any Plaintiff in any Judgment, or Cognizee of any Statute or Recognizance, shall be defeated of his or their Debts, by any Title made or devised by such Will, unless the Will be actually registred within three Years after the Death of the Devisor or Testatrix. Concealment of Wills.

18. And that all and every Memorials of Judgments, Statutes and Recognizances, so to be entred and registred at the said Register-Office as aforesaid, shall be in Writing, and express and contain, in Case of such Judgment, the Names of the Plaintiffs, and the Names and Additions therein of the Defendants, the Sums thereby recovered, and the Time of the Signing thereof; and in Case of Statutes and Recognizances, the Date of such Statute or Recognizance, the Names and Additions of the Cognizers and Cognizees therein, and for what Sums, and before whom the same were acknowledged; and that in Order to the making an Entry of such Memorials of Judgments, Statutes and Recognizances as aforesaid, the Party and Parties desiring the same, shall produce to and leave with the said Register, or his Deputy, to be filed in the said publick or Register-Office, a Memorial of such Judgment, Statute or Recognizance, signed by the proper Officer, or his Deputy, who shall sign such Judgment, or his Successor in the same Office, or by the proper Officer in whose Office such Statute or Recognizance shall be inrolled, together with an Affidavit sworn, or solemn Affirmation in Writing of a Person of the Persuasion of the People called Quakers, made before one of the Judges at *Westminster*, or a Master in Chancery, that such Memorial was duly signed by the Officer whose Name shall appear to be thereunto set; which Memorial such respective Officer is hereby required to give such Plaintiff or Plaintiffs, Cognizee or Cognizees, or his, her or their Executors or Administrators, or Attorney, or any of them, he, she or they paying for the same one Shilling, and no more. Memorials of Judgments, Statutes and Recognizances.

19. And that the said Register, or his Deputy, shall make an Entry, and likewise (if required) shall give a Certificate in Writing under his Hand, testified by two credible Witnesses, of every such Memorial of any Judgment, Statute and Recognizance brought to him to be so registred as aforesaid, and in such Book wherein such Memorial shall be entred, and also in such Certificate to be so given, shall mention the Fee. Method of registering and giving Certificate.

the certain Day and Hour, or Time of that Day on which such Memorial is so registred or entred, and in such Certificate shall mention in what Book, Page and Number the same Memorial is entred.

And filing
Memorials.

20. And that such Register shall duly file every such Memorial of Deeds, Conveyances, Wills, Judgments, Statutes and Recognizances, in Order of Time as the same shall be brought to the said Register, and shall enter or register the same Memorials in the same Order that they shall respectively come to his Hands.

Recital of the
Act 27 H. 8.
c. 16.

21. And whereas by an Act of Parliament made in the 27th Year of the Reign of King Henry the 8th, intituled, *An Act for Inrolments of Bargains and Sales*, it is enacted, *That no Manors, Lands, Tenements or Hereditaments, shall pass, alter or change from one to another, whereby any Estate of Inheritance or Freehold shall be made, or take Effect, in any Person or Persons, of any Use thereof to be made by reason only of any Bargain and Sale thereof, except the said Bargain and Sale be made by Writing indented, sealed and inrolled in one of the King's Courts of Record at Westminster, or else within the same County or Counties where the same Manors, Lands, Tenements or Hereditaments so bargained and sold lie, or before the Custos Rotulorum, and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at the least, whereof the Clerk of the Peace to be one; which Act hath been found by Experience to be of little or no Use within the said North-Riding, for that the Clerk of the Peace thereof for the Time being, who hath the Keeping of the said Inrolments within the said North-Riding, is not by the said Act enjoined to give any Security for the safe Keeping, nor under any Penalty for the negligent Keeping of the said Inrolments, nor is any Place by the said Act appointed for Keeping thereof: And whereas by this present Act a publick Office is intended to be erected and established as aforesaid, at the publick Charge of the said North-Riding, for Registering and safe Keeping of Memorials of all Deeds and Conveyances as aforesaid, and a publick Register to be chosen, who, according to the Directions herein after mentioned, is to give sufficient Security for the due Execution of the said Office. For rendring therefore the said Act made in the 27th Year of the Reign of King Henry the 8th more effectual and beneficial to the Inhabitants of the said North-Riding, it is further enacted, That after the 29th Day of September 1736. all Bargains and Sales of any Manors, Lands, Tenements and Hereditaments, situate, lying and being within the said North-Riding, which shall be inrolled by the said Register, or his Deputy for the Time being, in the said publick Office, shall be as good, effectual and available to all Intents and Purposes whatsoever, as if the same had been inrolled in one of the King's Courts of Record at Westminster, or before the Custos Rotulorum, and two Justices of the Peace, and the Clerk of the Peace for the said North-Riding, or two of them, according to the aforesaid Act made in the 27th Year of the Reign of King Henry the 8th, or any other Act now in Force; and one or more Justice or Justices of the Peace of the said Riding for the Time being, shall have Power to take and enter the Acknowledgment of the Bargainor, if but one, or one of the Bargainors, if more in such Bargains and Sales; and the said Register, or his Deputy for the Time being, shall well and sufficiently inrol, by ingrossing in Parchment-Books all such Bargains and Sales as shall for that Purpose be acknowledged as aforesaid, and shall indorse a Certificate of such Bargains and Sales of the Times of inrolling thereof, and sign the same, and the Books thereof shall safely keep in the said publick Office, there to remain upon Record amongst the Memorials of Deeds there registred: And that all Deeds of Bargain and Sale so inrolled in the said Publick or Register-Office as aforesaid, which shall appear to be so inrolled by an Indorsement or Certificate on the said Deeds of Bargain and Sale, signed by the said Register, or his Deputy; and all Copies of Inrolments thereof remaining on Record in the said Register-Office, shall be allowed in all Courts where such Bargains and Sales, or Copies, shall be produced, to be as good and sufficient Evidence as any Bargain and Sales inrolled in any of the Courts at Westminster, and the Copies of the Inrolments thereof.*

Bargains and
Sales of Lands
inrolled by
the said Register,
as effect-
tual as if in-
rolled accord-
ing to the said
Act.

The Copies of
Deeds so in-
rolled good
Evidence.

The Regi-
string of Wri-
tings at full
Length.

22. And whereas Deeds have been often destroyed by Fire and other Accidents, it is further enacted, That from and after the said 29th Day of September 1736. any Person or Persons having or claiming Title to any Honors, Manors, Lands, Tenements or Hereditaments in the said North-Riding, may Register, at full Length in the said Register-Office, all and every or any the Deeds, Writings, Wills or Conveyances, by or under which such Title shall be claimed, and which shall be made and executed, or signed and published; and in the Case of Wills where the Devisor or Testatrix shall die after the said 29th Day of September 1736. and the said Register,

or his Deputy, is hereby authorized to enter and inrol all such Deeds, Writings, Wills and Conveyances, as shall be so brought to be registred, at full Length, by ingrossing them in Parchment-Books; and the said Register, or his Deputy, shall in the Margin of every such Entry and Inrolment mention the Time of such Entry and Inrolment, and shall indorse and sign a Certificate on such Deed, Conveyance or Will, in Manner as is by this Act directed, where a Memorial is entred, and shall safely keep all and every the Books, wherein such Entries and Inrolments shall be made, in the said publick Office, there to remain upon Record; and all Copies of such Entries and Inrolments of such Deeds, Writings, Wills and Conveyances so registred at full Length, and which Copies shall be signed by the said Register, or his Deputy, and attested by two or more Witnesses, shall be allowed in all Courts of Record to be good and sufficient Evidence of such Deeds, Writings, Wills or Conveyances so registred and destroyed by Fire or other Accident.

23. And that at the Time of any Deed, Conveyance or Will, made and executed, or signed and published, after the 29th Day of September 1736. shall be brought to the said Register's Office to be registred or inrolled at full Length, one of the Witnesses to the Execution of such Deed or Conveyance, or to the Signing and Publishing such Will, shall make Oath, or being one of the People called Quakers, take his solemn Affirmation before the said Register, or his Deputy, that such Deed or Conveyance was duly executed by the Grantor or Grantors, or that such Will was signed and published by the Devisor or Testatrix.

What Testimony necessary before Inrolment.

24. Provided always that such Deeds, Conveyances and Wills, that shall be made and executed in any Place not within forty Miles of the said Office, may be entred and registred at full Length by the aforesaid Register, or his Deputy, in Case an Affidavit sworn, or a solemn Affirmation of Quakers, made in Writing, before one of the Judges at Westminster, or a Master in Chancery, ordinary or extraordinary, be brought with such Deed, Conveyance or Will, wherein one of the Witnesses to the Execution of such Deed or Conveyance, or to the Signing or Publishing such Will, shall swear or affirm, that he or she saw the said Deed executed, or in Case of Wills, such Will signed and published by the Devisor or Testatrix.

And what if forty Miles from the said Office.

25. And that every such Inrolment of every such Deed of Bargain and Sale, and Registry at full Length of such Deeds, Writings, Conveyances and Wills in the said Register-Office as aforesaid, shall be deemed and adjudged to be the Entry of a Memorial thereof, pursuant to this Act; and shall have the same Force and Effect upon the Estate therein mentioned, in Relation to all subsequent Deeds, Conveyances and Wills, and to all other Intents and Purposes, as if a Memorial of such inrolled Deed or Deeds, Writing, Conveyance or Will so registred at full Length, had been entred in the said Register-Office as aforesaid, pursuant to the said Act; and the Certificate signed and indorsed on such Deeds of Bargain and Sale so inrolled, or on such Deeds, Conveyances or Wills, registred at full Length, shall be taken and allowed as Evidence of such Inrolments or Registries in all Courts of Record whatsoever.

Inrolments at full Length to be deemed the Entry of a Memorial.

26. That every such Register shall be allowed for the Entry of every such Memorial as is by this Act directed, the Sum of one Shilling, and no more, in Case the same do not exceed 200 Words; but if such Memorial shall exceed 200 Words, then after the Rate and Proportion of Four-pence an 100 for all the Words contained in such Memorial, over and above the first 200 Words: And the like Fees for the like Number of Words contained in every such Bargain and Sale inrolled, and Deeds, Writings, Conveyances and Wills registred at full Length as aforesaid, and in every Certificate or Copy given out of the said Office, and no more; and for every Search at the said Office, one Shilling, and no more.

Register's Fees.

27. That every such Register, or his sufficient Deputy, shall give due Attendance at his Office every Day in the Week, (except Sundays and Holydays) between nine and twelve in the Forenoon, and two and five in the Afternoon, for the Dispatch of Business belonging to the said Office; and that every such Register, or his Deputy, as often as required, shall make Searches concerning all Memorials that are registred, Deeds of Bargain and Sale inrolled, and Deeds, Writings, Conveyances and Wills so registred at full Length as aforesaid, and give Certificates concerning the same under his Hand, if required by any Person, testified by two credible Witnesses.

Attendance.

28. That every Register at the Time of his being sworn into the said Office as aforesaid, shall enter into a Recognizance, with two or more sufficient Sureties, (to be approved of by five or more of the Justices of the Peace of the said Riding) that

Register to give 2000 l. Security.

were present at his Election, by Writing under their Hands and Seals, to be registred at the next General Quarter-Sessions of the Peace for the said Riding, of the Penalty of two Thousand Pounds unto his Majesty, his Heirs and Successors, to be taken by the same Justices of the Peace that approved of his Security, conditioned for his true and faithful Performance of his Duty in the Execution of his said Office, in all Things directed and required by this Act: The same to be transmitted by the same Justices of the Peace within one Month next after the Date thereof, into the Office of his Majesty's Remembrancer of the Exchequer, there to remain amongst the Records of the said Court.

Penalty on
Register for
Neglect of
Duty.

29. And that if any such Register, or his Deputy, shall neglect to perform his or their Duty in the Execution of the said Office, according to the Rules and Directions in this Act mentioned, or commit, or suffer to be committed, any undue or fraudulent Practice in the Execution of the said Office, and be thereof lawfully convicted, then such Register shall forfeit his said Office, and pay treble Damages with full Costs of Suit to every such Person or Persons as shall be injured thereby; to be recovered by Action of Debt, &c.

Register's Se-
curity, when
to be vacated.

30. Provided nevertheless that when any Register shall die, or surrender his Office, and there shall within the Space of three Years from and after such Death or Surrender no Misbehaviour appear to have been committed by such Register in the Execution of the said Office, then and in such Case at the End of the said three Years after his Death or Surrender, the said Recognizance so entred into by him shall become void and of none Effect to all Intents and Purposes whatsoever.

Penalty on
Forgery,

31. And it is enacted, That if any Person or Persons shall at any Time forge or counterfeit any Entry of the Acknowledgment of any Bargainor in such Bargain and Sale as aforesaid, or any such Memorial, Certificate or Indorsement as is herein mentioned or directed, and be thereof lawfully convicted, such Person or Persons shall incur and be liable to such Pains and Penalties, as in and by an Act made in the fifth Year of Queen Elizabeth, intituled, *An Act against Forgery of false Deeds and Writings*, are imposed upon Persons for forging and publishing of false Deeds, Charters or Writings sealed, Court-Rolls or Wills, whereby the Freehold or Inheritance of any Person or Persons, of, in or to any Lands, Tenements and Hereditaments, shall or may be molested, troubled or charged: And that if any Person or Persons shall at any Time forswear himself, or being a Quaker, shall falsely, maliciously and corruptly affirm before the said Register, or his Deputy, or before any Judge or Master in Chancery, in any of the Cases herein mentioned, and be thereof lawfully convicted, such Person and Persons shall incur and be liable to the same Penalties as if the same Oath had been made in any of the Courts of Record at Westminster.

and Perjury.

Certificates of
Mortgages
discharged,
how to be re-
gistred.

32. That in Case of Mortgages, Judgments, Statutes and Recognizances, whereof Memorials shall be entred in the said Register-Office, or in Case of Mortgages where the Mortgage-Deed shall be registred at full Length, pursuant to this Act, if at any Time afterwards a Certificate shall be brought to the said Register, or his Deputy, signed by the Mortgagees in such Mortgage, Plaintiffs in such Judgment, Cognizees in such Statute or Recognizance, their respective Executors, Administrators or Assigns, and attested by two Witnesses, whereby it shall appear that all Monies due upon such Mortgage, Judgment, Statute or Recognizance respectively, have been paid or satisfied in Discharge thereof; which Witnesses shall upon their Oath, before any one of the Judges of his Majesty's Court of King's Bench or Common Pleas, or any one of the Barons of the Court of Exchequer, or before any one of the Masters of the Court of Chancery, or before the said Register, or his Deputy, who are hereby respectively empowered to administer such Oath, prove such Monies to be satisfied or paid accordingly, and that they saw such Certificate signed by the said Mortgagees, Plaintiffs or Cognizees, their respective Executors, Administrators or Assigns, that then and in every such Case the said Register, or his Deputy, shall make an Entry in the Margin of the said Register-Books against the Registry, of the Memorials of such Mortgage, Judgment, Statute or Recognizance, or against such Deed registred at full Length respectively, that such Mortgage, Judgment, Statute or Recognizance respectively, was satisfied and discharged according to such Certificate, to which the same Entry shall refer, and shall after file such Certificate, to remain upon Record in the said Register-Office.

Judgments,
&c. registred
in twenty
Days after
signing, good.

33. Provided nevertheless, that if any Judgment, Statute or Recognizance, be registred in the said Register-Office within twenty Days after the Acknowledgment or Signing thereof, all the Lands that the Defendants or Cognizees had at the Time of such

such Acknowledgment or Signing, shall be bound thereby, and the Registry of a Memorial of such Judgment, Statute or Recognizance within the Time aforesaid, shall be as available to all Intents and Purposes as if such Memorial thereof had been entered in the said Register-Office on the Day of the Signing or Acknowledgment of such Judgment, Statute or Recognizance.

34. Provided always that this Act shall not extend to any Copyhold Estates, or to any Lease at a Rack-Rent, or to any Lease not exceeding twenty-one Years, where the actual Possession and Occupation goeth along with the Lease.

35. And it is enacted, That in all Deeds of Bargain and Sale hereafter inrolled in Pursuance of this Act, whereby an Estate of Inheritance in Fee-simple is limited to the Bargainee and his Heirs, the Words *grant, bargain and sell*, shall amount to and be construed and adjudged in all Courts of Judicature to be express Covenants to the Bargainee, his Heirs and Assigns, from the Bargainor, for himself, his Heirs, Executors and Administrators; that the Bargainor, notwithstanding any Act done by him, was at the Time of the Execution of such Deed seised of the Hereditaments and Premises thereby granted, bargained and sold, of an indefeasible Estate in Fee-simple, free from all Incumbrances, (Rents and Services due to the Lord of the Fee only excepted) and for quiet Enjoyment thereof against the Bargainor, his Heirs and Assigns, and all claiming under him; and also for further Assurance thereof to be made by the Bargainor, his Heirs and Assigns, and all claiming under him, unless the same shall be restrained and limited by express particular Words contained in such Deed; and that the Bargainee, his Heirs, Executors, Administrators and Assigns respectively, shall and may, in any Action to be brought, assign a Breach or Breaches thereupon, as they might do in Case such Covenants were expressly inserted in such Bargain and Sale.

36. And that every Leaf of the aforesaid Register-Books and Inrolment-Books shall be signed by two Justices of the Peace of the said Riding, (to be from Time to Time appointed by the Justices of the Peace thereof, or the major Part of them, at their General Quarter-Sessions of the Peace assembled) who are hereby required to sign the same accordingly; and that an Entry thereof shall be made from Time to Time, by the Clerk of the Peace for the said Riding for the Time being, in the Order-Book of the same Sessions, and signed by the same Justices of the Peace that shall from Time to Time sign the said Register-Books and Inrolment-Books, to remain upon Record amongst the Records of the said Sessions; and that a like Entry shall be made upon Record, and signed as aforesaid, of the Number of the same Books, and how called or marked, and how many Pages each of them contains, that are at any Time and from Time to Time used in the said Register-Office.

37. And that no Member of Parliament for the Time being shall be capable of being chose Register, or of executing by himself, or any other Person or Persons, the said Office; or to have, take or receive any Fee, or other Profit whatsoever issuing out of the said Office, or for or in Respect thereof: Nor shall any such Register, or his Deputy, or any Person or Persons receiving Profit out of such Office, be capable of being a Member to serve in Parliament.

38. And that this Act shall be taken and allowed in all Courts in this Kingdom as Publick Act; and all Judges, Justices, and other Persons therein concerned, are hereby required to take Notice thereof as such, without special Pleading the same.

For the Forms of these Memorials, Certificates, &c. see the Second Part.

This Act not to extend to Copyhold Estates.

Deeds of Bargain and Sale of Estates in Fee-simple.

Every Leaf of the Register to be signed by two Justices,

and entered by the Clerk of the Peace.

The Register excluded from being a Member of Parliament.

C H A P. VI.

Of the different Kinds of Deeds, Wills and Testaments.

S E C T. I.

Of the Difference between Deeds, Wills and Testaments.

BEING in this Chapter to treat of the different Kinds or Sorts of Deeds, Wills and Testaments, it is proper to shew what Distinction the Law makes between one and the other.

A Deed (as before observed, *Chap. 5. §. 1.*) is a Writing or Instrument sealed and delivered to prove the Agreement of the Parties to what is contained therein.

And a Will, Devise or Testament, is Directions for the Disposition of a Person's Effects after his Decease.

The former takes Effect on the Perfecting thereof, by sealing and Delivery, Livery of Seisin, &c. and the latter on the Death of the Testator; but as Lands or Goods may either be conveyed by Deed or Will, it is necessary to treat of both in this Chapter.

S E C T. II.

*Of the various Kinds of Deeds in general.**(A) With Relation to the exterior Form.*

AS to the exterior Forms of Deeds, I have before shewn in what Hand and Language a Deed must be written, and that it must be written in Paper, Parchment or Vellum; it remains now to shew what Kinds of Deeds there are relative to the exterior Form: Therefore observe, that all Deeds are either indented or Poll.

Indenture.

A Deed indented (or that which is called an *Indenture*) is when the Paper or Parchment is indented, or cut unevenly, or in and out on the Top or Side answerable to another that comprehends the self same Matter and Form; and it is so called because it is so indented; for altho' it is called an Indenture, and usually begins in these Words, *This Indenture*, &c. yet if it begins with these Words, and is not actually indented, it is no Indenture, but it will have the Effect of a Deed Poll; and if it be not so called, or the Words, *This Indenture* in the Beginning, or Words importing the same, be omitted, yet if it be indented it is an Indenture in Law.

An Indenture was antiently called *Charta cyrographata vel communis*, because each Party had his Part.

An Indenture is sometimes *Bipartite*, *i. e.* of two Parts, when there are two Parties and two Parts of the Deed, and then commonly the Feoffor, Grantor or Lessor has one Part, and the Feoffee, Grantee or Lessee, the other Part. Sometimes it is *Tripartite*, *i. e.* when there are three Parties and three Parts, and then commonly each Party has a Part of the Indenture. And sometimes it is *Quadripartite*, *Quinquartite*, &c. according to the Parts that are sealed interchangeably one to another. Among these Parts that which is sealed by the Feoffor, Grantor or Lessor, is the Principal or Original, and the Rest are called Accessary, Counterparts or Copies; and yet all of them in Law do make up one intire Deed, every Part of the Indenture being of as great Force and Effect as all the Parts together.

These Deeds are sometimes in the first Person; as, *Know all Men*, and that I *A. B.* have given and granted, &c. and altho' an Indenture be so made, yet it is good.

And sometimes they are made in the third Person; as, *This Indenture witnesseth*, &c. that the same *A. B.* &c. hath given and granted, &c. But a Deed Poll is usually made in the first Person, yet if it be made in the third Person, it is good.

And tho' the Feoffor, Donor or Lessor, only seals the Part of the Indenture running in the third Person belonging to the Feoffee, Donee or Lessee, the Indenture is good; for if the Feoffee, Donee or Lessee, never seals the Counterpart belonging to the Feoffor, &c. he has an Interest in the Estate, being made Party to the Deed in the Beginning.

But if the Indenture is made in the first Person, mention must be made in the Deed, that the Feoffee, &c. has put his Seal, and he must put his Seal accordingly to make himself Party to the Deed; for he is not Party to the Deed, (being made in the first Person) but only by the Clause that he hath put his Seal thereunto.

All the Parts of a Deed indented in Judgment of Law make up but one Deed, and every Part is of as great Force as all the Parts together, and they are esteemed the mutual Deeds of either Party, and either Party may be bound by either Part of the same, and the Words of the Indenture are the Words of either Party.

And altho' they be spoken as the Words of one Party only, yet they are not his Words alone, but may be applied to the other Party if they more properly belong to him; for every Word that is doubtful shall be applied and expounded to be spoken by him to whom they will best agree, according to the Intent of the Parties; and they shall not be taken more strongly against one or beneficially for the other, as the Words of a Deed Poll shall: If therefore *A.* by Indenture enfeoff *B.* upon Condition, and then enters for the Condition broken; in this Case it hath been held, that *A.* in his Pleading may shew forth the Deed that he himself sealed, and this is sufficient.

And therefore it is also thought that an Indenture made in the first Person is as good in the Law as an Indenture made in the third Person, when both Parties hath to this put their Seals; for if in an Indenture made in the third Person, or in the first Person, Mention be made that the Grantor only has put to his Seal, and not the Grantee, then the Indenture is only the Deed of the Grantor; but when Mention is made that the Grantee also has put his Seal to the Indenture, it shall be said to be the Deed of them both.

And altho' both Parts of an Indenture are but as one Part, yet the Deed of the Grantor, Feoffor, &c. is the Principal, and the other are but Counterparts.

And therefore if the Lessor only seals and not the Lessee, yet it is as good as if both had sealed; and if there be any Difference between the Parts, the Counterparts shall be made to agree with the Principal, and it shall be deemed the Misprision of the Clerk.

But now it is customary in some Deeds, and very proper, to make all the Parts Originals by all the Parties signing, sealing and delivering each Part.

This Deed is the strongest Kind of Deed of the two, for this worketh an Estoppel, i. e. it bars and concludes either Party to say or except any Thing against any Thing contained in it; for if a Lease be by Indenture, both Parties are concluded to say that the Lessor has nothing in the Land at the Time of the Lease made, so that if the Lessor happens to have the Land afterwards by Purchase or Descent, the Lessee may enter upon him by way of Conclusion, and the Lessee by Estoppel shall be forced to pay his Rent: But it is otherwise of a Deed Poll, for this is commonly but of one Part, which is sealed by the Feoffor, Lessor, &c. only; and this shall be expounded to be the sole Deed of the Feoffor, Lessor, &c. and the Words therein contained shall be said to be his Words, and shall bind him only, and be expounded altogether in Advantage of the Feoffee, Lessee, &c. and against the Feoffor, Lessor, &c. and does not work any Estoppel against either Party.

But if a Deed be indented or Poll, and there be therein reciprocal Covenants between them from one to another, altho' there be but one Part, yet if each of them seals and delivers it one to the other, this is good for both Parties, and each of them that can get the Deed into his Hand to shew or plead may take Advantage thereof against the other; and in this Case the Deed is usually kept by one indifferent between them both.

A. enfeoffs *B.* of a Manor, rendring for certain Closes, Parcel of the Manor, to *B.* Rent per Ann. and *A.* assigned the Rent to *C.* by Bargain and Sale inrolled; *B.* delivered the Counterpart sealed by him to *C.* who lost it, and *A.* found it and tore it. *C.* brought an Action against *A.* for tearing the Counterpart, upon which it was held by all the Judges but the C. J. that this being only a Counterpart, and not being particularly granted, did not pass to the Plaintiff as incident; but the Chief Justice held, that this Counterpart waited upon the Interest, and is as good Evidence for it. *Telv. 223.*

In *Cur' Canc'* a Counterpart of a Settlement in Tail was admitted as sufficient Evidence, that there was such a Settlement, and a Conveyance was decreed accordingly. *Proc. Chan.* 116.

Duplicate.

There were two Patentees of the same Office for their Lives; one whereof had the real Patent, and the other had only a Duplicate: The principal Patent was wrote *per Warrantiam de privato sigillo auctoritate Parliamenti*, and a little under the Seal of the other was wrote the Word *Duplicate*; he that had the principal Patent surrendered it in the Absence of the other Patentee who was beyond Sea, and took a new Patent to himself and another Person, and the first Patent was cancelled: It was several Persons Opinions, that when the principal Patent was cancelled, the Force of the Duplicate was gone in Law, because no Title could be made by this Patent, because it was granted and sealed by the Chancellor at his Pleasure, and without any Warrant from the King so to do. *D.* 179. *b.*

Per Holt C. J. If a Fine be levied by Baron and Feme of Lands which he has in Right of his Wife, and there is a Deed made at the same Time to declare the Uses thereof, and afterwards this Deed is lost, and then another is made to the same Effect, and dated as the first, that Deed is sufficient to declare the Uses of the Fine. *Holt's Rep.* 735.

A Person who had a large Estate, settled the greatest Part of it, and constrained himself to deliver all the Deeds to the Purchaser, by which he had none left to make out the Title to the Residue. The Vendor moved the Court of Chancery, that the Parties to the Conveyance to him might be ordered to execute a Duplicate of the Conveyance to be kept by him. Lord Keeper *Wright* said, he looked upon it to be within the Covenant for further Assurance, and ordered that a Duplicate should be executed, but that it should be indorsed upon it, that this was only a Duplicate. But the Matter being moved again by the other Side, the Order was discharged; because the Decree being once executed, the Court had no more to do in it. *Alr. Ct. Eq.* 166.

Deed Poll.

A Deed Poll is that which is plain without any indenting when the Parchment or Paper is poll'd or cut even.

This was antiently called *Charta de una parte*, for it is single and but one, which the Feoffee, Grantee or Lessee, for the most part has.

Every Deed that is pleaded shall be intended to be a Deed Poll, unless it is alleged to be indented. It commonly begins thus, **To all People** to whom these Presents shall come, &c. or, **Know all Men** by these Presents, &c. In this Deed Poll a Lessee is not estopped or concluded to plead, that the Lessor had nothing at the Time of the Lease made; for the Lessor only puts his Seal to it, and delivers it only as his Act.

If a Defeasance of a Statute be indented, yet it is but in the Nature of a Deed Poll, and the Words of the Defeasance are the Act and Words of the Conusee only; and if the Conusor and Conusee deliver a several Deed to one another, and there is a Variance in any material Point, it shall be expounded according to the Deed delivered by the Conusee. *2 And.* 58.

If an Indenture be not made between Parties, it is in Nature of a Deed Poll, and thereby the Party may covenant with a Stranger. *2 Lev.* 74.

A. by a Deed Poll covenanted with *B.* to sell him Land for 200 *l.* and *B.* by the same Deed covenanted with *A.* to pay the Money. *B.* sealed and delivered it as his Deed to *A.* and so did *A.* to *B.* This was adjudged the Deed of both *A.* and *B.* and he that has it may have Covenant against the other on Breach. *2 And.* 30.

What Conveyances must be by Indenture and not by Deed Poll.

By *Stat.* 27 *H.* 8. *c.* 16. No Manors, Lands, Tenements or other Hereditaments, shall pass, alter or change from one to another, whereby any Estate of Inheritance or Freehold shall be made or take Effect in any Person or Persons, or any Use thereof to be made by Reason only of any Bargain and Sale thereof, except that the same Bargain and Sale be made by Writing indented, sealed and inrolled.

For more of this Act vide *Tit. Bargain and Sale*, post.

And by *Stat.* 32 *H.* 8. *c.* 28. All Leases of any Manors, &c. by Writing indented under Seal for Term of Years, or Life, by any Person of full Age, having any Estate of Inheritance either in Fee-simple, or in Fee-tail, in their own Right, or in the Right of their Churches or Wives, or jointly with their Wives, of any Estate of Inheritance made before the Coverture or after, shall be good and effectual in the Law against the Lessors, their Wives, Heirs and Successors, and every of them.

See more of this Act *Tit. Lease*, post.

And by Stat. 13 Eliz. c. 7. A Bargain and Sale of a Bankrupt's Estate must be by Deed indented and inrolled.

For this Statute see before Page 104.

And by Stat. 43 Eliz. c. 11. Where the Queen or her Successors is or shall be Lord or Owner of the Freehold of the Soil of Waste or Common (proposed by this Act to be drained and recovered in the Isle of Ely, and the Counties of Cambridge, Huntingdon, Northampton, Lincoln, Norfolk, Suffolk, Sussex, Essex, Kent, and County Palatine of Durham) the most Part of the Commoners in such Soil may contract, bargain, assign and set forth Part of their Common therein, to any Persons who will undertake the Draining, which shall bind all the said Commoners, their Heirs, Executors or Assigns, and all others that shall hereafter, by Reason of any their Residence, claim any Common of Pasture in the said Wastes or common Grounds whereof the Soil belongs to the Queen, of and for all their Interest or Claim of Common therein; To hold according to the true Intent and Effect of such Contract, Bargain, Assignment and Conveyances, by Writing indented, sealed and delivered by the most Part of such Commoners, as shall be made between the most Part of such Commoners and such Undertakers: But shall not in any Sort be of any Effect or Validity against the Queen, her Heirs, Successors or Assigns, or their Estates in the Soil thereof, except such Conveyances be by Writing indented in Parchment, and one Part thereof under the Hands and Seals of most Part of the Commoners so contracting the same, certified into Chancery, if the Waste or Soils shall be of the Possessions of the Queen's Crown of England; and except her Majesty's Royal Consent be obtained thereunto, and signified by and under the Queen's Privy Seal, or Great Seal, and inrolled in the Queen's said Court of Chancery; and after such Assent so had, signified and inrolled, then the same Contracts and Covenants shall be good and available to all and every such Undertakers, their Heirs and Assigns, against the Queen's Heirs and Successors, according to the Provisions, Agreements and Covenants so assented unto by the Queen, her Heirs and Successors; and where they are of the Possession of the Duchy of Lancaster, then the said Contract, Bargain, Assignment of or from the Queen, shall not be of any Effect or Validity against the Queen, her Heirs, Successors and Assigns, except such Contract and Bargain touching the Premises, and such Assignment and setting forth of such Part to the said Undertakers to hold in Severalty be by Writing indented in Parchment, sealed and delivered by the said Commoners, or the most Part of them, and the said Undertakers, and one Part thereof, certified under the Hands and Seals of most Part of the Commoners, into the Queen's Court of the Duchy of Lancaster for the Time being, and your Majesty's Royal Consent under the Seal of the said Duchy obtained thereunto, and there inrolled in that Court; which Consent Royal being obtained for the Soil of such Waste, being of the Possessions of the Crown, and under the Seal of the said Duchy of the Queen's Soil of such Waste as are of those Possessions, the said Undertakers, and their Heirs and Assigns, shall and may enjoy in Severalty the Soil of so much Waste and Common as was so contracted for, assigned and set forth by the most Part of the Queen's Commissioners, in such Sort and Quality as the said Undertakers shall hold and enjoy the Interest of Common to all Intents and Purposes.

Provided always that this Act, nor any Thing therein contained, shall not extend to the Impairing, Diminishing, Letting, Taking away or Extinguishing of the Interest of Commoners, or any of them, or of the Lords or Owners of the Soil, of, in or to any Part of the Residue of the Waste or Commons which is not or shall not be set forth or assigned to the Undertakers, nor to any Franchises or Liberties, or Waif, Stray, Leet, Law-day, nor other Liberties to be used or taken in the Part so to the said Undertakers assigned, but that as well the Commoners and Lords and Owners of that Soil, shall and may enjoy their Commons in the Residue thereof; and the Queen's Majesty, her Heirs and Successors, and the Lords and Owners, shall and may have and enjoy such Liberties and Franchises in such their Part as heretofore was lawfully used, and as they or any of them should or might have done, if this Act, or such Contract, Bargain and Assignment, had never been.

Provided always that this Act, or any Thing therein contained, shall not extend either to any Bargain, Sale, Agreement, Grant, Conveyance or Assurance, or to the Inning, Draining, or Laying dry of any Commons, Marshes or surrounded Grounds, whereby or by Means whereof any of the Havens or Ports of the Realm may be in any Sort annoyed, impaired or hindred, nor to any Grants within eight Miles of Tarmouth, or six Miles of Lyn in Norfolk.

Note;

Note; The preceding Clause of this Act relates to Contracts, &c. made concerning the Wastes and Commons of which the Soil belongs to Subjects, but it does not direct such Contracts, &c. to be by Deed indented; the Clause of the Act is as follows:

It is enacted, That the Lord or Lords, as well Bodies Politick or Corporate, as any other Person or Persons whatsoever of all and every the Waste and Commons aforesaid, and the most of the Commoners for their particular Commons, and likewise the Owners, and such as have or shall have Interest in any several surrounded Grounds lying within or near the same, may contract or bargain for Part of such Commons, Wastes and Severals aforesaid, with such Person and Persons which will undertake the Draining and Keeping dry perpetually the several Wastes or Commons of that Quality; which Contract, and Bargain and Conveyances thereupon made, shall be good and available in Law to all Constructions and Purposes against the said Lords of the said Soil, and Owners of Several, and their Heirs, Successors and Assigns, and all the Commoners, and such as shall or might have Common or Interest there afterwards, according to the Contracts, Covenants, Provisions and Agreements in those Conveyances to be specified, and for so much of such Commons, Wastes or Severals, as shall be so contracted or conveyed; To hold and enjoy in Severalty, to such Person or Persons, his or their Assignee or Assignees, as shall or have undertaken the same, in such Manner and Form as his or their Estates and Interest are or shall be, by or upon such Contracts or Agreements, by such Conveyances limited or appointed.

There are three Kinds of Persons who may make Leases for three Lives, &c. but they must be by Deed indented, and not by Deed Poll, viz. (1) Any Person seised of an Estate-tail in his own Right. (2) Any Person seised of an Estate in Fee-simple in the Right of his Church. (3) Any Husband and Wife seised of any Estate of Inheritance in Fee-simple or Fee-tail in the Right of his Wife, or jointly with his Wife before the Coverture or after, viz. the Tenant in Tail by Deed to bind his Issue in Tail, but not the Reversion or Remainder; the Bishop, &c. by Deed without the Dean and Chapter to bind his Successors; the Husband and Wife by Deed to bind the Wife and her and their Heirs; and these are made good by the Statute of 32 Hen. 8.

(B) *Of the various Kinds of Deeds with Relation to their Use and Effect.*

THERE are some Deeds which concern the Publick, and others which concern and are made between particular Persons.

And of these some are absolute and some conditional, some concern the Realty, some the Personalty, and some are mixed.

Some Deeds contain *Matter of Grant*, or *Gift*, amongst which *Feoffments*, *Gifts*, *Bargains and Sale*, *Grants and Leases*, are the chief.

And some of them contain *Matter of Discharge*, as *Releases*, *Acquittances*, *Discharges*, and such like.

And some of them contain other Matter, as *Confirmations*, and such like.

Or as they are otherwise distinguished: Some of them are *constitutive* and *making*, and some are *remissory* or *liberatory*. Some of the first Sort are *creating*, i. e. such whereby an Estate, Property or Obligation, not having Essence before, is newly raised and created; as the first *Grant* of a Rent, Common, Way, &c. Estate-tail for Life, Years, &c. and some of them are *conveying*, i. e. such by which Estates, Properties, and the like, being already created, are conveyed to others; as *Feoffments*, *Bargains and Sales*, *Grants over*, or *Assignments*, *Surrenders*, and the like.

Those of the last Sort are such as describe and testify some precedent Contract for a Duty or Fact to be paid, performed or done, released or discharged; of which Sort are all *Acquittances*, *Releases*, and other such like Matters of Discharge.

But observe, *First*, That there may be and are divers other Kinds of Deeds besides those which are named before, for every *Agreement* put in Writing, sealed and delivered, becomes a Deed.

And *Attornments*, *Exchanges*, *Surrenders*, *Partitions*, *Authorities*, *Commissions*, *Licences*, *Revocations*, and the like, are usually made, given, done and granted by Deed; and there are divers other Instruments concerning Merchants, and other Affairs; if therefore any of these be done by Deed, such a Deed is for the most part subject to the Rules of Deeds herein laid down.

Secondly

Altho' Feoffments, Gifts, Bargains, Leases, Attornments, Exchanges, Surrenders, and such like, may in divers Cases be as well made and done without as with a Deed; yet if a Man will make his Claim to any Thing given or granted by such Feoffments, Gifts, &c. by Deed, such Deed must be a good and perfect Deed.

Conveyances are either, (1) According to the Course of the Common Law; (2) According to, or by Force or Power of Acts of Parliament; or (3) According to Custom.

First, According to the Course of the Common Law, there are two Kinds of Conveyances; 1. By Matter of Record; 2. By Matter in pais.

I. By Matter of Record, they are either, (1) By Fine; (2) By Common Recovery; or (3) By Deed inrolled.

1. Fines in general are of two Kinds; (1) At Common Law; or (2) With Proclamations: And their Effects are, (1) In Relation to the barring Privies, or Conveyance of Estates; or (2) In Relation to Strangers, Non-claim.

2. Common Recoveries as to their Kinds, are either with single, double or treble Voucher: And as to their Effects, they are (1) In Relation to transferring or barring Estates-tail, Remainders, Reversions, &c.

3. Deeds inrolled are of three Kinds; (1) Deeds inrolled by special Custom, as in London; (2) Deeds inrolled at Common Law; or (3) Deeds inrolled in Pursuance of the Stat. 27 H. 8. or Bargains and Sales inrolled.

II. Conveyances by Matter in pais, are either, (1) Without Deed; or (2) By or with Deed.

Conveyances in pais without Deed, are either, (1) Of Chattels, as Leases or Exchanges of Land, which may be either by Grant or Assignment by Parol, or by Exchange, (but as to the last Quære); or (2) Of Freeholds of Lands by Livery, and Conveyances in pais with or by Deed, with Relation to the creating or passing Estates, are called Charters, Grants or Feoffments.

Deeds with Relation to their Use (as has been observed in the last Section of Chapter 5.) are either, (1) Such as have their Efficacy without the Adjunct of some other Ceremony; or (2) Such as to their Effects require another Ceremony to be joined with them.

I. As to the first they are of three Kinds, (1) Grants, (2) Releases, and (3) Confirmations.

As to Grants; there are many Things that are of an incorporeal Nature; as Advowsons, Tithes, Liberties, Commons, &c. that cannot pass from one to another by Act of the Party without Deed, and yet pass by Deed without any other Ceremony requisite.

As to Releases, they are of several Kinds, viz. (1) Releases whereby the Thing released is extinguished in the Possession of the Release; as Rights, Common, Seigniories, Rents, &c. and other Profits issuing out of Lands by Release to the Tenant; or (2) Releases whereby an Estate is transferred, which is either by Mitter le Estate, as of one Jointenant to another; or by Encrease or Enlargement of the Estate, being made by the Reversioner to the Lessee in Privy, with apt enlarging Words.

As to Confirmations, they are of two Sorts, viz. 1. Corroborating the Estate of which it is made; as Dean and Chapter confirming the Grant of the Bishop; Patron and Ordinary confirming the Grant of the Parson; or the Disseisor that of the Disseisor. 2. Enlarging the Estate with apt Words, as in Case of Release.

II. And as to such Deeds as require a Ceremony concomitant with them to make them effectual; such Ceremonies are Livery of Seisin in the Case of Feoffment, tho' by Deed; or Attornment, which is requisite in Grants of Reversions, Remainders, Rents, Seigniories.

The Effects of Attornments are, (1) To create a Privy of Distress or Action, as in the Case of Fines, *Quid juris clamat, Quem redditum reddit, Per quæ servitia*. Or (2) To pass the Interest, as in Case of Grants singly by Deed.

As to other concomitant Ceremonies, see the last Section of Chapter 5.

Secondly, Conveyances according to, or by Force or Power of Acts of Parliament, are of two Kinds; 1. By way of Bargain and Sale, according to the Stat. 27 H. 8. 2. By way of Use, which is either, (1) With Transmutation of Possession, as by Feoffment or Fine; or (2) Without Transmutation of Possession, by Covenant to stand seised. 3. By way of Devise.

Thirdly, Conveyances according to Custom. These are of Copyhold Estates, which are either by the Grant of the Lord where he is absolute Owner; or by Surrender and Admittance, where the Owner is a Copyholder.

All which Kinds of Deeds and Instruments, whether constitutive, conveying, restrictive, remissory or liberatory, are proposed to be particularly treated of in the ensuing Part of this Chapter, viz. under the Titles of,

1. Feoffment.
2. Fine, which is a Feoffment on Record.
3. Common Recovery, which is a common Conveyance, and is in the Nature of a Feoffment on Record.
4. Indentures to lead the Uses of Feoffments, Fines and common Recoveries.
5. Covenants to stand seised to Uses.
6. Bargain and Sale.
7. Grant.
8. Lease.
9. Lease and Release.
10. Exchange.
11. Assignment.
12. Confirmation.
13. Surrender.
14. Revocation and new Declaration.
15. Agreements or Articles of Covenant.
16. Statute.
17. Obligation.
18. Defeasance.
19. Devise, or last Will and Testament.

S E C T. III.

Of Feoffments.

(A) Feoffment what, and Feoffor and Feoffee who.

Feoffment,
Definition of
the Thing.

Derivation of
the Word.

It is a Con-
veyance in
Fee-simple.

Of a corporeal
Estate.

* *Sed vide*
Stat. 29 Car.
2. c. 3. post.
(B).

A Feoffment is a Conveyance in Fee-simple of a corporeal Estate of Inheritance by Word or Writing, with Livery of Seisin.

The Word *Feoffment*, (*Feoffamentum*) in the Opinion of some Writers, is derived from the Gothick Word *Feudum*, which is interpreted *Fee*, and signifies *Donationem Feudi*. Cowel's Interp.

Lord Coke (*Co. Lit. 9. a.*) says, Feoffment is derived from the Word of Art *Feodum*, *quia est Donatio Feodi*; for the antient Writers of the Law call a Feoffment *Donatio*, of the Verb *Do* or *Dedi*, which is the aptest Word of Feoffment; and that Word *Ephron* used (*Gen. 23. ver. 11, &c.*) when he enfeoffed *Abraham*, saying, *I give thee the Field of Machpelah over against Mamre, and the Cave therein I give thee, and all the Trees in the Field and the Borders round about*; all which were made sure unto *Abraham* for a Possession, in the Presence of many Witnesses.

A Feoffment is a Conveyance in Fee-simple; for *Lit. 9. 57.* says, a Feoffor is where a Man enfeoffs another in any Lands or Tenements in Fee-simple, and makes this Difference between him and a Donor or Lessor: A Donor (says he) is where a Man gives certain Lands or Tenements to another in Tail, and a Lessor is where a Man lets to another Lands or Tenements for Term of Life or Years, or to hold at Will.

A Feoffment must be of a corporeal Estate of Inheritance. An Estate in Fee or Inheritance is either corporeal, as Lands and Tenements which lie in Livery, comprehended in the Word *Feoffment*, and may pass by Livery by Deed, or * without Deed, which some call *Hereditas corporata*. Or incorporeal, which lie in Grant, and cannot pass by Livery, but by Deed, as Advowsons, Commons, &c. which by some is called *Hereditas incorporata*. *Co. Lit. 9. a.*

Sometimes a Conveyance is improperly called a Feoffment when an Estate of Freehold only passes. *Co. Lit. 9. a.*

By Freehold only is meant such Estate as is not Fee-simple, or of Inheritance, as a Man's own or another's Life, or an Estate in Tail; for altho' an Estate in Fee-simple is Freehold too, yet it is also an Estate of Inheritance, and the greatest Estate a Man can have.

These Estates are called Freeholds to distinguish them from Estates for Years, Chattels upon incertain Interests, Lands in Villenage, or Customary or Copyhold Lands. And Note, that Tenants by Statute-Merchant, Statute-Staple or *Elegit*, are said to hold Lands *ut liberum Tenementum* till their Debts be paid; but in Truth they have no Freehold but a Chattel, which goes to the Executors. *Co. Lit. 43. b.*

A Feoffment must be *by Word or Writing*. *Parol Feoffments* were usually made in By Word or Writing. former Times, but now they are restrained (by the *Stat. 29 Car. 2. c. 3. of Frauds and Perjuries*) to extend no farther than Estates at Will. See the next Division (B).

So that now Feoffments are usually made in Writing, and then they are called *Deeds of Feoffment*, as a Distinction from *Parol Feoffments*.

Livery of Seisin must be of the Thing conveyed, for till that is made, the Words or With Livery Deed of Feoffment have no Effect to change any Use, nor pass any Estate but at Will, of Seisin. so that Livery of Seisin is essentially necessary.

The Feudists call a Feoffment an *Investiture*. *Spelm. Gloss. verbo Feoffare.*

A Feoffor is he who makes such Feoffment; and a Feoffee is he to whom it is made. Investiture.
Feoffor and Feoffee who.

From whence proceeds the Word *enfeoff*; so one may properly say, *the Feoffor enfeoffs the Feoffee* of such and such Lands, &c. Enfeoff what.

(B) Of the Antiquity of Feoffments.

AS all Property in Lands began by Occupancy, so it seems the first Method of transferring Property was by *Investiture* (that is by Feoffment); for as no Man could originally appropriate but by settling himself in the Possession and Application of it to his own Use, so no Man could transfer but by a solemn and publick Delivering over the Possession, and the Ceremony used in such Act of Delivery is in our Law called *Livery of Seisin*, and is thus defined, *Solemnis rei feudalis traditio sub protestatione fidei coram testibus vassallo facta.* *Spelm. Gloss. 510.*

The End and Design of this Institution was, by this Sort of Ceremony or Solemnity, to give Notice of the Translation of the Feud from one Hand to another; because if the Possession might be changed by the private Agreement of the Parties, such secret Contracts would make it difficult and uncertain to discover in whom the Estate was lodged, and consequently the Lord would be at a Loss of whom to demand his Services, and Strangers equally perplexed to discover against whom to commence their Actions for the Prosecution and Recovery of their Right; to prevent therefore this Uncertainty, the Ceremony of Livery and Seisin was instituted.

This Method of Conveyance was made use of before Men were acquainted with Letters, and therefore it was required to be on the Land, or near the Land, that the other Tenants of the Manor might be Witnesses of it, who in those Days were called to the Lord's Court to determine all Controversies relating to such Translation; and so after the Use of Letters a Charter of Feoffment was introduced, yet was not this necessary, but only tended to the Authentication or Evidence of it, and so our Law determined before the Statute of Frauds and Perjuries. See the Alterations that Statute made hereafter.

It has been before observed, that *Ephron* enfeoffed *Abraham* (*Gen. 23. ver. 11, &c.*) of the Field of *Machpelah* over against *Mamre*, and the Cave therein, and all the Trees in the Field and Borders round about, in the Presence of many Witnesses, *Gen. 23. 17.*

It is plain in the Scriptures, that upon making a Feoffment of Lands Livery of Seisin was made; for we read in *Ruth, chap. 1st and 4th*, that *Elimilech*, his Wife *Noami*, and two Sons *Mablon* and *Chilion*, went into the Land of *Moab*, where the two Sons married *Orpah* and *Ruth*: The Father and two Sons died, the Widow returned into her own Country with *Ruth* her Daughter-in-law. Now *Boaz* was a near Kinsman to *Elimilech*, and *Noami* thought he had a Right to inherit her Husband's Lands; but *Boaz* called into Judgment a nearer Relation than himself, and advised him to redeem the Estate according to the Manner in *Israel*; and telling him, that if he would not, he himself was the next after him. He said he would redeem; but upon *Boaz's* telling him, that upon buying the Land of the Hand of *Noami*, he must buy it also of *Ruth* the *Moabites*, the Wife of the Dead, to raise up the Name of the Dead upon his Inheritance, the Kinsman replied, he could not redeem for himself, lest he marred his own Inheritance, and so offered *Boaz* his Right; so

so he pulled off his Shoe, and gave it to *Boaz* in the Name of Seisin of the Land, for it was the Manner in former Time in *Israel* concerning redeeming and changing, and to confirm all Things a Man plucked off his Shoe, and gave it to his Neighbour, and this was a Testimony in *Israel*. And *Boaz* said to the Elders and all the People, *Ye are Witnesses this Day, that I have bought all that was Elimelech's, and all that was Chilion's and Mahlon's, of the Hand of Naomi. Moreover, Ruth the Moabitess, the Wife of Mahlon, have I purchased to be my Wife, to raise up the Name of the Dead upon his Inheritance, that the Name of the Dead be not cut off from among his Brethren, and from the Gate of this Place: Ye are Witnesses this Day.* And all the People that were in the Gate, and the Elders, said, *We are Witnesses.*

This was about 1312 Years before Christ. See *Deut. chap. 25. ver. 5. to 11.*

And Lord Coke (2 *Inst.* 119.) observes, that Feoffments in *England* by Deed or without Deed were of great Antiquity in antient Time before the Conquest.

(C) Of the Kinds of Feoffments.

FFeoffments are either by Parol or in Writing.

A Feoffment in Writing is either by Deed Poll or indented.

Feoffments were antiently made in most Cases by Word without Writing, but now in few Cases otherwise than in Writing. See the *Stat. 29 Car. 2. c. 3. post.*

The Father enfeoffed the Son to the Use of the Father himself for his Life, and after his Decease then to the Use of the Son and his Heirs; and after the Father and Son (upon Communication that the Father should rehave the Land in Fee) came together to the Land, and upon the Land by Parol, without any Deed the Son delivered Seisin of the Land to the Father, *Habendum* to him and his Heirs, &c. This was held a good Feoffment, and in Law the Acceptance of Livery implies two Effects, *viz.* first a Surrender, and after a Feoffment; as a Surrender to the Grantee of a Reversion amounts to an Attornment and Surrender. *Dyer* 358. *pl.* 48. *Bendl.* 288.

A Feoffment with Livery without Deed, by way of Mortgage, has been held good. *1 Mod.* 144.

A Feoffment might have been of an Advowson by Livery of the Door of the Church without Deed. *43 Ed. 3. 1. b.*

A Feoffment might be with Attornment of a Manor without Deed, and the Services would pass by Letter of Attorney. *3 Co. 29. 20 H. 6. 7. a.*

The Question was, *Whether an Advowson would pass by the Livery made in the View of the Church without Deed or not, the Church being full of an Incumbent.* Upon which it was resolved by the Lord Chief Justice of the King's Bench and Justice *Mansfield*, to whom the same was referred, that the Advowson could not pass by that Livery. *Cary's Rep.* 74.

And Livery of Seisin (contrary to the Opinion of *Coke Ch. Just.*) might be received without Deed, as a Stranger might take Livery to the Use of *J. S.* and if after *J. S.* agreed to it, it was held good. *2 Sid.* 61.

By *Stat. 29 Car. 2. c. 3.* it is enacted, That after the 24th of *June* 1677. all Leases, Estates, Interest of Freehold or Terms of Years, or any uncertain Interest of, in or out of any Messuages, Manors, Lands, Tenements or Hereditaments, made or created by Livery and Seisin only, or by Parol, and not put in Writing, and signed by the Parties so making or creating the same, or their Agents thereunto lawfully authorized by Writing, shall have the Force and Effect of Leases or Estates at Will only, and shall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect; any Consideration for making any such Parol Leases or Estates, or any former Law or Usage to the contrary notwithstanding.

2. Except nevertheless all Leases not exceeding the Term of three Years from the making thereof, whereupon the Rent reserved to the Landlord during such Term shall amount unto two third Parts at the least of the full improved Value of the Thing demised.

3. And moreover that no Leases, Estates or Interest, either of Freehold or Terms of Years, or any uncertain Interest, not being Copyhold or Customary Interest, of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall at any Time after the said 24th Day of *June* be assigned, granted or surrendered, unless it be by Deed or Note in Writing, signed by the Party so assigning, granting or

or surrendering the same, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.

And there is a Difference between a Feoffment at Common Law and a Feoffment according to the Statute of 1 R. 3. which operates *sub modo*. Those at Common Law are the antient Conveyances of Lands, but they which are according to the said Statute are Upstarts, and have not had Continuance above 150 Years.

In Case of those at the Common Law the Feoffor ought to be seised of the Lands at the Time of the Feoffment, but in Case a Feoffment be made according to the said Statute, the Feoffor needs not be in Possession.

Feoffments at Common Law give away both Estates and Rights, but Feoffments by Statute give the Estates but not the Rights.

The Feoffee at Common Law is in in the *Per*, viz. by the Feoffor; but if by the Statute, the Feoffee is in in the *Post*, viz. by the first Feoffees.

So a Feoffment by *Cestuy que Use* by Force of the said Statute will not fasten upon any Thing but what the Statute requires. 5 H. 7. 5. 21 H. 7. 25. 2 Roll. Rep. 334. Godb. 318.

(D) Feoffment, how made and executed.

It has been already observed, that since the Stat. 29 Car. 2. c. 3. Feoffments in most Cases must be by Deed in Writing, Poll or indented.

The Poll Deeds were usually made in *Latin*, and did begin, *Sciant presentes & futuri quod ego, &c.* but sometimes in *English*, and did begin, *To all Christian People, &c.* and were called Deeds Poll, because they are cut plain at the Top without indenting. Co. Lit. 229. a.

Indentures begin, *This Indenture*; and must be indented at the Top, for the Writing of *This Indenture*, without the actual indenting of it, will not do. Co. Lit. 229. a.

Both the Poll Deeds and Indentures must be written in Parchment or Paper. Co. Lit. 229. a.

The antient Forms and Examples of these Deeds are very brief; and yet they had these Parts contained in them:

1. The Premises. 2. The *Habendum*. 3. The *Tenendum*. 4. The *Reddendum*. 5. The Clause of Warranty. 6. The *In cujus rei testimonium*. 7. The Date. 8. The Clause of *His testibus*. *Hæc fuit candida illius ætatis fides & simplicitas quæ pauculis lineis omnia fidei firmamenta posuerunt.*

All which different Parts are fully treated of in the fifth Chapter.

The Execution of a Feoffment is by Signing, Sealing and Delivery of the Deed, and executed. and also by Livery of Seisin made by the Feoffor to the Feoffee, or else by Attorney or Attornies, authorized by Deed to deliver Seisin, or to receive it, as the Case shall be.

But nothing of the Land passes by the Delivery of the Deed, tho' upon the Land. Popb. 49.

But the Feoffee upon his Entry (until Livery) will become Tenant at Will to the Feoffor. Lit. §. 60.

Tho' if the Deed is delivered on the Land in the Name of Seisin of the Land; or the Feoffor says to the Feoffee, *Take and enjoy the Land according to the Deed*; or *enter into the Land, and God give you Joy of it*: These Words would amount to a Livery. Co. Lit. 57. a. 48. a. 9 Co. 137. b. 6 Co. 26. 2 Roll. Abr. 7. Vide Cro. Jac. 80. which seems *contra*.

A Delivery of any Thing upon the Land in the Name of Seisin, altho' it be nothing relating to the Land, as a Gold Ring, &c. it is good. Co. Lit. 48. a.

A Deed executed by Livery shall not take Effect any other way. Andersf. 113. Popb. 49.

A Father in Consideration of Love which he beared to his Son, and for natural Affection to him, bargained and sold, gave, granted and confirmed to him and his Heirs the Land; the Deed was inrolled: This did not pass the Land, unless Money had been paid, or it were executed with Livery; but because the Son was then in Possession, it was held that it shall enure as a Confirmation. Cro. Jac. 127. pl. 17. Co. 31. a.

The Manner of making Livery, see post.

(E) *What amounts to a Feoffment.*

A Lease and Release countervails a Feoffment. *Bro. Feoffment de terres, pl. 3. 44 Ed. 3. 3.*

A Lease for Years and Release is said to have been adjudged a good Feoffment, because a Freehold passes by the Release; and that if it was a Grant of a Reversion after the Death of Tenant for Life, it would be otherwise. *11 H. 4. 33. a. Bro. Feoffment de terres, pl. 13.* And that it would be otherwise if it be with a Warranty. *Bro. Feoffment de terres, pl. 10.*

A Lease for Years, and a Release afterwards made to the Lessee in Fee, is, in a Manner, agreed to be a Feoffment. *Per Fitz. contra to Ingham.*

And a Lease for Life, and a Release in Fee, countervails a Feoffment, but is not a Feoffment in Fact; for the Fee and Freehold do not go *uno flatu*, as in *Casu supra*. *Bro. Feoffment de terres, pl. 30. — 31 Aff. 25.*

In *Formedon* the Tenant in Dower granted his Estate to *W. N* and afterwards he, in Reversion released to him in Fee: This is no Feoffment, and yet it countervails a Feoffment; but if the Issue be taken, if the Heir infeoffed him, this is no Feoffment; *Quod caveat placitand*. *Bro. Feoffment de terres, pl. 44, 58. Co. Lit. 207. a.*

A Release to a Disseisor is an Extinguishment of the Action and Right, and not a Feoffment; for a Feoffment is, where there is a Transmutation of Possession from one to another, which there is not upon a Release by a Disseisor to the Disseisor. *Bro. Feoffment de terres, pl. 10.*

And a Freehold will not pass by a Release. *Idem, pl. 58.*

A Bargain and Sale was made to *J. S.* and his Heirs by Deed indented but not enrolled, and the Bargainor made Livery of the Land, *secundum formam Chartae, &c.* this was held a good Feoffment. *2 And. 68.*

If one who has a Freehold in Possession levies a Fine Come ceo, &c. it enures as a Feoffment with Livery on Record; but where he has but a Reversion or Remainder, it enures only as a Grant thereof, without Tort presumed or done to the Possession of a Stranger, who has the Freehold. *Moor, fol. 629.*

The Father seised in Fee infeoffed his Son in Fee, to the Use of the Father for Life, and after to the Use of the Son in Fee; and after to the Intent that the Father should be enabled to make a Lease to the Son for sixty Years, the Son without any Writing infeoffed the Father of the Tenements aforesaid, *Habendum* to the Father and his Heirs. The Court held the Feoffment good, and in this is implied that the Father should have the Land to him and his Heirs for the Use intended. *And. 51. pl. 126. Dyer 358. pl. 48. Bendl. 288. pl. 288.*

A Man made a Feoffment to the Use of himself in Tail, the Remainder to his Son in Tail. The Father died, and the Son entred, and by Indenture made a Bargain and Sale of the Land (without any Words of *Dedi* and *Concessi*) to the Uses of *J. S.* in Fee, and in the Indenture was a Letter of Attorney to make Livery, which was made accordingly. *J. S.* by the said Indenture covenanted, that if the Son before such a Day paid 40 s. then *J. S.* and his Heirs would stand seised, &c. to the Use of the Son and his Heirs; and if the Son did not pay, &c. then if the said *J. S.* did not pay to the Son within four Days after 10 l. that *J. S.* and his Heirs should thenceforth be seised to the Use of the Son and his Heirs, &c. And the Son covenanted further, to make such further Assurance as the Son's Counsel should advise: Both failed of Payment, and the Son levied a Fine to *J. S.* without any Consideration: This was adjudged a good Feoffment well executed by the Livery notwithstanding the Words of Bargain and Sale only, and that the Covenant to be seised to the new Uses conditionally upon Payment and Non-payment being in one and the same Deed, should raise the Use upon the Contingency according to the Limitation of it. *1 Leo. 25.*

(F) *The*

(F) *The Difference between a Feoffment to Uses and a Covenant to stand seised to Uses.*

IN a Covenant to stand seised to Uses, all the Uses that are not disposed of return back and remain in the Covenantor to serve the contingent Uses when they happen; but in a Feoffment to Uses, the Uses are disposed of by the Livery, the Estate in Law being in the Feoffees. *Carter* 202.

A Feoffment to the Use of *A.* for Life, Remainder to *B.* *A.* refuses to take the Estate, *B.* shall then take presently, because the whole Estate is out of the Feoffor by the Livery: But if it had been by Covenant to stand seised, *B.* should not take till after the Death of *A.* but it should rest in the Covenantor, because he had not parted with the Possession, and therefore should have the Use in the mean Time, which is not in the Case of a Feoffment to Uses, the Estate being only in the Feoffee, and passed out of the Feoffor by the Livery. 2 *Lev.* 77. See the Lord *Paget's* Case in the Rector of *Chedington's* Case, 1 *Co.* and in 1 *Leon.* Case 279.

But if a Man makes a Feoffment, and declares the Uses for Life, or in Tail, the Residue of the Use not disposed of is in himself by Result. *Ibid.*

If a Man makes a Feoffment in Fee, without a valuable Consideration, to divers Uses, so much of the Use as he disposeth not of is in him, as in his antient Use, in Point of Reverter. *Co. Lit.* 23. a. 13. a. 1 *Co.* 100. b.

Where a Man, in Consideration of 200*l.* paid by the Father for a Marriage-Portion with his Daughter to his Son, covenants to execute an Estate of such Lands by such a Time to the Use of the Man and Woman (agreed to be married) for their Lives, and after their Decease, to the Use of the Issue of their Bodies; and he afterwards executes the Estate by Feoffment, Fine and Recovery, to the aforesaid Uses, and the Marriage doth not take Effect. It was held, that the Use did arise to the Man and Woman agreed to be married, as well as if the Marriage had taken Effect, which it did not, because it is a Use declared upon an Estate executed, *viz.* by Feoffment, Fine and Recovery, which needed not any Consideration: But if it had been an Use declared upon a Covenant to stand seised upon a Consideration of Marriage and Money, there no Use will arise without Marriage, altho' the Money was paid, because the Marriage is the principal Consideration in the Intent of the Parties, and the Money is but the Accessary, which attends the Marriage. *Moor*, Case 247.

In the Case of *Thompson* and *Atfield* it was allowed, that altho' a Conveyance be made purporting a Deed of Feoffment, yet nevertheless it may operate as a Covenant to stand seised to Uses, &c. And here a Difference was taken between the several Sorts of Conveyances, as to the supplying their Defects, in what Cases they may and may not be made good. 1 *Vern.* 40.

(G) *In what Cases Uses are vested or changed by a Feoffment.*

IF *A.* makes a Feoffment to *B.* to the Use of his last Will expressed in the same Deed, *viz.* to his own proper Use for his Life, and after to *F.* and his Son in Tail, &c. and after he makes a Lease for Years, and dies: He might have altered his Will in this Case; for where the Word *Will* is expressed in the Deed or Schedule, he may alter his Will notwithstanding the other Words; but where the Use is declared upon the Livery without the Word *Will*, there he cannot alter his Will. *Per tot' Cur' except Shelley*, 19 *H.* 8. 11. *Bro. Feoffments al Uses*, pl. 1.

If a Man makes a Feoffment, and annexes a Schedule to it containing the Use, he cannot change such Use afterwards. *Bro. Feoffments al Uses*, pl. 47. 30 *H.* 8.

It is so if the Use be expressed in the Deed of Feoffment; but otherwise where he declares the Use by the Words of his Will; as that, *I will that my Feoffees shall be seised to such an Use*; in this Case he may change the Use, because it is by Will, &c. *Bro. Feoffments al Uses*, pl. 47.

The Lord *Audley* made a Feoffment to *B. G.* and others, and afterwards by Indenture, reciting the said Feoffment, he declared the same was made, to the Intent his Feoffees should perform his last Will, to this Effect, (*viz.*) *My Will is that my Feoffees shall stand seised, &c. to pay all my Debts, and afterwards that they make an Estate of the Lands to me and Elizabeth my Wife, and to the Heirs of our Bodies, with divers Remainders*

mainders over. The said Lord had Issue by one Wife a Son, and by another a Daughter; the Feoffees never made any Estate to the Lord and his Wife. Adjudged that by this Feoffment and Deed no Use was changed; for tho' the Feoffees shall be seised to the Use of the Feoffor and his Heirs, (for there was no Consideration for which they should be seised to their own Use) yet the same cannot make a new Use to the Lord and to his Wife in Tail; neither can this Writing take Effect as a Will, because it appoints an Estate to be made to the Lord himself, and he cannot take by his own Will. 2 Leon. 159. Dyer 324. Moor 516.

Lease to Husband and Wife for the Life of the Wife, Remainder to the Heirs of the Husband; afterwards the Husband made a Feoffment in Fee to the Use of himself and Wife for their Lives, Remainder to his own right Heirs: The Husband died, the Wife committed Waste; and in an Action of Waste brought against her, it was adjudged that she is in, not by the Lessor, or by the Feoffment, but by the Statute of Uses. 2 Leon. 222.

(H) *Of Feoffments upon Conditions, and to the Uses of another, and to a Will.*

THE Feoffee seised of Lands in Socage made a Feoffment thereof to his Son and the Heirs of his Body, to the Use of him and his Heirs: Adjudged that his Son had an Estate in Tail, and no Fee-simple, because Tenant in Tail cannot stand seised to an Use. At Common Law, if a Feoffment had been made to one and to the Heirs Male of his Body, such an Estate had been a Fee-simple conditional; and if it had been afterwards limited to the Use of him and his Heirs, these are always intended such Heirs as were named before, viz. the Heirs of the Body of the Feoffee. See Plowd. Com. 555. Walsingham's Case.

Feoffment in Fee, to the Use of such Person and Persons, and for such Estate and Estates as he shall appoint by his last Will: In such Case by the Operation of Law the Use vests in the Feoffor, and he is seised of a qualified Fee, viz. until he makes a Will, and declares the Uses according to the Power reserved; so where he makes a Feoffment to the Use of his last Will, he is seised in the mean Time to the Use of himself and his Heirs; and when the Will is made, it is only directory, for nothing passes by it, but all by the Feoffment. 6 Co. 18. Moor 567. Cro. Eliz. 877. 1 Bulst. 200. Moor 476.

Feoffment in Fee to B. G. upon Condition that he shall not alien; this Condition is void; but if Livery is made, the Feoffment is good against the Feoffor, but a Covenant that he shall not alien may be good. Cro. Jac. 596.

Feoffment in Fee to the Use of another, upon Condition, &c. it was inrolled in Chancery, but no Livery made: Adjudged no good Feoffment, but the Inrolment shall conclude the Person to say that it was not his Deed. Popb. 6.

The Husband made a Feoffment, upon Condition that the Feoffee should make a Feoffment to the Use of the Husband and his Wife for Life, Remainder over in Fee to a Stranger: Adjudged that the Feoffee is not bound to make this Feoffment till required by the Husband, because the particular Estate for Life, which is the Foundation and Support of the Remainder, ought to be made to the Husband himself, who is a Party to the Condition; but if he should die before the Feoffment made, then the Feoffee is bound to make it to the Wife without Request; she is a Stranger to the Condition, and if she dies before it is made, then it must be made to him in Remainder without Request. Hetley 56.

If a Feoffment be made to a Man upon Condition that he will kill B. it shall be good, but a Bond with such a Condition is void. For in the one Case, lest the Man should have any Temptation to do the Act, the Law secures him the Possession of the Land without performing the Condition; and in the other, frees him from the Penalty of the Bond; so that the Law has the same End in View in making the Feoffment good, and the Bond void, viz. the Prevention of the Fact. Ca. Law & Eq. in Macclesfield's Time, 134.

(I) *Of the Nature, Operation and Force of a Feoffment.*

AS the Conveyance by Feoffment is the most antient Kind of Conveyance, so it is the best and most excellent of all others, and in some Respects excels the Conveyance by Fine or Recovery; for it is of that Nature and Efficacy by Reason of the Livery of Seisin, which is always inseparably incident to it, that

It clears all Disseisins, Abatements, Intrusions, and other wrongful and defeasible Titles, and reduceth the Estate clearly to the Feoffee when the Entry of the Feoffor is lawful, which neither Fine, Recovery, nor Bargain and Sale by Deed indented and inrolled, will do when the Feoffor is out of Possession. *Co. Lit. 9. a. 49. a.*

And it passeth the present Estate of the Feoffor, and not only so, but barreth and excludeth him of all present and future Right and Possibility of Right to the Thing which is so conveyed, insomuch that if one has divers Estates, all of them pass by his Feoffment; and if he have any Interest, Rent, Common, or the like, into or out of the Land, it is extinguished and gone by the Feoffment. *Hob. 337. 1 Co. 111.*

And further, it bars the Feoffor of all collateral Benefits touching the Land, as Condition, Power of Revocation, Writs of Error, Attaint, and the like, insomuch that if a Man makes an Estate of his Land upon Condition, or with Power to revoke it, and after he makes a Feoffment of the Land, by this he is barred for ever of taking Advantage of the Condition or Power of Revocation.

It destroyeth contingent Uses, gives away a future Use inclusively, gives away a Seniory inclusively, and gives away a Right of Action: For both the Feoffment and Livery of Seisin incident thereunto are much favoured in Law, and shall be construed most strongly against the Feoffor, and in Advantage of the Feoffee.

And besides all this, because it is solemnly and publickly made, it is of all other Conveyances most observed, and therefore best remembred and proved. *Co. Lit. 9, 49, 237. 1 Co. 111, 112, 121. 6 Co. 70. Plow. 423, 424, 554. Perk. §. 210. 39 H. 6. 43. 9 H. 7. 24. 24 Ed. 3. 70. Bro. Scire Facias 88.*

If the Feoffment be made by Deed, then must the Deed be so made, written, read, sealed and delivered, as all other Deeds that are well made must be.

A Feoffment excludes the Feoffor of all Right, Entries, Actions, Titles, Possibilities and Conditions. *W. Jones 72.*

It bars all present Rights, and all Rights after arising to the same Parties by Causes before the Feoffments, and that without Respect to the Loss of Strangers. *Hob. 337. 2 Roll. Rep. 506. 1 Co. 174. a.*

And it is a Bar to a Writ of Error. *Godb. 301, 320. 1 Co. 111.*

If when my Entry is taken away I oust the Tenant, and after enfeoff him by Deed, he is remitted, and I shall be barred; for this is a good Confirmation. *Bro. Feoffment de terre, pl. 84. 11 H. 7. 20.*

If a Feoffment be made, but no Livery, and the Feoffee enters, he is become Tenant at Will to the Feoffor, because he enters by Consent; but the Feoffor may oust him when he pleases. *Co. Lit. 56. b.*

And if one who has Title of Dower enters and enfeoffs the Heir by Deed, her Title of Dower is determined; for it is a good Confirmation and Discharge of the Dower, & *contra* without Deed. *Bro. Feoffment de terre, pl. 84. 11 H. 7. 20.*

A future Right and Right of Action is gone by Feoffment. *2 Roll. Rep. 323. 9 H. 7. 24. Fitz. Gibb. 234.*

A Power of Revocation is extinct by Feoffment. *2 Roll. Rep. 337.*

A Possibility to be Tenant by the Curtesy is gone by Feoffment; so of Attaint, and so of Writ of Deceit. *2 Roll. Rep. 337. 9 H. 7. 1. 4 H. 6. 38 Ed. 3.*

What is extinguished by Feoffment.

(K) *Who may make a Feoffment, and to whom it may be made.*

IN every good Feoffment that is made there must be, (1) A Feoffor, *i. e.* a Person able to grant the Thing passed by the Feoffment; (2) A Feoffee, *i. e.* a Person capable to take by it; (3) A Thing grantable; and (4) It must be granted in that Manner as the Law requires: Therefore observe, that

Whosoever is disabled by the Common Law to take, is disabled also to make a Feoffment, Gift, Grant or Lease.

Attainted Persons, Aliens, Villains, *Non sane memorie*, deaf, blind, dumb, Feme Covert, Infant, Durefs.

Leper.

Deaf, &c.

Drunkards, Villains, Persons excommunicated.

Non sane memorie.

Deaf, dumb.

Infant.

And many also that have Capacity to take by such Conveyances, have no Ability to grant by them; as Men attainted of *Treason*, *Felony*, or in a *Præmunire*, *Aliens born*, the King's Villains, *Idiots*, *Madmen*, a Man *deaf*, *blind* and *dumb* from his Nativity, a *Feme Covert*, an *Infant*, and a Man by *Durefs*; for the Feoffments, Gifts, &c. of such Persons may be avoided.

But such Persons as have committed *Treason* or *Felony*, if Attainder do not follow; such as are Attaint of *Heresy*, a *Leper* removed by the King's Writ from the Society of Men, Bastards, such as are *deaf*, *dumb* or *blind*, that have Understanding and sound Memory, altho' they cannot express their Intentions otherwise than by Signs. Those that are *drunken*, the Villains of a common Person before Entry, &c. also excommunicate Persons, and outlawed Persons, altho' the King take the Profits of their Lands; all these may make Feoffments, Gifts, &c. and all these have Capacity to take by such Conveyances. *Co. Lit.* 2, 42, 43. *Perk.* §. 182, 183, 185. *Bro. Feoffment* 2, 7, 8, 9, 17. 39 *H. 6.* 43. 21 *H. 7.* 7.

And if a Man *de non sane memorie* makes Feoffment and Livery himself, it is not void. *Contra* 9 *H. 6.* 6.

All his Acts *in pais* are void, except his Feoffments, Livery and Seisin, and those are only voidable. The Reason is because of the Respect the Law gives to a Feoffment on the Account of its Solemnity in the Transmutation of a Freehold. And the Writ *De non compos mentis*, which says *Demisit*, must be understood of a Feoffment or a Fine, those being the antient and only Conveyances at that Time. 2 *Salk.* 427.

If a Person *Non compos* makes a Feoffment, and gives Livery himself; this is allowed on all Hands to be good to bind himself, so that he can by no Process or Plea avoid the Feoffment, and restore himself to the Possession; the same Law of an *Idiot*; and the Reason is, because the Investiture being made before the *Pares Curie*, their solemn Attestation could not be defeated by the Person himself, because it is presumed they are competent Judges of the Ability of the Feoffor to make such Feoffment. 2 *Roll. Abr.* 2. *Co. Lit.* 247. 4 *Co.* 125. a. *Show. Parl. Cases* 153.

Feoffment by one *deaf* and *dumb* is not good; for if he makes Livery himself it is voidable, as it seems, like Feoffment of an *Infant*, or one *Non sane memorie*. If it be by Letter of Attorney, it seems a *Disseisin*. *Quare.* *Bro. Feoffment de terre*, pl. 7. 2 *H. 4.* 8.

If an *Infant* makes a Feoffment, and makes Livery himself, it is a good Feoffment till it be defeated. 42 *E. 3.* 12. b. 9 *H. 6.* 5. It is only voidable. *Bro. Feoffment de terres*, pl. 48. 18 *E. 4.* pl. 27. *Bro. Coverture*, pl. 1. 26 *H. 8.* 2.

And it is not material of what Age the *Infant* is at the making of the Feoffment; for whether he be within Age of Discretion, viz. of five or seven Years, or beyond the Age of Discretion, viz. sixteen or more, his Feoffment is not void. 9 *H. 6.* 6. b.

But if an *Infant* makes Livery by Attorney, it is void. 7 *H. 4.* 5. b. 12.

If an *Infant* seised of Land joins in Feoffment with a *Stranger* who has nothing in it, yet it is a good Feoffment. 42 *E. 3.* 12. b.

If an *Infant* makes a Feoffment, and makes Livery himself, this shall not bind him, but he himself may avoid it by Writ of *Dum fuit infra ætatem*; yet the Feoffment of the *Infant* is not void in itself, as well because he is allowed to contract for his Benefit, as that there ought to be some Act of Notoriety to restore the Possession to him equal to that which transferred it from him. 4 *Co.* 125. 2 *Roll. Abr.* 2. 8 *Co.* 42, 43. *Whittingham's Case*.

But if an *Infant* makes a Feoffment, and a Letter of Attorney to make Livery, that is void: So if a Person *Non compos* makes a Surrender or Release, this is void in Law; so if he makes a Letter of Attorney to give Livery; but the Heir at Law, after the Death of the Person of *Non sane memorie*, or *Idiot*, may avoid his Feoffment; and so may the King upon an Office found of his Lunacy during his Life. 8 *Co.* 45. *Co. Lit.* 247. a. 4 *Co.* 125. a. 2 *Roll. Abr.* 2. *Show. Parl. Cases* 153.

As the *Infant's* Feoffment is voidable by *Dum fuit infra ætatem*, when he comes of full Age, so it is voidable by him by Entry during his Nonage, but his Letter of Attorney is merely void; and the same Law seems to be of a *Feme Covert*, for if she makes a Feoffment upon the Land, it is voidable by her Husband; but if she makes a Letter of Attorney to give Livery, it is absolutely void in Law; and the Reason is, because the Contracts of those that are disabled by Law to contract were void Contracts; but their Infeudations were not in themselves void, because they were made *Coram paribus Curie*, who were presumed not to attest Contracts of Persons disabled by

by the Law to contract, especially since such Contracts were made for *Military* or *Socage* Service, which were for the Good of the Commonwealth; and by those Infeudations a Stranger was directed to bring his *Præcipe* against the Person that was actually invested in the Land, wherefore the Infant's Feoffment was good till it was avoided by an Act of equal Notoriety, to wit, by his Entry *Coram paribus*, which was equally solemn with the Act of Feoffment, or by bringing his Action at full Age, when the Law had enabled him, by Action in a Court of Record, to set aside the Feoffment that he had made during Minority; but the Law enabled him by Entry to set aside the Acts *Coram paribus* during Minority, because the *Pares* might undo what was done *in pais*, but the Courts of Justice were not to destroy the Act *in pais* till the Infant by his own Discretion had chosen to avoid them, because it was derogatory to the Dignity of the Courts of Justice to set aside the solemn Acts *in pais* till the Infant had come to such Age of Discretion as might make it fully appear that the Feoffment was made during his Disability, for the Infant was not received to disable himself during the Time of his Disability, but during such Disability he might, by equal Solemnity *in pais*, disable himself, since such an Act was only *Coram paribus*, in the same Manner as the Feoffment itself was made; but the Warrant of Attorney of the Infant was *ipso facto* void, and therefore such Feoffee was a Disseisor as if no Authority had been committed to the Attorney to make the Feoffment; but in the Case of the *Non compos* he was not admitted to stultify himself, because there was no stated Time when such Persons returned to Sense and Understanding, and therefore they could not be presumed to be conscious themselves of their own Follies or Defects; but the King who had the Care of all his Subjects, might by solemn Office found avoid such Acts of Insanity, and so might the Heir at Law after their Death. 2 *Bac. Abr.* 499. cites 4 *Co.* 125. 2 *Roll. Abr.* 2. 8 *Co.* 42, 43, 45. *Cro. Jac.* 617. *Gardiner and Norman.* *Perk.* §. 183.

If a Man makes a Feoffment by *Durefs*, it is not void. *Contra* 9 *H.* 6. 5. *b.* It is *Durefs*. only voidable. *Bro. Feoffment de terres*, pl. 48. 18 *E.* 4. 27.

He who is outlawed in Action Personal, and Office is found that he was seised of Outlaw. such Land the Day of the Outlawry, may make Feoffment of his Land well enough, for the King is not seised. *Bro. Office Devant*, &c. pl. 2. 9 *H.* 6. 20.

If *Baron and Feme* are Jointenants, and Baron makes Feoffment and Livery, the *Baron and Feme* being upon the Land, and disagreeing to it, yet it is good. 21 *E.* 3. 6. *b.*

But tho' a married Woman be seised in her own Right with her Husband, yet Livery and Seisin made by her alone, without the Agreement of her Husband, is void, inasmuch that her Husband and she may have an Affise notwithstanding such Livery of Seisin, if the Husband be seised of the Freehold in the Right of his Wife: But in such Case if he was seised in his own Right, then notwithstanding such Livery of Seisin made by the Wife, he shall have an Affise in his own Name, &c. *Perk.* §. 186.

A Man cannot make a Feoffment to his own Wife after the Marriage is consummate. But after a Contract made, and carnal Knowledge had, he may make a Feoffment to her, and such a Feoffment will be good. *Perk.* §. 194.

A Feme was Devisee for thirty Years of the Occupation and Profits of a Term, if she should so long live a Widow, and after her Widowhood, the Residue of the Term in the Lease to go to *B.* his Son. The Feme entred, and afterwards Reversioner by Indenture *Dedit, concessit, &c. totum illud tenementum, &c.* to the Feme and her Heirs. Resolved, that a Lessee for Years in Possession may take a Feoffment altho' it be by Deed, and may take Livery after the Delivery of the Deed, altho' the Lessee may take the Deed by way of Confirmation, and then the Livery is but Surplusage and void. *Owen* 6, 7.

If Feoffment be made to the Use of *W. N.* for Life, and after to the Use of *J. S.* *Cestuy que Use.* and his Heirs, there *Cestuy que Use* in Remainder or Reversion in the Life of *W. N.* but he cannot make Feoffment till after his Death. *Bro. Feoffment. al Uses*, pl. 44. 25 *H.* 8.

A Lessee for Years, Remainder to *B.* in Tail, Remainder over. *A.* infeoffed *J. S.* and made a Letter of Attorney to *W. R.* to enter into the Lands and seal the Feoffment, and deliver it in his Name to the Use of *B.* and his Heirs; *B.* made a Letter of Attorney to *C.* to enter in his Name, who entred accordingly: This was held a good Feoffment tho' both *A.* and the Attorney were Disseisors; for it is good between the Feoffor and Feoffee. For the Remainder-Man by the Feoffment and Entry is remitted, and the Term gone, the Freehold having come to it. *Gouldsb.* 92.

If

If a *Lessee for ten Years* makes a Lease for one Year to a Reversioner, there he in Reversion, who has the Land for a Year, may make a Feoffment to the Lessee for ten Years, and it is good. *Owen* 66.

A *Lessee for Years*, Remainder to *B.* for Life, Remainder to *C.* and *C.* enfeoffed *A.* by Deed, and made Livery. The Conveyance was held void, for it could not work by Livery to the Tenant for Years, who was in Possession before. *1 Vent.* 360.

Corporation.

Neither the Head alone, nor any one or more of the Members of a Corporation Aggregate of many alone, may make a Feoffment of any of the Land belonging to their Corporation; but all of them together may make a Feoffment: And if any of them be seised of Land in his own Right and in his natural Capacity, he may make a Feoffment of this Land as another Man may do; yea he may make a Feoffment of this Land to the same Corporation whereof he is a Head or Member, and so give and take also in a divers Capacity. *Fitz. Facts and Feoffments* 29. *Perk.* §. 205, 224, 225.

Ecclesiastical Persons.

Ecclesiastical Persons cannot make Feoffments, Gifts, &c. of their Ecclesiastical Lands for longer Time than three Lives, or twenty-one Years; for all Feoffments, Gifts, Grants and Leases by Bishops, altho' they be confirmed by Dean and Chapter, or by any of the Colleges or Halls in either of the Universities, or elsewhere, or by Dean or Chapters, Masters or Guardians of any Hospitals, Parsons, Vicars, or any other having Spiritual or Ecclesiastical Living, are voidable. *Co. Lit.* 43.

If Deed of Feoffment be made to *J. S.* and Letter of Attorney to make Livery to *J. S. Capellano*, he cannot make Livery to *J. S.* unless he be a Chaplain. *4 H. 6. 1. b. Bro. Grants*, pl. 50. *4 H. 6. 1.*

A Feoffment might be made to an *Abbot* or *Prior*, by the Name of *Abbot* or *Prior* of such a Place, &c. without naming them by their Names of Baptism. *39 E. 3. 13. b.*

The same Law is of a Mayor or Dean. *Ibid.*

Coparceners.

If four join in a Feoffment, whereof one is only seised of the Land, yet it is a good Feoffment. *42 E. 3. 12. b. Bro. Feoffment de terres*, pl. 4.

If there are two Coparceners, one of them may enfeoff the other of her Part or Portion. *Perk.* §. 193. *17 E. 3. 47. b.*

And if she does it by *Dedi & Concessi*, it shall enure by Confirmation without Livery; for it countervails *Remisi & Confirmavi*. *Bro. Confirmation*, pl. 18. *10 Ed. 4. 3.*

Jointenants and Tenants in common.

One Jointenant cannot make a Feoffment of his Part of the Land to his Companion, for a Man cannot give a Possession to him that hath it before. And hence it is also that the Lessor cannot make a Feoffment to his Lessee for Life, Years, or at Will.

And yet perhaps a Feoffment in this Case, if it be in Writing, may work as a Confirmation; but one Tenant in common or one Coparcenor may make a Feoffment of his Part of the Land to his Companion. *Perk.* §. 197. *Fitz. Facts and Feoffments* 26.

Disseisor and Disseisee.

If a Man makes a Feoffment of another's Land, it is a Disseisin, but a good Feoffment against all Men but the Disseisee himself.

And if four join in a Feoffment of Land, and three of them have nothing in the Land, and the fourth hath all the Estate; this is a good Feoffment. *Bro. Feoffment & Perk.* §. 222.

A Disseisee cannot make a Feoffment, tho' to the Disseisor by Agreement. *Goldsh. 25. pl. 6. Owen* 1.

A Disseisor cannot make a Feoffment of the Land to the Disseisee but it will be void, for the Disseisee will be remitted. But a Disseisee may make a Deed of Feoffment, and a Letter of Attorney to enter and give Livery: And if the Attorney do so, this will be a good Feoffment. *Perk.* §. 197. *Co. Lit.* 48, 49.

The King.

No Feoffment or Livery of Seisin can be made to the King, for he always gives and takes by Matter of Record. *Fitz. Facts and Feoffments* 21.

The King cannot be infeoffed without Deed inrolled, for no Livery can be made to him. *Bro. Office Devant*, &c. pl. 41. *5 E. 4. 8.*

See more concerning this where Livery of Seisin is mentioned post. and in Chap. 5. ante.

(L) *How the Feoffor may be named.*

W. Porter may make a Feoffment by the Name of *W. Fammisworth*. 14 H. 4. 35. b. 2 Roll. Abr. 3.
Vide Chap. 4. §. 5. p. 218.

(M) *How the Feoffee may be named.*

A Feoffment to *J. S. Militi*, is good tho' he be not a Knight, because it passeth by the Livery. 4 H. 6. 1. 6. 2 Roll. Abr. 3. Bro. Grants, pl. 50.

But if a Grant be made to *B.* by the Name of Knight, and he is not a Knight, it is void. Bro. Grants, pl. 50.

A Feoffment may be made to *Julian*, by Name of *Gilder* or *Gill*. 29 Aff. 16. 2 Roll. Abr. 3.

A Feoffment may be made to *J.* and *A.* his Wife; where his Wife's Name is *M.* she shall take nothing by this Feoffment. 3 Affise 4. But *Quære* 2 Roll. Abr. 3.

See Chap. 4. §. 7. p. 228.

(N) *What Consideration is necessary to a Feoffment.*

BEFORE the Statutes of 13 Eliz. c. 5. & 27 Eliz. c. 4. against fraudulent Conveyances, to a Feoffment there was no need of a Consideration of Money, Blood, or otherwise; but since those Statutes, if a Man makes a voluntary Feoffment without good Consideration, it shall be fraudulent against a Purchaser (but good amongst themselves. Cro. Jac. 270. 2 And. 272.) for a real Consideration, a Mortgagee, a Judgment or Statute-Creditor for good Consideration. See the said Statutes hereafter **Title Fraudulent Conveyances**, & Cro. Jac. 270. pl. 3. Lucas 247, 489, &c. Williams 203.

Note; The Consideration of Money paid, or the Money for which Judgments or Statutes are entred into, must be proved upon a Trial.

(O) *Of what a Feoffment may be.*

A Feoffment may be made at this Day of any Thing which lies in Livery by whatsoever Tenure it be held, notwithstanding the Statute of *Magna Charta*, cap. 32.

But in some Cases where a Man aliens his Land held of the King, he must have the King's Licence before-hand to do it, or else he must pay a Fine to the King afterwards for not having a Licence.

But of such Things as lie in Grant, whereof no Livery of Seisin can be made, as *Advowsons*, (*Qu. vide post.*) Rents, Reversions, &c. no Feoffment can be made. Co. Lit. 49. 21 H. 7. 7.

A Feoffment cannot be made of incorporate Things, because no Livery can be of them. Co. Lit. 49.

A Feoffment cannot be made of an *Advowson* in Gross, because no Livery can be of it. Contra 11 H. 6. 4. 2 Roll. Abr. 1. 2.

It may be of an *Advowson* by Livery of the Door of the Church. 43 Ed. 3. 1. b. Roll. Abr. 11. Bro. Grants 18. Feoffments de terres, pl. 49. 20 Ed. 4. 15. Bridgm. 95.

A Feoffment and Livery may be made in an upper Chamber; for a Man may have an Inheritance in it, and it is corporeal. Co. Lit. 48. b. Bro. Feoffment de terres, pl. 49. cites 5 H. 7. 9. accordingly; but cites 21 H. 6. contra.

Feoffment by Tenant in common is good of his *Moiety*, tho' undivided, and not in severalty. Bro. Feoffment de terres, pl. 75.

One may make a Feoffment of a *Moiety*, third, fourth or fifth Part of his Manor, or other Land, and that by the Name of a *Moiety*, third or fourth Part. Co. Lit. 190.

If *Parceners* have made a Partition of their Land, that the one shall have it from *Whittamas* to *Easter* to her and her Heirs, and the other shall have it from *Easter* to *Whittamas* to her and her Heirs, or that the one shall have it one Year and the other the other Year *alternis vicibus*: Or if they have two Manors descended, and they agree that the one shall have the one Manor one Year, and the other the other Manor

Manor the same Year, and the next Year that he that had the one shall have the other *alternis vicibus* for ever: In these Cases the Parcenors may either of them make a Feoffment of this Land or Manor. *Co. Lit. 4, 48.*

If there be a *Meadow* of one hundred Acres which Time out of Mind hath been divided amongst divers Persons, and each Person hath a certain Number of Acres, but in no certain Place, the Custom being to allot each Person his Number in one Year in one Place and another in another *alternis vicibus*; in this Case either of these Persons may make a Feoffment of his Part by the Name of so many Acres lying in such a Meadow, without any bounding or describing of it. *Co. Lit. 4, 48.*

No Livery can be made of a *running Water*, because it is fugitive; *secus* of Water in a standing Pool. 4 *Leo. 238. pl. 385.*

Livery cannot be of a *Reversion*. *Bridgm. 96.*

See before, p. 232.

(P) *By what Name a Thing may be enfeoffed.*

A *House* may pass by a Deed of Feoffment, which makes mention only of a *Curtelage*. 13 *H. 4. 10. b. Dubitatur. 2 Roll. Abr. 1.*

A Feoffment may be of a Manor by the Name of a Knight's Fee. 17 *E. 3. 8. b. 2 Roll. Abr. 1.*

If a Man seised of a *Manor*, leases *Parcel* of the *Demefus* for Life, and after makes Feoffment of the Manor, to which the Lessee and the Tenants of the Manor attorn. The Reversion of this Land so leased for Life shall pass by this, because it is *Parcel* of the Manor. 2 *Roll. Abr. 2.*

If a *Manor* be known only by the Name of *Sarrett*, and he who is seised of this Manor makes a Deed of Feoffment by the Name of *Seriot*, and delivers *Seisin secundum formam Chartæ*, the Manor shall pass by it; for the making *Delivery secundum formam Chartæ* refers to the Estate, and not to the Name. 2 *Roll. Abr. 2.*

Upon a *Scire Facias* upon a *Fine* of certain Lands, the Tenant pleaded a Feoffment by the Ancestor of the Plaintiff with Warranty of the same Land, by Name of the *Manor* of *D.* where in Fact the Land is no Manor, and yet a good Plea by Judgment, by Reason of the Livery of *Seisin* of the same Land. *Bro. Scire Facias, pl. 200. 22 H. 6. 39.*

If a Man has a *Manor* in the County of *N.* and Land is held of the Manor which lies in the County of *S.* by Grant of the Manor with the Appurtenances in the County of *N.* the *Services* of the Land in the other County shall pass, and by Livery of the Manor made in one County, the *Services* of the Land in the other County shall pass. *Bro. Grants, pl. 32. cites 21 E. 3. 18.*

If a Man by Deed grants *Vesturam* to another and his Heirs, and makes Livery *secundum formam Chartæ*, he shall have by this *Vesturam terræ, viz.* the Corn, Grass, Underwood, Sweepage, and such like, and he shall have an Action, *Quare clausum fregit*. *Co. Lit. 4. b.*

But in this Case he shall not have the Soil by this Grant, because he has by this but a particular Right in the Land, for by this he shall not have the Houses, Timber-Trees, Mines, and other real Things, *Parcel* of the Inheritance. *Co. Lit. 4. b.*

It passes not the Soil, for the Livery cannot enlarge the Grant. *Co. Lit. 4. b.*

So it is of Grant of *Herbage* of Land, the Soil shall not pass, but he shall have only a particular Interest; but shall have *Trespas Quare clausum fregit*. *Co. Lit. 4. b.*

If a Man by Deed grants *Separalem piscariam* in a River, and makes Livery *secundum formam Chartæ*, the Soil shall not pass by it, nor the Water; for if the River becomes dry, the Grantor may take the Benefit of the Soil. *Co. Lit. 4. b.*

So if a Man grants *Aquam suam*, the Soil does not pass, but the Fishery within the Water shall pass. *Co. Lit. 4. b.*

But if a Man by Deed grants the *Profits* of his Lands, and makes Livery *secundum formam Chartæ*, the Soil shall pass. *Co. Lit. 4. b.*

If a Man has a *moveable Estate* of Inheritance in thirteen Acres, *Parcel* of a Meadow of eighty Acres, the Charter of Feoffment ought to be generally of the thirteen Acres, lying within the Meadow of eighty Acres, without bounding or describing of it in Certainty, and Livery may be made of the thirteen Acres allotted to the Feoffor for the Year, *secundum formam Chartæ*; and this is good Livery to pass the Contents of thirteen Acres in what Place soever it lies in that Meadow. *Co. Lit. 48. b. Cro. Eliz. 421. Moor 302.*

By

By the Grant of *Boilhury de Salt*, the Soil shall pass. *Co. Lit. 4. b.*

If a Man grants to another to *dig Turfs* in his Land, and to carry them at his Will and Pleasure; the Land shall not pass, because he has granted only Parcel of the Profit. *Co. Lit. 4. b.*

And he may bring Assise of Common of Turbary, and shall recover, but he cannot bring Assise of the Soil. *Bro. Feoffment de terres, pl. 21. 5 Aff. 9.*

For more concerning these Matters, see Chap. 4.

(Q) *What is a good Feoffment in Respect of the Presence or Possession of other Persons on the Land.*

IF there be a Lease for Life or Years in Being of that Land or Thing whereof the Feoffment is made, and he that hath this Lease for Life or Years, or in his Absence his Bailiff or Servant, keeping in the House or Land whereof the Feoffment is to be made, doth give Leave and agree that Livery of Seisin shall be given upon the House or Land by the Lessor himself, or by his Attorney, and for this Cause doth leave the Possession of the House or Land, and thereupon Livery of Seisin is made; this is a good Feoffment and a good Livery of Seisin, and yet it doth not prejudice the Estate of the Lessee.

And if the Lessor makes a Feoffment of the Land to a Stranger by Assent or Licence of the Lessee, the Lessee then being on the Land, it is a good Feoffment.

In like Manner as it is where the Lessor enfeoffs a Stranger to which the Termor agrees, saving his Term.

And if the Lessor makes such an Entry upon the Lessee for Life or Years as to put him out of Possession of the House or Land, and then he makes a Feoffment and Livery of Seisin of it; or if the Lessor in the Absence of the Lessee, his Wife, Servants and Children, enters upon the Thing in Lease, and makes a Feoffment and Livery of Seisin thereof: In these Cases there is a good Feoffment to pass the Reversion, for in these Cases when the Lessee for Life or Years re-enters, the Law adjudges this to be an Attornment in Law.

But if a Lessor will enter upon his Lessee, and against his Will (the Lessee being still in Possession of the Land) makes a Feoffment of the Land, and gives Livery; this is void, and can never take Effect as a Feoffment.

And therefore if there be a Conveyance made of a House and Land thereunto belonging in Lease, and the Feoffor comes into Part of the Land without the Leave of the Lessee, and there makes Livery of Seisin of that Part in the Name of all the Rest of the Land, (the Lessee himself, his Wife, Child or Servant, being then upon any other Part of the Land, and especially if they be in the House) this is no good Feoffment for any Part of the Land, but void of the Whole. *2 Co. 32. Co. Lit. 48, 49, 52. Dyer 340, 18. Perk. §. 221, 220. 21 H. 7. 7. 46 Ed. 3. 25. Bro. Feoffments de terres 68.*

And yet if the Lessee for Years makes an Under-Lease of Part of the Land to another, and the Feoffee makes a Feoffment of this Part, and gives Livery of Seisin upon this Part; in this Case the Possession of the first Lessee in the Residue will not hurt the Feoffment or Livery for this Part, but it is a good Feoffment. *Veynor's Case, Trin. 7 Jac. B. R.*

Also if the Lessee gives the Lessor leave to make Livery, and depart and leave a Servant of the Lessee upon the Land; in this Case his Presence upon the Land while the Livery is made will not hurt.

And so if the Lessee leaves the Possession, and leaves nothing upon the Land but his Cattle; they will not keep his Possession, nor prejudice the Livery of Seisin. *Co. Lit. 48.*

If a Lease be made of an Acre to one, and another Acre to another, and the Lessor makes a Feoffment of both these Acres, and makes Livery in one of them in the Name of both Acres; this is no good Feoffment for the other Acre, for by this Livery he is not put out of Possession of that Acre.

So if one makes a Feoffment of two Manors, the one in Possession and the other in Lease, and gives Livery of Seisin of the Manor in Possession in Name of both of the Manors; this is no good Feoffment for the other Manor, neither will it pass by this Feoffment.

So if one makes a Lease for Years of a House, and after makes a Feoffment in Fee of the House and of a Close adjoining, and gives Livery of Seisin of the House, the Termor's Wife and Children being then in the House; this is no good Livery neither to pass the House nor the Close. 21 H. 7. 7. Dyer 18.

If Lessee for Life or Years makes a Feoffment of the Land, the Lessor being then upon the Land, and not contradicting it; it seems this is a good Feoffment, and that the Presence of the Lessor upon the Land, especially if he does not contradict it, will not hinder the Virtue of the Feoffment as against the Feoffor and all others: But the Lessor may enter afterwards for the Forfeiture notwithstanding if he pleases. *Perk. §. 222. Dyer 362.*

If the Husband alone makes a Feoffment of the Land he has in the Right of his Wife, or that he has jointly with his Wife, his Wife being then upon the Land and disagreeing to it; in this Case the Feoffment is good against the Feoffor and all others but the Wife notwithstanding her Presence and Disagreement, but the Wife may after his Death avoid it. *Perk. §. 223.*

Jointenants.

If one Jointenant makes a Feoffment of the whole Land, his Companion being then upon the Land; by this there passes no more but a Moiety, and the Feoffment is void as to the Moiety of his Companion, for the Feoffment does not give his Moiety. *Perk. §. 220.*

If a Man enters into my Land by Wrong, and makes a Feoffment of it to a Stranger, I being then upon the Land; this Feoffment is void, for in this Case the Law adjudges me to be always in and never out of the Possession. *Perk. §. 219.*

Prerogative.

If the King has any Possession of the Land by Wardship or otherwise, the Owner of the Land can make no Feoffment of it; and therefore if the King be intitled to Land by Wardship, or *primier* Seisin after Office found after the Death of an Ancestor of one of his Tenants; in this Case it is said the Feoffment of the Heir is void and passeth nothing, for the King is still in Possession.

And if it be before Office found it will be all one, for the Office shall relate to the Death of the Ancestor; and yet in these Cases the Feoffment is good against the Heir himself, and all others besides the King.

If the Heir before Office found enters and makes a Feoffment, and then the King pardons the Feoffee; in this Case the Feoffment is good; and yet such a Feoffment after Office with Pardon is void.

And the like Law is if the Entry be before Office, and the Pardon after the Office, for this is void also.

Outlawed.

But if a Man be outlawed for Debt or Trespas, and thereupon the King has the Profits of the Land; in this Case the Owner may make a Feoffment of this Land notwithstanding.

(R) What Feoffments are void.

THE Stat. 1 Ric. 2. c. 9. recites, That many People of the said Realm, as well great as small, having Right and true Title as well to Lands, Tenements and Rents, as in other personal Actions, be wrongfully delayed of their own Rights and Actions, by Means that the Occupiers or Defendants to be maintained and sustained in their Wrong, do commonly make Gifts and Feoffments of their Lands and Tenements which be in Debate, and of their other Goods and Chattels, to Lords and other great Men of the Realm, against whom the said Pursuants, for great Menace that is made to them, cannot nor dare not make their Pursuits.

And also on the other Part, Complaint is made to the King, that oftentimes many People do disseise others of their Tenements, and anon after their Disseisin done they make divers Alienations and Feoffments, sometimes to Lords and great Men of the Realm to have Maintenance, and sometimes to many Persons of whose Names the Disseisees can have no Knowledge, to the Intent to defer and delay by such Frauds the said Disseisees, and the other Demandants, and the Heirs of their Recovery, to the great Hindrance and Oppression of the People. *And therefore*

It is ordained and established, that from henceforth no Gift or Feoffment of Lands, Tenements or Goods, be made by such Fraud or Maintenance.

And if any be in such wise made, they shall be holden for none, and of no Value.

And the said Disseisees shall from henceforth have their Recovery against the first Disseisors, as well of the Lands and Tenements as of their double Damages, without having Regard to such Alienations, so that the Disseisees commence their Suits within the Year next after the Disseisin done.

And it is ordained and established, that the same Statute shall hold Place in every other Action in Plea of Land where such Feoffments be made by Fraud or Collusion, to have the Recovery against the first such Feoffor.

And it is, to wit, that this Statute ought to be understood where such Feoffors thereof take the Profits.

The Preamble of the said Act declares, That Mischiefs which the Makers of the Act intended to Remedy were, to those who had Right and just Title, or were disseised; and the Purview gives the Remedy only to Disseisees, and so it must be a Disseisin in Fact, and after this Use made; in which Case Remedy is given to such Disseisee against Cestuy que Use, and a Recovery against him shall bind him and the Feoffees; and so this Act makes no other but Cestuy que Use able to lose the Land of the Feoffees in a just Action brought by the Disseisee, but does not make him able to lose the Land of the Feoffees in a feint Action brought against him. *Plow. 3. b.*

By this Statute Feoffments made to great Men for Maintenance are declared void; but this is as to Strangers, but not between the Feoffor and Feoffee. *Bro. Feoffment de terres, pl. 1.* And that Strangers shall have an Action against the Pernor of the Profits. *Ibid. pl. 19.* And such Feoffment would not make a Remitter in Prejudice of a third Person. *Ibid.—Co. Lit. 369.—Hawk. P. C. 263. §. 3.*

If Baron and Feme, being Cestuy que Use in Right of his Wife, make a Feoffment, and the Baron dies; this Feoffment is not void *ab initio*, but is determined. *Bro. Feoffment de terres, pl. 1.*

A Feoffment by a Feme, of her Jointure made by her first Baron in Possession or in Use, is void by the Statute of 11 H. 7. as to the Heir, but not as to all. *Ibid.*

See before, (I).

(S) *Livery of Seisin what.*

LIVERY of Seisin is the giving Possession of Lands or Tenements corporeal; or it is a Solemnity or overt Ceremony required by Law in passing Lands or Tenements corporeal, as an Evidence or Testimonial of the willing Departing by him that makes the Livery from the Thing whereof Livery is made, and the willing Acceptance thereof by the other Party.

(T) *The Antiquity and Origin of Livery of Seisin.*

LIVERY of Seisin is as antient as a Feoffment, for no Feoffment is made without Livery of Seisin, altho' Livery of Seisin be sometimes made upon other Conveyances. See before concerning the Antiquity of Feoffments.

Livery of Seisin was first invented as an open and notorious Act, to the End that the Country might take Notice how Lands pass from Man to Man, and who is Owner thereof, that such as have Title thereto may know against whom to bring their Actions, and that others may know that have Cause of whom to take Leases, and of whom to require Wardships, &c.

And by this Means if the Title comes in Question, the Jury can better tell in whom the Right is.

(U) *The Kinds of Livery of Seisin.*

THERE are two Kinds of Livery of Seisin: 1. A Livery in Deed and a Livery in Law.

A Livery in Deed is when the Feoffor, Donor, &c. in Person or by Attorney takes Livery in the Ring of the Door of a House, or a Turf or a Twig off the Land, or a Ring of Deed what.

(a) Who are Pernors of the Profits, (which is as much as to say, that they are Cestui que Use). *Plow. 3. b.*

Gold, or any other Thing, tho' it does not concern the Land, and delivers the same upon the Land unto the Feoffee, Donee, &c. in the Name of Seisin of the House, or Seisin of the Land; or it may be made by Words only without Deed.

It. Law what.

A Livery in Law is where the Feoffor says to the Feoffee, being in View of the House or Land, *I give you yonder House (or Land) to you and your Heirs, go enter into the same and take Possession thereof accordingly*, or the like.

See more concerning Livery in Deed, and Livery in Law, post.

(V) *The Nature and Operation of Livery of Seisin.*

THE Manner of Conveyance by Feoffment is so antient, and the Ceremony of Livery of Seisin being inseparably incident to it, it is much favoured in Law; and therefore it is expounded and taken strongly against him that makes it, and beneficial for him to whom it is made.

And for this Cause it worketh not only to transmit the present Estate, but also to bar all present and future Rights and Possibilities.

If therefore one makes a Lease for Life to *J. S.* the Remainder to the right Heirs of *J. D.* (which *J. D.* is then living) and gives Livery of Seisin according to the Deed; in this Case altho' he in Remainder be not capable of this Remainder, yet by the Livery it shall pass out of the Feoffor, and shall be in Obedience during the Life of *J. S.*

So if a Feoffment be made to one *et heredibus*, without the Word *suis*, and Livery of Seisin be made of the Deed, this Livery perhaps may make the Estate good. 5 Co. 92. Lit. §. 70. 6 Co. 26. Doct. & Stud. 13. Co. Lit. 49.

(W) *The Effect and Operation of Livery of Seisin to pass a future Interest.*

THE Ceremony of Livery of Seisin was first instituted, that the Pares of the County may upon any Dispute relating to the Freehold determine in whom it is lodged, and from thence be the better enabled to determine in whom the Right is. Hence therefore it is, that if a Man makes a Feoffment, or Lease for Life to commence *in futuro*, and makes Livery immediately, the Livery is void, and only an Estate at Will passes to the Feoffee; for the Design of the Institution would fail if such Livery were effectual to pass the Freehold, for it would be no Evidence or Notoriety of the Change of the Freehold if after the Livery made the Freehold still remained in the Feoffor, the Use of the Investiture would rather create than prevent the Uncertainty of the Freehold, and in many Cases would put Men to fruitless Trouble and Expence in Pursuit of their Right; for by that Means after a Man had brought his *Præcipe* against a Person whom he supposed to be Tenant to the Freehold, and had proceeded in it a considerable Time, the Writ might abate by the Freehold's vesting in another, by Virtue of a Livery made before the Purchase of the Writ. Another Reason why such future Interest cannot be allowed to pass by an Act of Livery of Seisin was, because no Man would be safe in his Purchase if the Operation of Livery might create an Estate to commence many Years after the Livery was made, and tho' they have allowed a future Interest to commence by way of Lease, yet that had no such ill Effect in making Purchases uncertain, because antiently they were under the Power of the Freeholder, who by Recovery might destroy them; and now, unless such Leases be made upon good Consideration, they are fraudulent against a Purchaser, and it is not to be presumed that Leases at great Distances should be purchased for Value. Cro. Eliz. 451. 2 Vent. 204. Co. Lit. 217. 5 Co. 94. b.

From hence we may account why a Freehold in Reversion or Remainder cannot be granted *in futuro*, tho' there no Livery is necessary to pass it; as,

Where *A.* is Tenant for Life, Remainder to *B.* in Fee. *A.* makes a Lease for Years to *C.* and afterwards grants the Land to *D.* *Habend'* from Michaelmas, because such future Grants create an Uncertainty of the Freehold, and the Tenant of the Freehold being the Person who is to answer the Stranger's *Præcipe*, and was answerable to the Lord for the Services, it were unreasonable to permit him by any Act of his own to prevent or delay the Prosecution of their Right. 2 Co. 55. 2 And. 29. Moor 423. Cro. Eliz. 450, 585. Hob. 170, 171. 5 Co. 94. 1 Roll. Rep. 261.

But where a Man makes a Lease to commence from *Michaelmas*, and after *Michaelmas* makes Livery and Seisin; this is sufficient to pass the Freehold, because in this Case, at the Time of the Livery made, the Possession and Freehold were actually transferred to the Lessee, and did not remain in the Lessor after the Notoriety made, which gives Notice of transferring the Freehold. *Hob. 314. Cro. Jac. 458, 563. 3 Bulst. 290.*

Yet if the Feoffor had made a Letter of Attorney to give Livery, the Attorney could not give Livery after *Michaelmas*, unless an express Authority were therein contained for it, because the natural Import of such Authority is to give Livery immediately, and the Authority of the Representative cannot extend beyond the Delegation. *Cro. Jac. 563. Hob. 314.*

If *A.* makes a Lease for five Years to *B.* upon Condition that if *B.* pays him 10 *l.* within two Years, that then he shall have a Fee-simple in the Lands, and makes Livery and Seisin to *B.* this passes the Freehold immediately, and *B.* has a Fee conditional, because if the Freehold were not to vest in *B.* till the Condition performed, it would be difficult to determine in whom the Freehold is, for such Conditions may be inserted in Deeds, which are perfected privately between the Parties, and therefore not so proper to govern the Possession and Seisin of the Freehold, as the solemn Investiture by Livery, which is made in the publick View of the whole County; therefore if this Solemnity was first appointed to give Notice of the transferring the Freehold, it follows that from the Reason of the Investiture the Freehold must pass at the Time of the Solemnity made, or not at all. But if *A.* had made a Lease for Life, upon like Condition to have Fee, the Livery made thereon should not carry the Inheritance till after the Condition performed, because there passed a certain Freehold in all Events to the Lessee, and the Livery gave Notice in whom it was lodged, so that no Man can pretend Ignorance against whom to bring his *Præcipe*, which would be the Mischief in the former Case, if the Freehold did not pass at the Time of the Livery made. *Lit. §. 350. Co. Lit. 217.*

A. by Indenture demised to *B.* *Habend' a die datu*, (which was the 10th of June) *Indentura prædict'* for his Life, with a Letter of Attorney to make Livery; the Attorney made Livery the 23d of July following, and the Livery was held to be void, because the Estate for Life being by the Indenture to commence the 10th of June, the Attorney had no Authority to change the Commencement of the Estate, and therefore having not pursued his Authority, by not giving Livery to let the Freehold commence according to the Deed, what he did afterwards was without any Authority, and consequently void; but in this Case, if the Deed had not been delivered till after the Day of the Date, and the Attorney had given Livery at the Time of the Delivery of the Deed; this had been a good Livery, because the Deed of Feoffment was to govern the Livery, but the Deed itself had no Effect till the Delivery, and therefore the Attorney making the Livery at the Time the Deed of Feoffment began to operate, which was to govern it, seems to have well enough executed his Authority. *Cro. Jac. 153. Moor, pl. 876. Cro. Eliz. 873.*

If a Lease for Years be made to begin at *Michaelmas*, Remainder to *J. S.* in Fee, and Livery is made before *Michaelmas*, the Livery is void for the former Reason, but a Lease for Years may be made to commence *in futuro*, because the Freeholder, who is to answer the Stranger's *Præcipe*, is, notwithstanding such future Interest, certain and known, and therefore not within the Reason of the former Case. *Plow. 156. a. Co. Lit. 217.*

If a Man makes a Feoffment to commence after his own Death, or makes a Feoffment in this Manner, being upon the Land: I do here, reserving an Estate for my own and my Wife's Life, give you these my Lands to you and your Heirs; these are void Feoffments, because the Possession is not delivered at the Time of the Notoriety made, and therefore if such Feoffments were allowed, the Investiture would be so far from being an Evidence to discover in whom the Freehold is lodged, that it would often mislead the Juries in such Inquiries; besides, it were absurd to suffer a Man to reserve a particular Estate to himself, and thereby in the same Contract be both Feoffor and Feoffee. *Cro. Eliz. 344, 345. Popb. 47, 48. 2 Roll. Abr. 7. Hob. 170. Co. Lit. 48. Moor 687.*

If a Lease for Years be made to *A.* Remainder to the right Heirs of *B.* and Livery and Seisin is made to *A.* yet the Freehold does not pass from the Lessor, and therefore the Livery is void, because there was no Person in Being at the Time of the Livery made in whom the Freehold could vest, for *Nemo est hæres viventis*; and the

the Law will not endure such future Operation of the Investiture, because it would create an Uncertainty of the Freehold, which would necessarily perplex and delay all Prosecutions against the Freehold. *Co. Lit. 217. a.*

If a Lease for Years be made to *A.* the Remainder to *B.* for Life, and Livery is made, the Freehold is well conveyed to *B.* but this Livery cannot be made to *B.* himself, for that belongs to *A.* during the Term; the Livery therefore must be made to *A.* who is to receive the Possession, and such Livery actually vests the Freehold in *B.* because the Presumption is that every Man accepts of a Gift which is for his Interest, and *A.* is looked upon as the Attorney of *B.* to take the Livery, because he having an immediate Interest in the Land, is the only Person to whom the Possession can be delivered, for *B.* has no immediate Right to the Possession; and therefore as he cannot receive it himself, by Consequence he cannot dispute another to take it. *Lit. §. 60. 5 Co. 94. b. Co. Lit. 49. 2 Roll. Abr. 8.*

But this Livery must be made to *A.* upon the Land, for a Livery within the View will not pass the Freehold to *B.* for this Livery within the View, being antiently made in Court, could only be made by the immediate Homagers of the Court from one to the other; but *A.* in this Case being no Homager to the Court, since he was only Lessee for Years, was not capable of such Livery within View. *Co. Lit. 49. b. 2 Roll. Abr. 6.*

And this Livery to *A.* must be made to him before he actually enters and takes Possession by Virtue of the Lease, because if the Possession be once filled by the Lessee for Years, there is no vacant Possession to be transferred by the Livery, for *Quod semel meum est amplius meum esse non potest*, no Man can receive that from another which is already in his Possession. *Lit. §. 60. Co. Lit. 49, 216. 5 Co. 94. Moor 14. Plow. 156. a.*

If a Lease for Years be made to *B.* the Remainder to *C.* in Fee, and Livery is made to *A.* in the Absence of *B.* whether the Conveyance be by Deed or without, the Livery is good to vest the Remainder in *C.* because by the bare Demise *A.* and *B.* have an Interest in the Land during the Term without any further Ceremony, and each being equally intitled to the whole Possession, either may invest himself in the whole Possession by Entry, or receive the Possession from the Lessor by the Solemnity of the Livery; and therefore when the whole Possession is delivered by the Lessor, and Livery made to *A.* in the Absence of *B.* in the Name of both, this Livery is sufficient to vest the Remainder in *C.* because *A.* had as much Power to receive the Possession of the Whole, he and *B.* being Jointenants by the Demise, and thereby seised *per my & per tout.* *Co. Lit. 49. 5 Co. 94. 2 Roll. Abr. 8.*

But if a Lease for Life had been made to *C.* to commence immediately, and *C.* had appointed *A.* and *B.* his Attornies to take Livery from the Lessor; the Livery made to one of them alone had been ineffectual and void, because one only without the other had no Authority from the Delegation to receive the Possession, and consequently what is done by a Representative, without an Authority from the Principal, is a Nullity and void; but otherwise it is if the Letter of Attorney had been jointly and severally to receive Livery. *Co. Lit. 49. b. 5 Co. 94. b. Palm. 23.*

The Father having two Sons, did give to his youngest Son certain Lands in Consideration of Marriage, *Habendum* to him and his Heirs after the Death of the Father, but no Livery was made; the Father died; it was insisted for the youngest Son that the Lands did pass by way of Covenant to stand seised; but adjudged that they should not, for by the Word *give*, it shall be intended to pass an Estate by Transmutation of Possession, and that cannot be done without Livery; but if Livery had been made in this Case it had been void, because the Gift of the Land was to his Son and Heirs after the Father's Life, and an Estate of Freehold cannot begin at a Day to come, because the Livery must enure on a present Estate. *March 50.*

In Ejectment the Case upon the Pleadings was, the Father being seised in Fee, did in Consideration of the Marriage of his eldest Son, speak these Words, *Stand forth Eustace, reserving an Estate to myself and my Wife, I do give thee my Lands, and to thy Heirs:* It was objected, that a Man could not pass a Freehold from himself to begin at a Day to come, and by it to make a particular Estate to himself at the same Time. It is true it was adjudged, that these Words being spoken on the Lands amounted to a Livery, and that the Son should have a Fee-simple after the Death of his Father and Mother: But this Judgment was reversed in the Exchequer-Chamber, first, because no Use was raised by these Words; and it could not be a Feoffment, because there are not proper Words for that Purpose, nor any Livery. *Poph. 4.*

A Lease for Years may commence *in futuro*, because it may be made without Livery, but a Lease for Life cannot, and a present Livery cannot be made upon a future Estate, therefore nothing passes by such Livery; but if there are two joint Lessees for Years, Remainder to B. G. for Life, the Livery made to one in the Name of both is good, because they have an Interest in the Land before they enter, and such Livery made to one is sufficient to support the Remainder to B. G. 5 Co. 93.

Feoffment was made, *Habendum* to the Feoffee and his Heirs after the Death of the Feoffor, and Livery was made; yet adjudged a void Feoffment, because an Estate of Freehold in Lands cannot begin at a Day to come; but where the Lessor made a Lease to three for their Lives, and granted the Reversion, *Habendum* to the Grantee for his Life, which said Estate for Life shall begin after the Death of the Survivor of the said three Lessees for Life; this was adjudged a good Estate in Reversion for Life. *Hob. 171.*

(X) *The Effect of Livery of Seisin with Respect to the Presence or Possession of others.*

It is regularly true, that the Feoffor must be actually in the Possession of the Land at the Time of the Livery made, or otherwise the Livery will be ineffectual and void, because the Design of the Livery is to give Notice of the Change made of the Possession, and therefore it must be a vacant Possession that is delivered; but it were absurd that a Man should be permitted to transfer to another what he has not within himself; wherefore if a Man makes a Lease for Years or Life of his Land, or has his Land extended by Virtue of a Statute-Merchant, &c. and makes a Feoffment and Livery, the Conusee or Lessee being in Possession of the Land, the Livery is void, because the Land is filled by the Lessee, and consequently during the Continuance of his Interest the Feoffor cannot deliver a vacant Possession, and therefore the Livery, which is a Solemnity instituted to give Notice of the Change of the Possession, must be void. *Co. Lit. 48. b. 2 Roll. Abr. 3, 4. 7 H. 4. 19. b. Dyer 33. Cro. Eliz. 322.*

Thus if there be Lessee for Years of a House and several Closets, and the Lessee and all his Servants being in the House, the Lessor enters into one of the Closets, and makes a Feoffment of it, and gives Livery, that is a void Feoffment, because the Possession of Part of the Thing demised is Possession of the Whole, for the Impossibility that a Man should be in the actual Possession of every Part of the Land at the same Time; and consequently the Lessor cannot take Possession of the Close, which was filled by his Lessee, and therefore the Livery must be void, because the Feoffor had no vacant Possession to transfer at the Time of the Livery made. 2 Co. 31. b. *Moor, 1397. 2 Roll. Abr. 4. Co. Lit. 48. b. Dyer 18. b.*

So it is if the Lessee for Years himself had not been in the House, or any Part of the Land, yet if his Wife, Children or Servants had been on any Part of the Land, that were sufficient; but the Cattle of the Lessee grazing upon the Land, without either Wife or Servant on the Land, does not fill the Possession as to prevent the Lessor from entering and making a good Livery to pass the Freehold, because the Cattle cannot be said to continue upon the Land, *Animo possidendi*, for the Benefit of their Master, as a Servant may and in Duty ought to do. *Co. Lit. 48. 2 Roll. Abr. 4. Dyer 18. Bro. Tit. Feoffment 66. But Moor 11. cont.*

In the making of every Livery of Seisin it is requisite that all Persons that have any lawful Estate and Possession in the Thing whereof Livery is to be made, as Lessees for Life, Years, and such like, join in the making thereof, or be removed thence, for every Livery ought to bring an immediate Possession to the Feoffee or Donee, &c. *Shep. Touch. 213.*

If Lessee for Years makes a Feoffment and Warrant of Attorney to give Livery of Seisin, and the Attorney makes Livery of Seisin, the Lessor being present upon the Land, and not contradicting it; it seems this is a good Livery of Seisin. *Dyer 361.*

The Presence of the Feoffor, Donor, &c. upon the Land after he hath delivered Seisin to the Feoffee, Donee, &c. altho' he stays upon the Land awhile, and does not depart and leave the Feoffee, &c. in Possession, will not hurt the Livery. *Bro. Feoffment 24.*

If a Man makes a Lease for Life of Lands, and afterwards makes a Feoffment of the same Lands, and makes Livery and Seisin upon the Land, by the Assent of the Lessee, and in his Presence; this is a good Livery to pass the Inheritance, because the

Lessee's permitting the Feoffor to come upon the Land, and make Livery, is a sufficient quitting of the Possession to him, either by way of Surrender, or to create a Tenancy at Will in the Feoffor, to make the Feoffment and Livery more effectual and valid. 2 Roll. Abr. Bro. Tit. Surrender 48.

But if the Servant of the Lessee were only on the Land, the Livery made by the Feoffor, tho' with the Servant's Permission, had been void if the Servant continued in Possession at the Time of the Livery made, for while the Servant continued in Possession, it must be only for the Use and Benefit of him that placed him there; and consequently the Possession of the Servant must be looked upon as the Possession of the Master, and therefore the Livery must be void, because it could not deliver a Possession which was still filled by the Master, and which the Master never consented to part with; and the Permission of a Servant will not admit of such a Construction as was made in the precedent Case, because the Servant having no Interest but in Right of the Master, could neither make a Surrender nor a Tenancy at Will to the Feoffor. 2 Roll. Abr. 5.

If there be a Lessee for Years of six Acres, and he makes a Lease for Years of three Acres to J. S. and he in Reversion enters upon J. S. and makes a Feoffment with Livery, this shall pass the three Acres, because by the Demise of A. for Years, the Possession became separate and divided, which was united and one under the Lease to A. himself, and therefore A. continuing in Possession of his own three Acres, could never be a Possession of the other three which he had no Right to during the Demise to J. S. but if A. had only made a Lease at Will to J. S. of those three Acres, the Entry and Livery of the Reversioner had not passed them, because he is still supposed to be in Possession of those three Acres, since he may enter into them when he pleases, by the Determination of his own Will, for no Man can be actually upon every Parcel of the Land, yet the Possession of one Acre is very reasonably construed the Possession of the Whole. 2 Co. 32. a. 2 Roll. Abr. 4. Dyer 18. b.

Lessee for Years of a House, and a Close distant from the House, and other Lands; afterwards the Lessor made a Feoffment of the said House, and all the Lands mentioned in the Lease, and made Livery and Seisin in the Close, the Lessor being within the House; adjudged that it is void for the Whole, because when an House and Land is demised together, the House is the Principal, and the Possession of the House is the Possession of the Whole, therefore the Lessee being in the House, he had the Possession of the Whole, and by Consequence the Livery not good; but if the Lessee had made a Lease for Years of any Part of the Land, and the Lessor had made Livery on that Part, it had been good to pass that Part; but not if such Lease had been at Will. 2 Co. 32. Moor 250.

The Disseisor made a Feoffment in Fee, and a Letter of Attorney to enter and take Possession of the Lands, and afterwards to make Livery *secundum formam Chartae*; adjudged this was a good Feoffment tho' the Disseisee was out of Possession at that Time, because the Power given to the Attorney was executory, and nothing passed till he had made Livery and Seisin. 37 Eliz. Brown v. Terry.

It has been held, where a Man made a Lease for Years of a House, and afterwards made a Feoffment of it, with a Letter of Attorney to make Livery, and the Attorney came to the House to make Livery in the Absence of the Lessee, and finding No-body in the House but the Servant of the Lessee, who quitted the Possession of the House at the Desire of the Attorney, and then the Attorney made Livery, which the Master approved of at his Return, saving his Term; that this was a good Livery, because here the Servant actually quitted the House, and thereby the Attorney had a vacant Possession to deliver to the Feoffee; so if the Attorney had found the Lessee himself upon the Land, and had entred and ousted him, and then made Livery, that had been good to pass the Freehold; for tho' the Ouster had been a tortious Act, yet the Possession became thereby vacant, and consequently by the Livery might be delivered to the Feoffee. Dyer 363. a. 2 Roll. Abr. 5. Moor 91.

So it is in Case of a Tenant at Sufferance; as if Tenant in Tail makes a Feoffment in Fee to the Use of himself in Fee, and afterwards makes a Lease for Years, and dies, by which the Issue is remitted before Entry, and consequently the Estate of the Lessee for Years is determined and changed into a Tenancy at Sufferance, because the Fee-simple, out of which it was derived, is vanished by the Remitter, and the Issue enters into Part of the Land descended, and makes a Feoffment of the Whole, and gives Livery of that Part into which he entred in the Name of the Whole; this shall pass all the Lands to which the Issue was remitted, tho' the Tenant at Sufferance

was in Possession of Part, because that Possession may be reasonably supposed to be in me, which I may actually place myself in at my Pleasure, and therefore the Livery in that Part, in which the Issue had actually entered in the Name of the Whole, shall pass all the Lands. 2 Roll. Abr. 5. 2 Roll. Rep. 260. Moor, pl. 1, 143.

A. seised of Land in Fee, held of the Queen in Socage, died, and it was found by Office that he died without Heir, by which the Lands were seised as the Escheat of the Queen, and B. the Heir of A. traversed the Office upon which the Issue was joined, and pending the Issue, B. made a Deed of Feoffment with a Letter of Attorney, and afterwards the Issue being for B. Judgment was given *Que les meins le R. soient amove*, and then the Attorney made Livery, after which the *Amoveas manum* was executed; this was held a good Feoffment and Livery, because by the Judgment against the Queen, her Possession was defeated, and B. was restored to his Right of Possession, which he might have placed himself in at his Pleasure, and therefore might transfer that to another which he might actually invest himself in at Pleasure. 2 Roll. Abr. 5, 6.

Thus if Land descends to J. S. who enters but in Part of it, and makes a Feoffment of the Whole, and Livery in that Part in which he entered in the Name of the Whole; all the Lands shall pass, for besides that in this Case an Entry into Part may be construed an Entry into the Whole, the Feoffor having a Power to reduce the Whole into his actual Possession at his Will, the very Act of Feoffment, with the Livery in all these Cases, may reasonably be taken to be a Determination of his Will to take the Possession, since the Livery and Feoffment would be invalid unless he were in Possession. 2 Roll. Abr. 5.

If Husband and Wife be seised of Land in Fee, and the Husband makes a Feoffment of the Whole, the Wife being upon the Land, yet the Livery shall pass the Land, because the Husband had the whole Possession, either in his own Right, or in Right of his Wife; and therefore could deliver it over by the Investiture tho' the Wife disagree to it. 2 Roll. Abr. 5. Perk. §. 223.

If a Man be seised of two Acres, and being disseised of one, makes a Feoffment of both, and Livery in the Acre in Possession in the Name of both; yet the Acre of which he was disseised does not pass, because he could not deliver that Possession to the Feoffee which the Disseisor had. So it is if the Disseisor had made a Lease at Will, and then the Disseisee had made a Feoffment of the Acre in his Possession in the Name of both; this had not passed both the Acres, because the Possession of one Acre was still out of him, and the Feoffment could not be any Determination of the Will of the Disseisor. 2 Roll. Abr. 6. Dyer 18.

But if a Man be seised of two Acres, and makes a Lease at Will of one, and after seiseoffs J. S. of both Acres; this shall pass both, because the very Feoffment and Livery is a Determination of the Estate at Will, and consequently the Feoffor has thereby resumed the Possession in order to convey it by Livery; otherwise of a Lease for Years, because the Possession is in the Termor during the Lease. Dyer 18. Roll. Abr. 5.

If A. be Lessee for Life of Blackacre, and being likewise seised in Fee of Whiteacre, makes a Feoffment of both, and gives Livery in Whiteacre in the Name of both; this is a good Feoffment of both Acres, because A. had the Freehold and Possession of both Acres, and therefore might well deliver them over by the Investiture; otherwise if A. had been only possessed of Blackacre for Years, for then it should not pass by the Feoffment, because the Charter of Feoffment passes the Interest in the Term before the Livery made, and a lesser Estate by Right shall be supposed to pass rather than a greater by Wrong; but in the first Case, where A. had the Freehold in both Acres, nothing passes till the Livery must operate to pass the Fee in both Acres, *secundum formam Chartæ*, or else it can pass nothing. 2 Roll. Abr. 6. 9 H. 7. 5. b.

But if A. had been possessed of Blackacre for Years in *Auter droit*, as Guardian to an Infant, and had made Feoffment of both Acres, and given Livery in Whiteacre in the Name of both; that had passed both Acres to the Feoffee, because the Term being vested in the Infant, the Guardian could lawfully transfer it as if he had been in Possession of it in his own Right; and therefore the Livery must operate to oust the Infant of the Term, and disseise him in Reversion, or else it will have no Effect at all. 2 Roll. Abr. 4.

If a Man be seised of two Acres, and makes a Lease for Years of one of them, and after makes a Feoffment of both Acres, and Livery of the Acre in his own Possession

feffion in the Name of both, the Livery is void and ineffectual to pass the Acre in Lease, because that being full of the Lessee, the Feoffor had not the Possession to transfer by the Livery; yet such Feoffment is a good Grant of the Reversion of the Leasehold Acre, if the Termor attorns, because every Man's Act is construed most strongly against himself; and therefore the Feoffor shall not be admitted to claim any Thing in any of the Acres, since the Possession of the one was actually transferred by the Livery, and the Reversion of the other in Lease by the Deed of Feoffment, which with the Attornment of the Tenant amounts to a Grant. *Co. Lit. 49. a. 2 Roll. Abr. 56. Plow. 162.*

But if there be a Lease for Years, Remainder to *B.* for Life, and *C.* the Reversioner in Fee makes a Feoffment in Fee with Livery to *A.* this is void as a Feoffment, because *C.* had no Possession to transfer by the Livery, that being already in *A.* and the Freehold in *B.* by the former Lease; and the Acceptance of the Livery by *A.* was neither a Surrender nor an Attornment; as in the former Case it could not amount to a Surrender, because of the intermediate Freehold which was in *B.* nor did the Feoffment amount to a Grant and Attornment, for tho' according to the former Case every Man's Conveyance is construed most strongly against the Grantor, yet in this Case the Grant is ineffectual for want of Attornment, for *A.*'s Acceptance is no Attornment, because he shall not bring *B.* with his Fealty, by an Act which was not in its original Intention designed to be prejudicial and injurious to *B.* by displacing his Remainder. *2 Roll. Abr. 4, 56. 1 Roll. Abr. 482.*

If the Queen be Lessee for Years, and he in Reversion enters upon the Land, and makes a Feoffment in Fee; this is void, because the Law preserves the Possession for the Queen, who by constantly attending the Business of the Publick, is presumed not to have Leisure to take Care of her private Concerns; but if the Queen had made a Lease for Years to *J. S.* and he in Reversion had entred and ousted him, and made a Feoffment, that had been good, because the Queen had no Right to the Possession during the Lease to *J. S.* and the Reversioner having gained the Possession by his ousting *J. S.* might consequently deliver it by the Investiture. *2 Roll. Abr. 5. & vide 2 Co. 53.*

If a Man makes a Lease for Life to *A.* and after makes a Feoffment and Livery to *A.* of the Land in Lease, this is a good Livery and Feoffment; for tho' the Land was in Lease to *A.* yet his Acceptance of the Feoffment and Livery amounts to a Surrender, *Ut res magis valeat*, and consequently the Feoffor has thereby Possession to transfer by the Livery to the Feoffee. *2 Roll. Abr. 495. Dyer 358. Moor 636.*

(Y) *Livery of Seisin, in what Cases it is requisite, or not.*

LIVERY of Seisin is needful, and must be had and made in all Cases where an Estate of *Fee-simple*, *Fee-tail*, or for a Man's own or another Man's *Life*, is made or granted by Writing or Word *in pais*, of any Lands or Tenements corporeal. [*But see the Statute for transferring Uses into Possession, post.*]

Every Feoffment, whether it be made with Deed or without Deed, must be made with Livery of Seisin, and this Livery of Seisin must be made according to the Rules of Livery and Seisin herein after laid down; for this is of the Essence of a Feoffment, and a Feoffment is not perfect until Livery of Seisin be made, for till then the Feoffee has only an Estate at Will in the Land, and the Feoffor may put him out when he will.

And if either of the *Parties die* before the Livery of Seisin be made, the Feoffment is void, and no Warrant of Attorney to make Livery can be executed after the Death of the Feoffor or Feoffee, neither is there any Remedy in this Case to get the Assurance to be made perfect but in a Court of Equity.

But in Case where there are many Feoffees, there the Death of one or some of them will not hinder the Livery. *Lit. §. 59, 66. Co. Lit. 52. Dr. & Stud. 31.*

Lessee for Life may surrender to him in Reversion without making any Livery. *44 Aff. 3. Curia. 2 Roll. Abr. 1. pl. 1.*

But if Lessee for Life makes a Grant to him in Reversion during the Life of the Lessor, rendring Rent during his Life; this Lease is not good without Livery. *1 And. 33.*

By *Exchange* a Freehold may pass without Livery. *Co. Lit. 1, 49. 2 Salk. 620.*
A Freehold may, by *Custom*, be surrendered without Livery. *Co. Lit. 49. a.* And

And where one makes a *Lease* of Land to another *for Years*, the Remainder to a Stranger in Fee-simple, Fee-tail, or for Life; in these Cases Livery of Seisin must be had and made to the Lessee for Years, or else nothing will pass to him in Remainder, and yet the Lease for Years will be good. *Moor*, Case 54. *Plow.* 156. a.

An *Inheritance* in Land may be granted without Livery, tho' the Land itself cannot, as *Vesturam terræ*. *Fitz. Præcipe* 55. And so many Trees which were an Inheritance in the Land. 1 *Lev.* 171.

If a Lessee enters before Livery made, then the Freehold and Reversion is in the Lessor; but if he makes Livery to the Lessee before his Entry, then the Freehold is in them in Remainder, according to the Form of the Deed. *Lit.* §. 60.

A leases to B. for Years, Remainder to the right Heirs of B. and makes Livery; the Remainder is void, because there is not any *in esse* who can take presently by the Livery; for every Livery ought to operate presently: But where a Lease is made to B. for Life, Remainder to his right Heirs, he hath a Fee executed, and it shall not be in Abeyance, for there he takes the Freehold by the Livery. 4 *Leon.* Case 67.

So that it is necessary that the Lease and Livery should be executed at the same Time by the Lessor himself: Or if Livery be to be made by an Attorney after the Lease is sealed, the Livery must be made before the Lessee hath actually entered; for until actual Entry the Lessee has only an *Interesse Termini*; for after he has actually entered, Livery will signify nothing, he having as much as Livery can give him, viz. the Possession.

By the Entry of the Lessee, he is in the actual Possession, and then the Livery cannot be made to him who hath the Possession already. But if the Lessor and Lessee come upon the Ground on Purpose for the Lessor to make, and the Lessee to take Livery, there it vests no actual Possession in him till Livery made. *Co. Lit.* 49. b.

And where a Lease for Years is made upon Condition that if such a Thing happens the Lessee shall have the Fee-simple; in this Case the Lessee must have Livery of Seisin before his Entry, otherwise the Estate will not increase. *Co. Lit.* 216.

If Lessee for Years makes a Lease for Life without Livery, the Term shall pass. *Moor* 423.

If A. is Lessee at Will, and the Lessor leases to A. for Years, Remainder to B. in Fee; this is good, tho' no Livery be made, for Possession countervails Livery. *Dyer* 269. b.

So a Gift in Tail, &c. to the Lessee at Will, or Tenant at Sufferance, is good without Livery of Seisin, because of the Possession which countervails a Livery of Seisin. *Noy* 56.

And if the King makes a Feoffment of the Land he has in the Right of the Duchy of Lancaster that is not within the County Palatine; in this Case Livery of Seisin must be made as in the Case of a Subject, if it be not of the Lands within the County Palatine, for they pass by Letters Patent of the Duchy without Livery; but a Lease for Years of them, or of other Lands, ought to be by Deed; *Quod nota bene*. And *Quære* if the Act of 1 E. 4. which annexed it to the King and his Heirs, Kings, was remembered. *Bro. Feoffment de terres*, pl. 51. cites 21 E. 4. 60.

If I make a Feoffment to the King by Deed, it is good without Livery if he inrols the Deed, otherwise not; for the King cannot take but by Matter of Record. *Bro. Feoffment de terres*, pl. 69.

And in all these Cases where Livery of Seisin is requisite and it is not made, there doth pass no Estate by the Conveyance, but an Estate at Will at the most. *Plow.* 24, 219. *Br. Feoffment de terres*, pl. 69.

But Livery of Seisin is not needful or requisite to be had and made in Cases where any Estate of Fee-simple, Fee-tail or for Life, is made or granted of any Lands by Matter of Record, as by the King's Letters Patent, Fine, Recovery, Deed indented and inrolled, and the like; nor is it needful where any such Estate is created by way of Covenant and raising of Use, by way of Exchange, Indowment *ad opus Ecclesiæ*, or *ex assensu patris*; nor is it needful where any such Estate is passed or granted by way of Surrender, Devise, Release or Confirmation, or by way of Increase or executory Grant, as when the Fee-simple is granted to the Lessee for Life or Years in Possession; neither is it requisite or can be made where any incorporeal Hereditaments, as Reversions, Rents, Commons, or the like, are granted in Fee-simple, Fee-tail, or for Life; for in some of these Cases there is an Attornment to be made that doth supply a Livery.

Neither is it requisite in some Cases where an Estate of Freehold is made of a corporal Thing; as if a House or Land belong to an Office, and the Office be granted by Deed; in this Case the House or Land doth pass as incident thereunto.

So if a House or Chamber belong to a Corody; by the Grant of the Corody the House or Chamber passes without any Livery of Seisin. *Co. Lit. 49.*

Neither is it requisite upon a Lease for Years; for if a Man makes a Lease for 1000 Years, it is perfect by the Delivery of the Deed without any Livery of Seisin.

Neither is it needful where one grants to me and my Heirs all the Trees growing on his Ground; for this will pass without any Livery of Seisin at all. *2 Co. 23. Lit. §. 59. Co. Lit. 49. 8 Co. 137. 11 Co. 49.*

A. being seised in Fee of an Estate upon Trust, and having two Daughters *B.* and *C.* conveyed the same to *B.* and her Heirs by Deed in Nature of a Feoffment without Livery and Seisin; and it was held that the Trust passed tho' the Deed was not executed by Livery, and that it was sufficient to declare the same, which as the Law then stood might be declared by Parol. *Nelf. Rep. in Canc. 86.*

Where Grants are made for Life or Lives in Pursuance of a Power, Livery and Seisin is not necessary, because it is only the Execution of an Authority; as in Case of Leases for three Lives made by bare Tenant for Life who has such Power; and so of a Sale of Land by Executors by Virtue of the Will. *Ca. in B. R. in William 3d's Time 281.*

If a Deed be inrolled in London, it binds as a Fine at Common Law, but not as a Fine with Proclamations; and in that Case Livery of Seisin is not requisite, it is a Discontinuance without Livery; and because the Custom there is saved by divers Acts of Parliament, it shall bind as a Fine. *Bro. Fines, pl. 110.*

If a Gift be made of Land, Rectory and Tithes in Fee, and no Livery made, the Tithes do not pass, tho' Words of Grant will pass them without Livery. *Moor 496.*

(Z) By whom Livery of Seisin may be made.

LIVERY of Seisin may and must be made either by the Party himself that makes the Estate, or if it be a Livery in Deed, it may in his Absence be made by his Attorney, sufficiently authorized by Writing.

And he that makes an Estate, to the Perfection whereof Livery is requisite, may himself and in his own Right make Livery thereupon, and in the Right of another, and as Attorney to another; so divers that cannot make any Estate, may notwithstanding make Livery of Seisin.

And therefore the Husband, altho' he may not make a Feoffment in Fee, or Lease for Life, &c. of Land to his Wife, yet he may as an Attorney make Livery of Seisin to her upon a Conveyance made by another.

And so also may the Wife, upon a Conveyance made to the Husband or her.

And so also Monks, Infants, Aliens, and such like Persons disabled to make Feoffments, &c. may notwithstanding make Livery of Seisin, as Attornies upon Conveyances made to others.

And so likewise may he in Remainder in Fee make Livery to the Lessee for Years. *Et sic de similibus. Perk. §. 184. Co. Lit. 48, 49, 52.*

There are some Persons who may make Livery of Seisin in their own Right, and also as Servants to others; and some cannot make Livery of Seisin in their own Right, but as Servants unto others they may; and some may make Livery of Seisin by themselves in their own Right unto some Persons, and unto others they cannot; and some shall make Livery of Seisin, and take by the same Livery, &c. *Perk. §. 183.*

All such Persons as may grant by themselves may make Livery of Seisin themselves, viz. in their own Right, and as Servants unto others, in the same Manner and Form as they may grant, &c. *mutatis mutandis, &c. Perk. §. 184.*

A. grants a Lease to commence at Michaelmas to *B.* Remainder in Fee to *C.* Tho' *A.* makes Livery and Seisin to *B.* yet the Livery and Seisin and the Remainder shall be void, because he has no present Estate to which the Livery may be annexed, nor on which it can rest on the mean Time. *Plow. 156.*

If a Man leases Land for Life, and the Lessee thereof enfeoffs a Stranger, and makes a Letter of Attorney to his Lessor to make Livery of Seisin accordingly, and he makes Livery; in this Case it hath been said by some Persons, that the Lessor might

might enter upon the Feoffee for a Forfeiture notwithstanding the Livery of Seisin made by himself; for they say that the Feoffee took nothing by him; for the Lessor had nothing to do upon the Land, if not to see whether Waste were done, and to distrain for Rent and Services if they were behind. *Perk.* §. 200.

Some Persons may make Livery to some who cannot do it to others, who yet may take by Livery from others; as if one *Jointenant* makes Feoffment to the other; this cannot be a good Deed at Common Law, for he cannot make Livery and Seisin, because the other is jointly seised with him; yet this Deed shall enure by way of Confirmation, and must be so pleaded, and not literally as the Deed is worded. *4 Mod.* 150. *Q. vide Perk.* §. 193, 197. *Bro. Feoffment de terres, pl. 48.*

(AA) *To whom Livery of Seisin may be made.*

LIVERY of Seisin may and must be to the Party himself that taketh the Estate, or in his Absence to his Attorney or Procurator sufficiently authorized; and in this Case any one may be an Attorney to take, that may be an Attorney to give Livery. *Co. Lit.* 48, 49.

If a Feoffment be made to *divers* by Deed, and Livery of Seisin is made to one or some of them; this is a good Livery to execute the Estate to them all.

But if a Feoffment be made to *divers* without Deed, and if Livery of Seisin be made to one or some of them in the Name of all the Rest; in this Case the Feoffment is good to execute the Estate in him or them to whom the Livery is made, and as void to the Rest. *Dyer* 35. *Co. Lit.* 49, 359. *5 Co.* 95.

If a Lease for Years be made to A. and B. without Deed, the Remainder to D. in Fee, and Livery of Seisin is made to A. or B. in this Case this is a good Livery to make the Remainder pass to D.

But if a Lease be made to A. the Remainder to the right Heirs of J. S. in Fee, J. S. being then living, and Livery of Seisin is given to A. this Remainder is void; for *Nemo est heres viventis*. *Co. Lit.* 217.

One *Jointenant* cannot make Livery of Seisin to his Companion as a Tenant in Common may.

And a Lessor cannot make Livery of Seisin to his Lessee for Life or Years. *Perk.* §. 40. *10 Ed.* 4. 3.

If a Man enfeoffs four by Deed, and makes Livery to the one in the Name of all, this is a good Feoffment to all; but if a Man enfeoffs four without Deed, and makes Livery to the one in Name of all; there it vests nothing but in him that takes by the Livery, *Quod nota Diversitas, quod nullus negavit*. *Bro. Feoffment de terres, pl. 16.*

Livery made to a Mayor and Commonalty, or other Corporation, without Deed to receive it by an Attorney, is not good; but *per Keble*, a Feoffment made to them and to another is good without Deed, if the other takes the Livery; but *Hussey contra*; for they shall be Tenants in Common by their several Capacities, for which they ought to have several Liveries of the Seisin. *Bro. Feoffment de terres, pl. 41.* cites *7 H.* 7. 9.

If a Feoffment is made to two, *Habendum* one Moiety to one and the other Moiety to the other; this operates as several Conveyances, and not as one; for there must be two Liveries, because there are several Freeholds, and Livery to one *secundum formam Chartæ* will not enure to the other. *1 Williams* 18, 19.

If A. and B. *Jointenants* in Fee, lease to C. for Life, and C. grants his Estate to B. some think that this shall enure by way of Surrender, because every one of the Lessors is seised of the Whole, and of the whole Reversion, and the Grant of the Estate of the particular Tenant cannot take Effect by way of Grant without Livery of Seisin; and the Grantee cannot take Livery of Seisin of the same Land, because he has the Reversion in Fee of the whole Land in him immediate to the same particular Estate, and in his own Right. *Perk.* §. 82.

A. leases to B. for Years, the Remainder to the right Heirs of the said B. and makes Livery, the Remainder is void, because there is not any Person *in esse* who can take by the Livery presently, and every Livery ought to have its Operation presently. But where a Lease is made to B. for Life, the Remainder to his right Heirs; there he has a Fee executed, and it shall not be in Abeyance, for there he takes the Freehold by the Livery. *4 Leo.* 21. pl. 67.

A Lord of the Manor of *D.* by Indenture between him of the one Part, and *J. S.* his Copyhold Tenant in Fee, and *R. S.* Son and Heir Apparent of *J. S.* of the other Part, in Consideration of 100 *l.* paid by *J. S.* enfeoffed, released and confirmed, &c. to *J. S.* the said Land, *Habendum* to *J. S.* and *R. S.* and their Heirs; and covenanted that all Assurances should be to the Use of *J. S.* and *R. S.* and Livery was made *secundum formam Chartæ*; resolved that *J. S.* only took by the Livery, and *R. S.* took nothing thereby; but *R. S.* took by the Limitation of the Use in the *Habendum*, as Jointenant with *J. S.* and by the Statute of Uses of 27 *H. 8.* was jointly seised of the Interest and Possession with *J. S.* *Ley 13.*

When a Feoffment is made to *A.* for Life, Remainder to the Heirs of his Body, and Livery is made to *A.* *secundum formam Chartæ*, this is good. 2 *Roll. Abr. 10.*

If *J. S.* be enfeoffed to have and to hold to *J. S.* and *T. K.* and Livery of Seisin is made unto *J. S.* according to the Deed, it is void unto *T. K.* *Perk. §. 164.*

But if Livery of Seisin had been made unto *T. K.* according to the Deed, then he takes by the Livery of Seisin, and not by the Deed. *Perk. §. 164.*

Some make Livery of Seisin and take by the same Livery of Seisin; but then they do not make Livery of Seisin in their own Right, or otherwise they do not take by the Livery of Seisin in their own Right, unless in special Cases, &c. *Perk. §. 198.* And therefore

If Land be leased for Life to *J. S.* the Remainder to *T. K.* in Fee, and a Letter of Attorney is made to *T. K.* to make Livery of Seisin, and he makes Livery of Seisin to the Lessee accordingly; in this Case he takes by the same Livery of Seisin which he himself made, but not of his own Grant, for he made the same as Servant to the Grantor. *Perk. §. 198.*

And it is said, that if a Man enfeoffs two by Deed, and makes a Letter of Attorney to one of them to make Livery of Seisin, and he makes Livery of Seisin according to the Deed to his Companion; he who makes the Livery of Seisin shall take by the same Livery of Seisin, because he shall be in by the Feoffor, and not by himself, &c. *Perk. §. 199.*

If a Man makes a Deed of Feoffment of his own Land to himself and to a Stranger, and makes Livery of Seisin to the Stranger according to the Deed; all shall pass to the Stranger and nothing to himself, because he cannot give unto himself, as this Case is, &c. *Perk. §. 203.*

If a Feoffment was formerly made to a Monk professed, and to a Stranger, by Deed, and Livery of Seisin was made to the Stranger according to the Deed, all passed to the Stranger: But if Livery and Seisin was made to the Monk according to the Deed, and not to the Stranger, nothing passed thereby. *Perk. §. 204.*

And unto divers Respects a Man may take by Livery of Seisin which he makes his own Right; but then he shall not take in his own Right, unless in special Cases. *Perk. §. 205.* And therefore

If there be Dean and Chapter, and one of the Chapter is sole seised in Fee in his own Right of Lands, and thereof by Deed enfeoffs the Dean and Chapter, and makes Livery of Seisin according to the Deed; in this Case the Feoffor gives and takes by the same Gift in divers Respects. *Perk. §. 205. cites 22 H. 6. 43.*

And so shall it be of a Mayor and Commonalty; if one of the Commonalty be seised of Land in his own Right, and thereof enfeoffs the Mayor and Commonalty. *Perk. §. 205.*

And such Persons as are in Possession of Lands for Years or Life, &c. cannot take Livery of Seisin of the same Land, &c. *Perk. §. 205.*

In a Feoffment to the Dean and Chapter, they cannot take Livery of Seisin but by Letter of Attorney under Seal. *Bro. Corporations, pl. 34. cites 14 H. 8. 2. 29.*

If a Man enfeoffs a married Woman, and makes Letter of Attorney unto the Husband to make Livery of Seisin according to the Deed, and he makes Livery of Seisin accordingly; it is a good Feoffment, for the Husband is but a Means to convey the Freehold to the Wife; for by this Act done, no Freehold doth pass from the Person, &c. *Perk. §. 196.*

Livery to a Corporation is not good unless it be executed by Letter of Attorney. *Cro. Jac. 411.*

(BB) *When Livery of Seisin must be made.*

IN all Cases where this Ceremony is requisite, whether it be done by the Parties themselves in Person, or their Deputies, it must be done and made,

1. *In the Life-time of the Feoffor, Donor or Lessor, and in the Life-time of the Feoffee, Donee or Lessee*, for if either of them die, it cannot be done afterwards; neither can a Warrant of Attorney be made to deliver Seisin after the Death of the Feoffor, &c. But if there be more Feoffees, Donees or Lessees than one, in such Cases altho' all of them die but one, the Livery of Seisin may be made to the one that survives, and it will be good to him to execute the Estate in all the Land. And so it is if there be a Warrant of Attorney made by a Corporation Aggregate, as a Mayor and Commonalty, Dean and Chapter, or the like, to give Livery of Seisin; in this Case the Death of the Mayor, &c. will not determine the Authority, and therefore in that Case the Livery of Seisin may be made after his Death. *Co. Lit. 52.*

2. If there be a Lease for Years with a Remainder over in Fee, the Livery must be made to the Lessee for Years *before his Entry*, or at the Time when he enters for that Purpose, for afterwards it cannot be made. *Quod semel meum est amplius meum esse non potest. Co. Lit. 49, 216. Perk. §. 205. Quere* whether the Law be not so in all other Cases, and let Men take heed they do not (as commonly they do) enter into the Land before they have Livery of Seisin made thereof unto them.

And yet it seems the Livery of Seisin is good when it is made afterwards. *2 Co. 55.* If a Man makes a Lease for Years to A. and B. Remainder to C. for Life, the Lessor ought to make Livery to A. and B. *before their Entry*; and by the Livery to A. and B. C. shall take a present Estate for Life by way of Remainder, by Force of the Livery made to the Lessees for Years. *5 Co. 94. b. Lit. §. 60.*

3. It must not be made *before the Estate begins*; for if a Lease be made for Years to begin at Michaelmas with a Remainder over, and the Livery of Seisin is made before Michaelmas, this Livery of Seisin is void; for if a Livery work at all it must work presently, and so it cannot in this Case, because it is before the Estate begins. *Co. Lit. 217.*

Livery made *after the Day*, not working futurely, is good enough. *Cro. Jac. 458.* As Lease for Life to commence at Michaelmas, and Lessor makes Livery after Michaelmas, it is good Livery. *Hil. 17 Jac. B. R. 2 Roll. Rep. 366.*

But if the Lessor had made Livery before Michaelmas, it had been void. *2 Roll. Rep. 109.*

Feoffment *Habendum a die datus*; if the Seisin be not made at the last Instant of the Day, it is not good. *Stile 189.*

A Lease for Lives to commence *a die datus*, was adjudged good, because Livery was executed *after the Day* of the Date: But if before, it should not. *Moor 637. Roll. Abr. 828. pl. 50.*

But where the Date was the 30th of July 21 Eliz. and the Livery was 23 Eliz. *secundum formam Chartæ*, the Livery so long after will not help the Lease, which was *Habendum a die datus*. *Cro. Eliz. 873.*

So if the Attorney makes Livery the same Day *secundum formam Chartæ*, it is void. *Cro. Car. 388.*

But such Livery must be made the next Day if it be to be made *secundum formam Chartæ*; for that is *forma Chartæ*. *2 Bulst. 306.*

In a special Verdict in Ejectment the Case was, two Women were Jointenants in Fee, one of them made a Feoffment with Livery within the View, (*viz.*) go enter and take Possession; but before it was executed by an actual Entry she married the Feoffee. It was insisted that this Feoffment was void, because there was no Entry; and by the Marriage the Feoffee became seised in Right of his Wife, and now cannot by his own Act work any Prejudice to her Right; but adjudged that this Livery might be well executed after the Marriage, for he had not only an Authority to enter, but an Interest passeth by the Livery in View, and the Woman did all on her Part to be done. *1 Vent. 186. 1 Mod. 91. 2 Lev. 34.*

In Letters of Attorney antiently Power was given to take Possession for the Feoffee; and altho' the Letter of Attorney be indefinite, without Limitation of any Time, yet the Law says, it must be in the Life of the Feoffor and Feoffee; and upon the Death of either of them the Deed is void, because nothing passes before Livery:

For if the Feoffee dies, Livery cannot be made to his Heir, because then he should take by Purchase where Heirs are named by way of Limitation to take by Descent. *Co. Lit. 52. b. 2 Roll. Abr. 9. Perk. §. 188.*

By *Dodderidge J.* The Act of the Attorney by Delivery of Seisin cannot make the Estate to pass if the Fabrick of the Deed is void: But if there be a good Deed of Feoffment with a Letter of Attorney to make Livery, the Attorney hath his Election to do it when he will. *1 Roll. Rep. 130.* But *Note*, it must be made in the Life of the Feoffor and Feoffee, otherwise it will be void.

(CC) *At what Place Livery of Seisin must be made.*

IF an Estate be made of divers Pieces of Land in divers Villages in the same County; in this Case the making of Livery of Seisin of and in any Part thereof in the Name of all the Rest, or of one Parcel according to the Deed, altho' he does not say in the Name of, &c. sufficeth for all, if all the Pieces be in the Grantor's Possession and out of Lease.

But if the Pieces of Land lie in divers Counties, or in the same County, and they be in Lease, or out of the Possession of the Feoffor, *contra*; for in that Case the making of Livery in one Part in the Name of all the Rest, is not sufficient for the Rest; for in this Case it is requisite that Livery of Seisin be made upon and in some of the Lands in both Counties, and upon every Parcel of Land that is out of Possession, or at least in some Part of the Land that is in the Occupation of every several Tenant.

And yet if one Part of a Manor be in one County and the other Part in another County in View of that Part; in this Case it seems Livery of Seisin in the one Part in the one County in the View of the other Part in the other County, is good, and suffices for all.

So if the Site of a Manor lies in one County and the Rest of a Manor in another County; in this Case the making of Livery in the Site of the Manor is sufficient for the whole Manor. *Co. Lit. 48. Lit. §. 61, 418. Perk. §. 226, 227, 228. Dr. & Stud. 3. Fitz. Feoffments and Fairs 111.*

If a Feoffment be made of the Manor of *Dale* in *Sale*, the which Manor doth extend in *Dale* and *Sale*, and Livery of Seisin is made accordingly in *Dale* only, and not in *Sale* also; by this Feoffment there passes no more of the Manor but that which is in *Dale* only. *Perk. §. 228.*

If I be seised of one Acre in Fee, and of another Acre for Life, and I make Feoffment of both Acres, and make Livery of Seisin in that Acre whereof I am seised in Fee in the Name of both Acres; in this Case it seems that suffices to pass both the Acres.

But if I be seised of one Acre in Fee, and possessed of another Acre for Years, and I make a Feoffment of both Acres, and Livery of Seisin on that Acre only whereof I am seised in Fee in the Name of both the Acres, *contra*; for this is as if I make a Feoffment of Land whereof I am seised, and of other Land whereof I am not seised. *&c. 9 H. 7. 5. Per Frowick.*

If I be seised of two Acres of Land, and let one of them for Years, and then make an Estate of both of them to another, and make Livery of Seisin in that which I have in Possession in the Name of both the Acres; this will not serve to pass the other Acre, but Livery must be made in that Acre also. *Fitz. Fairs and Feoffments 2.*

And accordingly it was agreed in the Case of *Montague ver. Jefferies*, in the King's Bench, *Hil. 38 Eliz.* which was that a Man was seised in Fee of a Manor, and other Lands called Groves, and he made a Feoffment of it, (Groves being then in Lease for Years) and a Letter of Attorney to give Livery, and the Attorney made Livery of the Manor in the Name of the Rest, the Lessee being still in Possession of Groves; in this Case it was agreed that this was no good Feoffment for Groves.

When a Feoffment is made of a House and Land, the Livery of Seisin is most aptly to be made of and in the House in the Name of the Rest, and at the Door of the House, &c. and when a Feoffment is made of Rectory or Parsonage, the Livery of Seisin may be made in the Parsonage-House; or if there be no House, it may be made upon the Glebe; or if there be neither, it may be made at the Ring of the Church-Door.

(DD) *Of what Things Livery of Seisin may be made.*

LIVERY of Seisin may be made of any *corporal Thing*, as Manors, Houses, Lands, Meadows, Pastures, Woods, Chambers, or the like; and these Things therefore are said to lie in Livery. But of incorporate Things, as Rents, Advowsons, Commons, Estovers, and such like Things, Livery cannot be made. And these Things therefore are said to lie in Grant, and not in Livery; and therefore when a Livery is made of these, *nil operatur.* Co. Lit. 49.

William Lord Dacres the Father made a Feoffment in Fee to his two Sons, upon condition that they should make a Feoffment over to Thomas Dacres and one Middleton, with a Letter of Attorney; but before the Father had delivered the Deed to his Sons, they had delivered their Deed of Feoffment to Thomas Dacres and Middleton, with a Letter of Attorney to B. G. to make Livery; afterwards the Father delivered his Deed, and then Livery was made by Virtue of the Letter of Attorney: Adjudged that the Livery was void, because the Sons, at the Time they made the Feoffment, had nothing to pass. 2 Bulst. 302.

Adjudged that where a Man covenants to make a Feoffment of the Value of 50 l. p. a. and afterwards he makes a Feoffment to the Uses in that Indenture generally, and doth not mention the 50 l. per Ann. certainly, that in such Case nothing passes but the very Land on which the Livery was made. 1 Roll. Rep. 187.

(EE) *How Livery of Seisin is to be made.*

TO every good Livery of Seisin is requisite either such an Act as the Law doth adjudge to be a Livery, or apt Words that amounts unto it: For a Livery may be good by Words without any Act or Deed at all.

But it cannot be good by an Act or Deed without any Words at all; however, that Livery that has an Act or Ceremony in it is the best, because it takes the deepest Impression in the Witnesses. Co. Lit. 49. 9 Co. 137.

The most usual, formal and orderly Manner of making of Livery of Seisin is thus: That the Feoffor, Donor, &c. and the Feoffee, Donee, &c. if they be present, or in their Absence their Attornies or Servants that have Authority, do come to the Door or Garden, if it be a House, if not, then to some Part of the Land where Seisin is to be delivered, and there in the Presence of many good Witnesses do shew the Cause of their Meeting, openly and plainly do read the Deed, or declare the Contents thereof, and of the Letter of Attorney, if there be any.

And then the Feoffor, &c. or his Attorney, (if it be a House) do take the Ring, Hatch or Hasp of the Door, (all the People, Men, Women and Children, being out of the House) or (if it be a Piece of Ground) do take a Clod of the Ground, or a Bough, or a Twig of a Tree, or Bush growing thereupon; and (all the People being out of the Ground) the same Ring, &c. Clod, Bough, &c. with the Deed, do deliver to the Feoffee, Donee, &c. or to his Attorney; and in the Delivery hereof do use these or some such like Words, viz. *I deliver these to you in the Name of Seisin of all the Lands and Tenements contained in this Deed, To have and to hold according to the Form and Effect of the same Deed.*

Or *I deliver you Seisin and Possession of this House or Ground in the Name of all the Lands contained in the Deed according to the Form and Effect of the Deed.*

And then if it be a House, the Feoffee, &c. enters in first alone, and shuts to the Door, and then he opens it and lets in others.

And if the Feoffment, Gift or Lease be made without the Deed, then they do and must withal express the very Estate itself which the Feoffee, Donee or Lessee is to have: As for Example, the Feoffor, Donor or Lessor, must come to the House or Land which is to be granted, and where Livery of Seisin is to be made, and there must by apt Words grant the House or Land to him that is to have it in Fee-simple, or in Tail, or for Life, as the Agreement is, (but see the Statute of Frauds, 29 Car. 2. c. 3.) and in Seisin thereof must deliver him the Ring of the Door, or a Turf or Twig of the Land.

And if the Feoffment, &c. be made by Writing, then it is Wisdom to indorse and set down on the Back of the same, how, when and where the same is made, and the Names

Names of the Witnesses thereunto. 1 *West. Symb.* §. 251. *Perk.* §. 209, 210. *Co. Lit.* 48.

But a Livery of Seisin that is not so exactly made, may be good notwithstanding. And therefore if the Feoffor, Donor, &c. or his Attorney, takes any Thing else that comes of the Land, as a Stone, or the like, and therewithal makes the Livery of Seisin; or if he takes a Turf or a Twig from off another Man's Ground, and not from the same whereof Possession is to be given, and delivers that upon the Ground in the Name of Seisin; or if he takes a Piece of Silver or Gold, or a Rod, Stick, or the like, and delivers this upon the Land in the Name of Seisin; all these are good Deliveries of Seisin and Possession. 9 *Co.* 137. *Fitz. Feoffments and Fairs* 111.

So if the Feoffor, &c. be at the Door, or by the Land, or in the House or upon the Land, and after he has delivered the Deed, he says to the Feoffee, Donee, &c. *Here I deliver you Seisin and Possession of this House or Land in the Name of Seisin and Possession of all the Lands and Tenements contained in the Deed; or, Have and enjoy this House or Land according to the Deed; or, Enter into this Land or House, and God give you Joy of it; or, I am content you shall enjoy this Land:* In all these Cases there is a good Livery of Seisin. *Et sic de similibus.* 6 *Co.* 26. 41 *Ed.* 3. 17.

If I being seised of a House in Fee, make a Feoffment of it, and of divers Lands, to a Man then present with me in the same House, and there deliver him the Deed in the Name of Seisin of all the Lands contained in the Deed; in this Case this is a good Delivery of the Deed, and a good Livery of Seisin also, altho' I continue in Possession of the House still, and go not out of it. *Bro. Feoffment* 28.

And if I be Lord of a Manor, and lying sick within some Part of the Manor, I make a Feoffment of the Manor, and deliver the Deed to the Feoffee, saying to him, *I will that you take Seisin presently; and thereupon command all my Tenants of the Manor to attorn to him,* and they do so; this is a good Livery of Seisin. *Perk.* §. 211, 212.

So if I make a Deed, and after I have read it, being upon the Land, I deliver it to the Feoffee, Donee, &c. and say, *here I deliver you this Charter as my Deed, in the Name of Seisin of all the Lands therein contained,* or the like; this is a good Delivery of the Deed and of Seisin.

But if I do only seal and deliver the Deed upon or in View of the Land, without saying or doing any more; this will not amount to a Livery of Seisin. *Perk.* §. 213. 6 *Co.* 26.

And therefore if a Man makes a Feoffment with Letter of Attorney to give Livery of Seisin, and then he delivers the Deed upon the Land; this is no good making of Livery of Seisin.

And so also if there be no Letter of Attorney. Adjudged in *Cromwell's Case in Scaccario* 15 *Eliz.*

If I be seised of a House in Fee, and being in the House, say to *J. S.* *Here J. S. I demise you this House for Term of my Life;* this will not amount to a Livery of Seisin; and therefore it is no good Lease until Livery of Seisin be made, but it is a good Beginning of a Lease. 6 *Co.* 26.

If the Father enfeoffs his Son of Land, and the Son suffers his Father to enjoy, and after the Son comes to the Parish Church where the Land lies, and there in the Audience of the Parishioners useth these Words to his Father: *Father, you have given me such and such Lands, (and names them) as freely as you gave them to me, I give them to you again;* this is no good Livery of Seisin, neither does any Estate pass hereby. *Perk.* §. 216.

So if one being upon Land says to *J. S.* *J. S. stand forth, I do here, reserving an Estate to me for my own Life, give this Land to thee and thy Heirs for ever;* this is no good Livery of Seisin, neither does any Estate pass thereby. *Hil.* 37 *Eliz.* *B. R. Callard's Case.*

So if one makes a Charter of Feoffment to me, and makes no Livery of Seisin thereupon, and after I make a Feoffment of the Land to *J. S.* and the Feoffor hearing and having Notice of it, saith, *I do willingly agree to it, and am contented that J. S. shall have it; or, I do agree to the Feoffment,* or the like; this does not make the Feoffment that was made to me good. *Fitz. Fairs and Feoffments.*

If divers Parcels of Land be conveyed, and Livery of Seisin is made in one; or there be divers Feoffees, and Livery and Seisin is made to one of them according to the Deed, without using any more Words; this is good.

But the best Form and Order of making of Livery in this Case is to add these Words, *In the Name of all the Rest, &c.* *Co. Lit.* 48. *Fitz. Estoppel* 177.

But

But if there are *divers Feoffees* named in a Deed, and Feoffor makes Livery to one of the Feoffees according to the Deed, without saying *In the Name of the whole*; yet the Land shall pass to all. *Co. Lit. 48. a.*

Where a Man makes a Feoffment in Fee, or a Lease for Life, and said to the Feoffee, being on the Land, or in Sight of it, *Enter into that Land and enjoy the same, according to the Purport of the Deed*; this is a good Livery; but the Delivery of the Deed on the Land without any further Ceremony, or saying any Thing, doth not amount to a Livery. *6 Co. 26. Moor 458.*

If A. makes a Deed of Feoffment of Land, and delivers the Deed, and says no more but *Take and enjoy the Land*; or, *Take the Land according to the Deed*, or such Words which amount to a Livery, when he delivers the Deed, nothing passeth; for the Law requires more Ceremony than the Delivery of the Deed on the Land. *Cro. Jac. 80.*

If the Feoffor says, *I am content you shall have this House according to the Deed to you made*; this is not a good Livery, for there is no Intent expressed either by Words or Circumstances to make Livery, but rather import an Assent and Promise to do a future Act. *Ley 3.*

If Words may amount to a Livery within View, much more it shall upon the Land, as *I am content you shall enjoy this Land, &c. according to the Deed, &c.* *Co. Lit. 48. a. 9 Co. 137. b. 138.*

The Delivery of any Thing upon the Land in the Name of Seisin of that Land, tho' it be nothing concerning the Land, as a Ring of Gold, is good, *Co. Lit. 48. a.* who says, that it had been so resolved by all the Judges. But this by the Feudists is called *Investitura impropria*. *Spelm. Gloss. Verb. Feofare.*

An Exchange amounts to a Livery. *Co. Lit. 51. b.*

Where two Tenants in Common of a House and Land, made Partition within the House of the House and Land by Parol without Deed; it was held that tho' it might have been good upon the Land, because it would have amounted to a Livery in Law; yet not being found that the Land was within View, it could not amount to a Livery in Law. *Cro. Eliz. 95.*

Tenant in Fee made a Feoffment, and delivered it on the Land in the Name of Seisin; adjudged that this Livery is good, and hath a double Operation at the same Time, *viz.* to making the Writing take Effect as a Deed, and to deliver Seisin of the Land according to the Deed. *9 Co. 136.*

If a Feoffment be made of divers Lands, and an House in which the Feoffor dwells, and the Feoffor delivers the Feoffment in the House, but says nothing of the Land; yet it is good for all, for they having an Intent to give and take Livery, it is a good Feoffment, for they assembled there for that Purpose. *Cro. Eliz. 142.*

But if a Feoffment be of a House, and the Deed is delivered in the House without other Circumstance, the same does not amount to a Livery of Seisin. And yet if he does any Act by which the Intent of the Feoffor appears, that the Feoffee should have Livery of Seisin; as if the Parties go of Purpose to the Place intended to pass, to the Intent the Deed may be delivered in that Kind; it amounts to a Livery. *1 Leon. 207.*

If Lands be given to a Mayor and Commonalty for their Lives by Intendment, they have an Estate not determinable. So if a Feoffment be made of Lands unto a Dean and Chapter without Speech of their Successors. *Perk. §. 240.*

If my Feoffee in Fee of one Acre of Land do re-enseoff me of the Acre by Deed, reciting in the same Deed, that I have enseoffed him of an Acre of Land, To have and to hold to him and his Heirs; and saith further in the Deed, that as fully as I have given the Lands unto him he doth give me them back again, and delivereth to me the Deed, and Seisin of the Land according to the Deed: In this Case it seemeth that I have an Estate of Inheritance in this Land notwithstanding that it is not given unto me and my Heirs, because that my Estate doth relate upon an Estate of Inheritance, recited within the same Deed; *Tamen quere.* *Perk. §. 241.*

But if Land be given unto me by Deed, To have and to hold to me in Fee, without speaking of my Heirs, and Livery of Seisin be made unto me according to the Purport of the Deed; by this Feoffment I have an Estate but for the Term of my Life, &c. *Perk. §. 243.*

If A. makes a Feoffment to B. and C. without Deed, and he makes Livery to B. in the Absence of C. in the Name of both; this is void as to C. because a Man who is absent cannot make a Freehold by Livery, but by an Attorney lawfully authorized to receive Livery by Deed. *Co. Lit. 49. b.*

But if a Feoffment be made to *A.* and *B.* and Livery is made to *A.* in the Absence of *B.* in the Name of both; this is good, because it is by Deed. *Co. Lit.* 49. *b.*

If there are four Feoffees, and one makes Letter of Attorney to one *R.* to take Livery in the Name of the Feoffee and the Co-Feoffees according to the Deed, and to do all other Things for him and his Feoffees which he might have done if he was personally present; and the Feoffor makes Livery to the Attorney in Name of that Feoffee and the other Co-Feoffees, to their Uses, according to the Deed; this is good to all. *2 And.* 196.

Feoffment to Corporation and another Person, there ought to be several Liveries in Respect of their several Capacities which makes them Tenants in Common. *Finch* 23. *b.*

If a Man be enfeoffed by Deed of *two Acres*, To have and to hold *three Acres*, and Livery of Seisin is made to him according to the Deed in the two Acres, the third Acre, of which there was no Speech in the Premises of the Deed, shall not pass by the Deed; but if Livery of Seisin be made in this Acre, then it shall pass by the Livery of Seisin, &c. *Perk.* §. 165.

If Livery be made to one of the Feoffees according to the Deed, it passes the Land to all; so of the Seisin of one Parcel; but the best way is to say in the Name of the Whole, or of all the Feoffees. *Co. Lit.* 48. *a.*

Where the Deed is void, Livery *secundum formam Chartæ* is also void. *Co. Lit.* 48. *b.* *Cro. Eliz.* 603. *2 Bulst.* 302. *1 Roll. Rep.* 229.

A Lease for Life is made 25th of March, *Habendum a die datus*, with Letter of Attorney in the Deed to make Livery *secundum formam Chartæ*; the Attorney makes Livery the 26th; this is not good. *2 Bulst.* 302. *2 Roll. Rep.* 229.

If a Man has a *moveable Estate* of Inheritance in thirteen Acres, Parcel of a Manor, they will pass by Name of the Manor. *Co. Lit.* 48. *b.*

If a Manor has a *moveable Estate* of Inheritance in thirteen Acres, Parcel of a Meadow of eighty, the Charter of Feoffment ought to be generally of thirteen Acres lying within the Meadow of eighty Acres, generally without bounding, or describing of it in Certainty, and Livery may be of the thirteen Acres allotted to the Feoffee for a Year, *secundum formam Chartæ*; and this is good Livery to pass the Content of thirteen Acres in what Place soever it lies. *Co. Lit.* 48. *b.*

This is to be understood if the thirteen Acres are in Gros, and not Parcel of a Manor. *Co. Lit.* 48. *b.*

If a Manor be separated and divided between two, so that the one has one Part one Year and the other Part the next Year, and so the other, and so they have moveable Freeholds; in this Case Livery ought to be made in the Manor. *Co. Lit.* 48. *b.*

But where two Manors are separated and divided *alternis vicibus*, there the Charter of Feoffment ought to be made in both, and Livery in this Manor whereof he is seised in any one Year *secundum formam Chartæ*, and the next Year in the other *secundum formam Chartæ*; for there are two distinct Manors, and several Estates in them. *Co. Lit.* 48. *b.*

If a Man makes a Charter by which he grants the Land in Fee, and delivers Seisin for Life *secundum formam Chartæ*, the Fee shall pass; for this shall be taken most strong against the Feoffor; for by the said Words, *secundum formam Chartæ*, are intended according to the Quantity and Quality of the effectual Estate in the Deed. *Co. Lit.* 48.

If a Man lease for Years by Deed, and delivers Seisin according to the Form and Effect of the Deed; yet he has but an Estate for Years, and the Livery is void. *Co. Lit.* 48. *b.*

If *A.* by Deed gives Land to *B.* to have after the Death of *A.* to *B.* and his Heirs; this is void, because he cannot create a particular Estate in himself; and if Livery be made according to the Form and Effect of the Deed, this is void, because it refers to a Deed which is void in Law. *Co. Lit.* 48. *b.* *5 Co.* 94. *b.* *11 Co.* 78. *Cro. Eliz.* 254. *Hob.* 171. *2 Roll. Abr.* 10.

If a Man covenants to make a Feoffment of Land of the Value of fifty Marks to *J. S.* and after makes Feoffment of the Land of a far greater Value, without assigning where the Land for fifty Marks shall be; this is void for the Uncertainty, and no more shall pass than the Place where the Livery was made. *2 Roll. Abr.* 10. *pl.* 4.

So in the same Case the Feoffor cannot after the Livery assign fifty Marks of Land to make so much to pass by the said Livery, inasmuch as it does not pass at first. *2 Roll. Abr.* 10. *pl.* 5.

But otherwise it would be if he had assigned where the fifty Marks Land should be before the Livery made. 2 Roll. Abr. 10. pl. 6.

So it seems it would be if he had assigned it upon the Livery made; for then the Assignment is *Uno flatu* with the Livery. 2 Roll. Abr. 10. pl. 7.

If a Man covenants to make a Feoffment of all his Land, whereof fifty Marks Value shall be to such a Use, and the other to other Use, &c. and after makes the Feoffment of all accordingly, without assigning the fifty Marks Value, he cannot after assign it. 2 Roll. Abr. 10. pl. 8.

If A. seised of one hundred Acres of Land in Fee, enfeoffs B. of eighteen of the said one hundred Acres *versus austrum*, or *versus orientem*, and makes Livery; this is good, for this is certain at the Time of the Feoffment. 2 Roll. Abr. 11.

But if A. seised of one hundred Acres of Land in Fee, enfeoffs B. of eighteen of the said one hundred Acres, *Habendum sibi & heredibus suis ad electionem ipsius B. & heredum suorum quandocunque eis placeret*, and makes Livery accordingly; this is a void Feoffment for the Uncertainty where the eighteen Acres shall be among the one hundred Acres, for the Freehold of the eighteen Acres ought to pass *absque aliquo temporis intervallo*, from the Feoffor to the Feoffee; for a Livery cannot operate *in futuro*. 2 Roll. Abr. 11.

In this Case the Feoffee died before Election, and the Judgment according to *And. 11.* seems to be grounded only upon the Election by the Heir; and *Anderson* puts a *Quere*, if the Feoffee himself might have made Election or not, and the Livery take Effect by such Election; and *Hob. 174.* cites it so, as that the Election of the Feoffee himself makes the Grant good. See *And. 11 & 12.*

If a Man makes a Charter in Fee, and makes Livery for Life *secundum formam Chartæ*, it passeth the whole Fee-simple. *Co. Lit. 48.*

If a Deed contains no Condition, but Livery does, the Land passes not by the Deed. *Lit. §. 359.*

If the Livery be *larger than the Agreement*, some hold that the Estate shall be according to the Agreement. *Co. Lit. 222. b.*

(FF) *Livery in Deed, how and to whom to be made, and when it is good.*

IF the Feoffor being upon the Land, or at the Door of the House, says to the Feoffee, *I am content that you should enjoy this Land according to the Deed; or, Enter into this House or Land, and enjoy it according to the Deed;* this is a good Livery to pass the Freehold, because in all these Cases the Charter of Feoffment makes the Limitation of the Estate, and then the Words spoken by the Feoffor on the Lands, are a sufficient *Indicium* to the People present to determine in whom the Freehold resides during the Extent of the Limitation, besides the Words being relative to the Charter of a Feoffment plainly denote an Intention to enfeoff. *Co. Lit. 48. a. 9 Co. 137. b. 6 Co. 26. 1 Roll. Abr. 7. Vide Cro. Jac. 80. which seems contra.*

If the Feoffor delivers a Charter upon the Land in the Name of *Seisin* of all the Lands comprized in the Deed; this is good to execute the Deed, and to give Livery also, because the bare Delivery of the Deed is good to execute it as a Deed, and the Delivery of the Deed, or any other Thing in the Name of *Seisin* of the Land, is sufficient to give Livery, because the Intention of those solemn Acts is only to discover to all Persons in whom the Freehold is lodged; and this End is as effectually answered by the Delivery of a Deed, or any Thing else in the Name of *Seisin*, as of a Turf or a Twig, the one being equally visible and notorious as the other. 9 Co. 137. b. 138. a. *Co. Lit. 48. a. 57. a. 2 Roll. Abr. 7. 6 Co. 26.*

A. being seised of Lands in Fee, borrowed 20 l. of B. and for Repayment agreed to assure him the Land; and thereupon they both went to the Land, where A. said to B. *I am indebted to you 20 l. and if I don't pay you before Michaelmas, then I bargain and sell this Land to you; and if I pay you then, I shall have my Land again;* and then puts B. in the Possession of the Land: This was held a good Livery, because here the Possession was actually delivered pursuant to the Agreement of assuring the Land for the Security of the Money, which Possession was to be reverted on the Payment of the Money by A. the Feoffor. *Moor, pl. 286. Cro. Eliz. 25.*

But if a Man without any Charter, being in his House, says, *I bere demise you this House as long as I live, paying 20 l. per Ann.* this passes no Freehold, but only an Estate

Estate at Will, because the Word *Demise* denotes only the Extent of the Limitation of the Estate intended to be conveyed; but bare Words of Limitation, without some Acts of Words to discover the Intention of the Feoffor to deliver over the Possession, are not sufficient to convey the Freehold; for if a Charter of Feoffment be made to a Man and his Heirs, this without some other Act or Words to give the Possession only passes an Estate at Will, because the Act of Delivery is requisite to the Perfection of the Charter; but besides the Charter of Feoffment, there must be some Act or Words to deliver over the Possession before the Feoffee can enjoy it pursuant to the Charter. 6 Co. 26. 2 Roll. Abr. 7. Co. Lit. 48. Cro. Eliz. 482. 9 Co. 138. Moor, pl. 632.

If it appears that a Man intended to make an actual Livery, this shall never amount to a Livery in Law. Dyer 28. 2 Roll. Abr. 7.

A Feoffment was made, *Habendum* to A. and B. for Life, Remainder to C. and Livery was made to all three. Resolved it was good to two for their Lives, Remainder to the third. 2 Mod. 79.

For more see before (EE).

(GG) *Livery in Law or within the View, how and to whom to be made, and when it is good.*

THIS Sort of Livery seems to be made at first only at the Court-Barons, which were antiently held *sub die* in some open Part of the Manor, from whence a general Survey or View might have been taken of the whole Manor, and the *Pares Curie* easily distinguished that Part which was then to be transferred. Pollex. 47.

But this Sort of Livery is not perfect to carry the Freehold till an actual Entry made by the Feoffee, because the Possession is not actually delivered to him, but only a Licence or Power given him by the Feoffor to take Possession of it; and therefore if either the Feoffor or Feoffee die before an Entry made by the Feoffee, the Livery within the View becomes ineffectual and void; for if the Feoffor dies before Entry, the Feoffee cannot afterwards enter, because then the Land immediately descends upon his Heir, and consequently no Person can take Possession of his Land without an Authority delegated from him who is the Proprietor; nor can the Heir of the Feoffee enter, because he is not the Person to whom the Feoffor intended to convey his Land, nor had he an Authority from the Feoffor to take the Possession; besides if the Heir of the Feoffee were admitted to take Possession after his Father's Death, he would come in as a Purchaser, whereas he was mentioned in the Feoffment to take as the Representative of his Ancestor, which he cannot do since the Estate was never vested in his Ancestor. Co. Lit. 48. b. 2 Roll. Abr. 3. 7. 1 Vent. 86. Moor 85. Pollex. 48.

If the Feoffee dares not enter into the Land without Peril of his Life, he may claim the Land as near as he may safely venture to go, and this shall be sufficient to vest the Possession in him, and render the Livery within View perfect and complete, for No-body is obliged to expose his Life for the Security of his Property; but when he is gone as far as he may with Safety, the Law very reasonably looks upon such Intention to be as effectual as the Act itself; for otherwise it might be in the Power of a Man, by his own Act of Violence, to deprive another of his Right, and thereby to receive an Advantage from an unlawful Act. 2 Roll. Abr. 3. Co. Lit. 48. b.

If a Man be disseised and he dares not enter the Land, he may go as near it as he dares for fear of Death, and make his *continual Claim*, and then make Livery of it within the View; for this Claim settles the actual Possession in him. 38 Aff. 23. 2 Roll. Abr. 6.

A Corporation cannot execute a Feoffment by Livery within View. Dyer 233. pl. 11.

If a Man makes a Deed of Feoffment with a Letter of Attorney to J. S. to make Livery, the Attorney cannot make Livery within View, for his Warrant is to be intended of an actual Livery, and not of a Livery in Law. Co. Lit. 52. b.

If the Feoffor, Donor, &c. delivers the Deed in Sight or View of the Land, and use these or any such like Words: *I will that you shall enter into the Land, and have it according to the Deed*; or, *Take and enjoy the Land according to the Deed*; or, *I deliver you this Deed in the Name of Seisin*; or, *Enter you into the Land and take Seisin of it*; or, *Take the Land, and God give you Joy of it*: Or if the Estate be made without Deed,

Deed, *I give you yonder Land to you and your Heirs, and go and enter into the same, and take Possession thereof accordingly; or, Enter into the Land and enjoy it in Fee-simple to you and your Heirs, or for your Life, &c.* In all these Cases the Estate and the Livery is good altho' the Feoffor, &c. stand in one County, and the Land in View be in another County. 9 Co. 137. 6 Co. 26. Co. Lit. 25, 348.

If a Man delivers a Charter of Feoffment to his Feoffee within View, and says, *I will that you have the Lands that you see there, the which are comprized in this Charter, according to the Purport of the Charter*; this is a good Livery within View; for the Charter of Feoffment fully denotes the Intention to enfeoff, and the Words are a Licence to the Feoffee to enter into the Land, and to take the Possession thereof, according to the Charter.

But if the Feoffor had only delivered the Charter of Feoffment within View, and only shewed the Feoffee the Lands *without saying any Thing*, tho' the Feoffee had actually entred into the Land, and the Feoffor had afterwards agreed to the Entry; yet this is no good Feoffment, because the bare shewing of the Lands to the Feoffee implies no Authority or Licence from the Feoffor to take Possession, and consequently the Entry being without any Authority cannot vest the Freehold in him, because there was no solemn Act nor publick Declaration made by the Feoffor, by which the Pares might discover a real Intention to change the Possession, and the subsequent Agreement of the Feoffor can never support an Act which was originally void; for tho' the Feoffee, after the Delivery of the Charter, might take the usufructuary Possession as Tenant at Will, yet the Freehold still continued in the Feoffor, for that cannot pass from one to another without some solemn or publick Declaration that the Pares may upon any Dispute determine in whom the Freehold resides. 2 Roll. Abr. 7. 2 Co. 55. b.

But in all these Cases of Livery within the View, it must be made,

1. By the Person himself that makes the Estate, for it cannot be made by his Attorney. *Terms de la Ley.* Co. Lit. 48. Dyer 18.

2. There must be a Relation to the Land; for if the Feoffor delivers the Deed only to the Feoffee in Sight of the Land, this is not a good Livery within the View. 11 H. 8. 16.

3. The Parties must stand within View of the Land, for if the Feoffor, &c. being out of Sight of the Land, says to the Feoffee, &c. *Go enter and take Seisin of the Land, and God send you Joy of it*; this is no good Livery of Seisin. Co. Lit. 48.

4. There must be Somebody capable of a Freehold to take by the Livery, for if it be made to a Lessee for Years, the Remainder to the right Heirs of J. S. and J. S. is then living, it is void.

5. The Feoffee must enter presently, for if either the Feoffor, Donor, &c. or Feoffee, Donee, &c. dies before Entry, the Livery cannot be made good; and yet if the Party dares not enter for fear, in this Case if he claims it only, and do not enter, it is sufficient. 1 Co. 156. Perk. §. 214. Fitz. Facts 47.

A Man delivers a Charter of Feoffment, and says to the Feoffee, *God give you Joy of it*; this is a good Feoffment; yet no Livery was made, and it does not appear that it was within View. 41 E. 3. 17. b. 2 Roll. Abr. 7.

But it seems it is to be intended that it is a Livery within the View, but it appears there that the Feoffor was not upon the Land. 41 Aff. 10. Co. Lit. 48. a. 2 Roll. Abr. 7.

If a Man within View of the Land delivers a Charter of Feoffment of it to the Feoffee, and saith, *I will that you have the Tenements which you see there, the which are comprized in this Charter according to the Purport of the Charter*, and shews the Land; this is a good Livery within the View. 38 E. 3. 11. b. 12. 38 Aff. 2. Co. Lit. 48.

A Man makes a Charter of Feoffment, and within View of his Lands says to the Party, *See you the Land, enter into and enjoy it according to the Effect of this Charter*, and the Feoffee enters; this amounts to a good Livery and Seisin of the Land. But otherwise it would be if he had been out of the View of the Land at the Speaking of the Words. 18 H. 6. 16. b. 9 Co. 137. Co. Lit. 48.

If a Man makes Livery within View to a Woman, and before she enters the Feoffor marries her, and afterwards never claims any Thing but in Right of his Wife; this is a good Execution of the Livery, for the Husband claiming the Land in Right of his Wife, shall be sufficient to reduce the Lands actually in her Possession, since he is the proper Person to transact for her; and therefore shall be presumed to have

have parted with and delivered up the Possession to her, since after the Coverture he claimed the Land only in her Right. *Perk. §. 214. 2 Roll. Abr. 3. Bro. Feoffment 57. 1 Vent. 186. Pollex. 53.*

So where two Women were Jointenants in Fee, and one of them made a Feoffment to a Man, and Livery within View, by saying, *Go, enter and take Possession*; and before the Man entred he married the Feoffor; his Entry after the Marriage was a good Execution of the Livery, because by the Livery within View an Interest passed to the Feoffee, which was not revocable by the Feme, and his Entry after the Coverture makes the utmost Notoriety the Thing is capable of to discover in whom the Freehold is lodged, and his Entry shall be intended for his Benefit, and therefore shall have a Retrospect to the Livery in View to make it a perfect Feoffment. *1 Mod. 91. 2 Keb. 872, 880. 1 Vent. 186. Pollex. 45 to 53.*

If a Man lying Sick upon certain Land of which he is seised in Fee, and agrees to make a Feoffment of the Land to another, and says to him, that *he vouchsafes that he shall take Seisin immediately, and commands all his Servants that they take the Feoffee as their Lord and Master*; this is good Livery within the View. *43 Aff. 20. 2 Roll. Abr. 7.*

In Affise it was found by Verdict that *A.* was seised in Fee, and made a Deed of Feoffment to *M.* and her Heirs; and before Livery *A.* marries *M.* and at the Church-Door, *extra terram*, shewed her the Land, which was in another County, and delivered her the Deed, and said that he would that she shall have the Land *secundum formam Chartæ*, and were married, and after they entred; and the Baron in the Lifetime of *M.* his Wife claimed nothing but in Right of *M.* his Wife, and *M.* died; and after the Baron devised the Land to *J. S.* in Fee, and died; and the Issue of *M.* brought Affise against the Devisee; and upon this Matter he recovered by Judgment, for the shewing of the Land and their Entry was taken instead of a Livery, and the Baron in his Life did not disagree to it, and the Devise was not taken for a Disagreement; and it is said in the Time of *H. 8.* that express Mention shall be made in the Pleading, that the Land was within the View. *Bro. Feoffment de terres, pl. 11, 57.*

Tho' the Livery be made within View, yet the Lease shall be pleaded to be made where the Land is; for it is no Livery nor Lease till the Entry of Lessee. *Dyer 233.*

If a Man delivers a Deed of Feoffment to the Feoffee within the View, and shews the Land to him without saying any more, and the Feoffee enters, and Feoffor agrees to this Entry; yet it seems that it is not a good Feoffment. *Contra 38 E. 3. 12. 2 Roll. Abr. 7.*

The Livery within View may be made of Lands in another County than where the Lands lie, because the Translation of the Feud was often made at the Court-Baron in the Presence of *Pares Curie*; and these Courts being held *sub die*, the *Pares* could have a distinct View of every Part of the Manor, and therefore were proper to attest this Sort of Investiture tho' the Lands were in a different County, for notwithstanding that they might have Part of the same Manor for which the Court was held. *Co. Lit. 48. b.*

When Livery is made within the View, if the Feoffor or Feoffee dies before Entry of the Feoffee, it is void. *Co. Lit. 48. b.*

See before (EE).

A Feoffment was made of a House and Land which was within the View of the House, and no Livery made, but only the Deed of Feoffment delivered as his Deed in the House; and this was adjudged no Livery for the Land, nor for the House, without mentioning that he should take the House. *Moor 458. pl. 632. 9 Co. 137. b.*

If *A.* makes a Lease for Years to *B.* the Remainder to *C.* in Fee, and makes Livery to *B.* within the View; this Livery is void, for none can take by Force of a Livery within the View but he who takes the Freehold himself. *Co. Lit. 49. b.*

Two Femes *A.* and *B.* were Jointenants in Fee; *A.* made a Charter of Feoffment to *J. S.* and Livery within View, and bid him enter, and after, before it was executed, married him. This Livery was well executed after Marriage, for an Interest passed by the Livery within View, which cannot be countermanded. *1 Vent. 186.*

(HH) *What shall be said an Execution of the Livery.*

IF a Man made and delivered a Deed of Feoffment to a Feme at the Door of a Monastery, and made Livery to her within the View, and after married her, and afterwards they both went from the House to the same Land, and the Baron never after claimed any Thing in the Land but in Right of the Feme: This was adjudged an Execution of the Livery, for by this he agreed to the Entry of the Feme, or his Entry should be an Entry for the Feme. 2 Roll. Abr. 3.

If a Man makes a Deed of Feoffment, and makes Livery within the View, and the Feoffee dares not enter for the Fear of Death, but claims it; this shall be good Execution of the Livery, and shall vest the Freehold in him. Co. Lit. 48. b.

If a Deed of Feoffment be delivered, and Livery within the View made, yet it is not a good Feoffment if the Feoffee does not enter into the Land; for it is not executed before Entry. 38 E. 3. 11. b. admitted. 38 Aff. 2. Co. Lit. 48. b. 2 Roll. Abr. 3.

(II) *In what Cases several Parcels will pass by one Livery, or where several Parties may take by a Livery to one.*

IT seems that antiently the Feoffment and giving Livery was performed before the Pares of the Manor where the Lands lay, but this being found too much to streighten the transferring the Possession, it was found necessary to admit the Testimony of Strangers; and this came afterwards to be established for the Conveniency of it, and because all Men of the County assembled at the County-Court in order to determine Disputes relating to the whole County, as the Tenants of the Manor did at their Court-Baron; and because there lay an Appeal from the Court-Baron to the County-Court, so that the Pares of the County were thereby ultimately to determine all Things relating to the particular Manors, it seemed the more reasonable to admit the Pares Comitatus to attest the Investiture thro' any particular Manor, and indifferently thro' the whole County; and from hence it came to be admitted, and so the law continues, that if a Man seised of Lands in several Villages in one County makes a Feoffment of the Whole, and gives Seisin of Parcel of the Lands in one Town in the Name of all the Lands in that Town, and in the other Towns, that all the Lands of the Feoffor lying in that County shall pass, as well as if there had been Livery given in each Town. Co. Lit. 253. a. 2 Roll. Abr. 11.

But if a Man having Lands in two Counties makes a Feoffment of both, and gives Livery of the Land in one County in the Name of all, the Land in the other County shall not pass, because there was no Relation or Dependance between one County and another, as there was between the several Manors and County-Court; for one County having no Power or Jurisdiction over another, the Pares of one were reasonably presumed to be ignorant of what was transacted in the other; and therefore the Investiture, which passed the Land in one County, was ineffectual to carry the Lands in the other, because that Investiture could be only a Notoriety to the Pares of the other County by any Solemnity of the Transferring of the Possession, the Possession must reside where it was placed by the last Investiture. Perk. §. 227. 2 Roll. Abr. 11.

But if a Manor extends into two Counties, and a Feoffment be made of the whole Manor, and Livery only in the Part lying in one County in the Name of the whole Manor, yet the whole Manor shall pass, because the Investiture is a Notoriety equally to all the Pares of that Manor of the Transmutation of the Possession; and tho' they live in different Counties, yet they reside *in eodem territorio ab eodem feudum habentes*, and therefore are presumed to be consant of every Thing done within the Territory or Manor to which they belong. Perk. §. 229.

But if the Manor of Dale extends into the Counties of D. and S. and a Feoffment be made of the Manor of Dale in D. and Livery and Seisin in D. nothing passes by this Livery but that Part of the Manor which lies in D. because the Feoffment being confined to the Manor of Dale in D. nothing can pass that doth not lie in the County of D. Perk. §. 228.

If

If a Feoffment be made to *A.* and *B.* by Deed, and Livery is made to *A.* in the Absence of *B.* in the Name of both, the Livery is good to pass the Estate to both; but if the Feoffment had been made without Deed, and the Livery given to one in the Name of both, it should operate to him only, because the Parties are united in a Deed, they all take as one; therefore Livery to one in the Name of the Rest, is an actual Delivery to them all, but without a Deed they are not so united; and therefore the Delivery to one in the Name of several, is no actual Delivery to the Rest, but the whole Estate must reside in him to whom it is delivered, and a subsequent Assent cannot take it out of him, such Assent being not so solemn as the Feoffment; besides in the Case of the Feoffment by Deed, *A.* may be looked upon as the Attorney of *B.* to receive Livery, and therefore the Estate shall immediately vest in *B.* because every Man is presumed to a Grant to his Advantage; but the Feoffment without Deed will admit of no such Construction, because no Man can receive Livery as Attorney to another without an Appointment. *Co. Lit.* 49, 359. 2 *Vent.* 202, 205. 5 *Co.* 95. 2 *Roll. Abr.* 9. 2 *Leo.* 23.

(KK) *Of making Livery of Seisin by Letter of Attorney (in general).*

IN the making of this Livery Care must be had,

1. That there be a Deed of Feoffment, for otherwise a Letter of Attorney to deliver Possession availeth nothing.

2. That there be a good Authority in Writing, which may be either in the Deed of Feoffment itself, whether it be Poll or indented, and that altho' the Attorney be not Party to it, or else by a single Deed besides the Feoffment, &c.

3. That the Attorney do pursue his Authority, at least in the Substance and Effect of it.

4. That the Attorney do it in the Name of the Feoffor, Donor, &c. who doth give the Authority.

5. That it be done in the Life-time of the Parties.

But a Livery in Law may not be made by an Attorney.

And therefore if a Letter of Attorney be to deliver Seisin generally, and the Attorney by Virtue thereof delivers Seisin in View, the Livery of Seisin is void. *Shep. Touch.* 217.

(LL) *By whom and to whom Livery may be made.*

A Feoffment may be made by Attorney. 11 *H. 4.* 71. 26 *Aff.* 39. 2 *Roll. Abr.* 8. *Dalif.* 95. pl. 23.

So it may be received by Attorney. 11 *H. 4.* 71. 2 *Roll. Abr.* 8.

A Stranger cannot make Feoffment of my Land by my Assent, for it is not my Feoffment. 40 *Aff.* 38. 2 *Roll. Abr.* 8.

Livery of Seisin in Deed may be made or taken by the Deputies or Attornies of the Parties, and Livery by them is as good as Livery made by the Parties themselves, altho' the Parties themselves be upon the Land at the Time of the making thereof, if they do not contradict it. *Shep. Touch.* 217.

A Man may either give or receive Livery by his Attorney; for since a Contract is no more than the Consent of a Man's Mind to a Thing, where that Consent or Concurrence appears, it were most unreasonable to oblige each Person to be present at the Execution of the Contract, since it may as well be formed by any other Person delegated for that Purpose by the Parties to the Contract. *Co. Lit.* 52. 2 *Roll. Abr.* 8.

If a Charter of Feoffment be made by Deed indented between *A.* and *B.* with Letter of Attorney to *C.* to make Livery; tho' *C.* be not a Party to the Deed, yet the Warrant of Attorney is good, and the Estate shall pass by this Livery. *Co. Lit.* 52. b. 2 *Roll. Abr.* 8, 9.

One Attorney cannot make Letter of Attorney to another to make Livery. 18 *E. 4.* 12. b. 19 *H. 8.* 10. 2 *Roll. Abr.* 9.

(MM) *Who*

(MM) *Who may make Livery of Seisin by Attorney.*

IF an *Infant* makes Livery by *Attorney*, it is void; *contra* if he makes Livery in proper *Person*, for there it is only voidable. *Bro. Feoffment de terres*, pl. 48.

It seems that a *Man dumb*, who has Reason to perceive by Signs, may make a Feoffment with Livery by Attorney. *Bro. Feoffment*, pl. 26.

A *Disseisee* may make a Feoffment; but when he makes a Letter of Attorney to one to make Livery, where he himself has no Estate, it is not good; for he has neither *jus in re*, nor *ad rem*. 2 Bulst. 305.

A *Tenant for Life* with Power to make Leases cannot make Livery by his Attorney; nor *Executors* who have Power to sell; but where they have Interest they may. 2 Roll. Rep. 393. 9 Co. 77.

If *Cestuy que Use* having Power to make a Feoffment, he may make Livery by Attorney. 2 Roll. Rep. 394.

A *Cestuy que Use* may make Livery by himself but not by Attorney, for that the Statute is taken strictly. *Bro. Feoffment at Uses*, pl. 28.

But *Brook* makes a *Quære*; for he says it was held otherwise at that Day.

If an *Infant*, or *Woman Covert*, makes a Feoffment and Letter of Attorney to make Livery, and the Attorney do so; this is void, for they are not able to give such an Authority. *Infant, Feme Covert.*

And if a *Man* whilst he is of sound Memory makes a Feoffment with a Letter of *Sane Memory* to give Livery, and after he becomes Paralytick, and so dumb, but by Signs he doth declare himself to be willing to have Livery of Seisin made, and it is made; this is a good Livery of Seisin.

But if a Letter of Attorney be made to deliver Seisin of certain Land by one that is *De non sane memorie*, and the Deed of Feoffment was made while he was of sound Memory, and afterwards he doth come to his Memory again, and then the Livery is made upon the first Warrant without any new Assent, &c. in this Case the Livery is not good. *Bro. Feoffment* 25. *Perk.* §. 23.

(NN) *Who may be an Attorney to make Livery of Seisin.*

THERE are but few Persons that are disabled to be private Attornies to make Livery of Seisin; for *Infants*, *Feme Coverts*, *Persons attainted*, *excommunicated*, *Aliens*, &c. may be; and a *Feme* may be Attorney to deliver Seisin to the Husband, and the Husband to the Wife, and he in Remainder to Lessee for Life. *Co. Lit.* 52.

If a *Man* seised of Land in the Right of his Wife, lease the same Land for Life reserving Rent, and makes a Letter of Attorney unto the Wife to make Livery of Seisin, and she makes Livery of Seisin accordingly, and the Husband dies, and the Wife accepts the Rent, yet she shall have *Cui in vita*; for this Acceptance cannot make the Lease good, inasmuch as she is a Stranger unto the Lessee; for the Lessee took nothing by the Wife notwithstanding that she made Livery of Seisin, for she made that but as Servant unto her Husband. *Perk.* §. 199.

A *Feme Covert* may be an Attorney to deliver Seisin to her Husband, and so may he in Remainder be an Attorney to make Livery to the Tenant for Life. *Co. Lit.* 52. a. *Perk.* §. 198.

If Lessee for Life makes a Deed of Feoffment and Letter of Attorney to his Lessor to deliver Seisin, if the Lessor makes Livery accordingly, it is a good Feoffment, but the Lessor notwithstanding he gave Livery himself may enter for the Forfeiture of the Tenant for Life, because the Freehold being in the Tenant for Life, the Lessor was only his Representative to transfer it; but if the Tenant had been only Lessee for Years, and the Lessor had made Livery, that had been no Forfeiture of the Term, because the Freehold being only in the Lessor, he could not be the Representative of the Termor to convey what the Termor had not; and therefore the Freehold which passed by the Livery must proceed from the Lessor himself, and consequently shall bind him. *Co. Lit.* 52. *Perk.* §. 200.

If a Letter of Attorney be made to Lessee to make Livery, and he makes it accordingly; yet this does not determine his Interest in the Land, for what he does is as Officer or Servant to the Lessor. 1 Leon. 192.

If *A.* makes a Lease for Years to *B.* and after makes a Deed of Feoffment with Letter of Attorney to *B.* to deliver Seisin, and *B.* makes Livery accordingly; this shall not extinguish or effect his Term, because the Livery was made to pass the Freehold, and that he did as Representative to the Lessor; and therefore since the Feoffee can claim nothing from the Lessee, the Interest of the Lessee remains as it was unaffected by the Feoffment. *Co. Lit. 52.*

(OO) *Livery to be by Deed.*

A Letter of Attorney to give or receive Livery must be by Deed and not by Parol, that it may appear to the Court that the Attorney had a Commission to represent the Parties that are to give or take Livery, and whether the Authority was pursued. *Co. Lit. 48. b. 52. a. 2 Roll. Abr. 8.*

For if the Letter of Attorney be to make Livery upon Condition, as to make a Feoffment conditional, and the Attorney delivers Seisin absolutely, the Livery is not good, because the Attorney had no Authority to create an absolute Fee-simple, and therefore such absolute Feoffment shall not bind the Feoffor, because he gave no such Authority; and hence in some Things the Attorney is called a Disseisor. *11 H. 4. 3. 2 Roll. Abr. 90. Co. Lit. 258. Perk. §. 188.*

But if the Letter of Attorney had been to make Livery absolutely, and the Attorney had made it upon Condition; this seems a good Execution of his Power, and the Feoffment good, because when the Attorney had once delivered Possession, he fully executed his Power, and the Condition annexed to it being without Authority, is void, and therefore shall not destroy the Operation of the Livery. *26 Aff. 39. 2 Roll. Abr. 8. Co. Lit. 258. Perk. §. 192.*

An Attorney of the Feoffee by Parol, without Letter of Attorney by Deed made to him, cannot take Livery. *Co. Lit. 48. b.*

If a Lease for Years be made to *A.* by Deed, or without Deed, the Remainder in Fee to *B.* and Livery is made to *A.* this is good tho' he be but an Attorney to take Livery for him in Remainder, for this enures only to him in Remainder. *Lit. §. 8, 60. Co. Lit. 49. b.*

(PP) *When Livery must be made.*

A Letter of Attorney to make Livery must be executed during the Life of the Person that gives it, because the Letter of Attorney is to constitute the Attorney my Representative for such a Purpose, and therefore can continue in Force only during the Life of me that am to be represented; and hence it is that if *J. S.* make a Letter of Attorney to deliver Seisin after my Death, it is void, because he cannot deliver Seisin during my Life, for that were plainly without any Authority from me; nor can he do it after my Death, for the former Reason. *2 Roll. Abr. 9. Co. Lit. 52. Perk. §. 188.*

This Authority to give Livery may be delegated by Deed indented tho' the Attorney be not Party to the Deed, because the Attorney takes nothing by the Deed, but has only a naked Authority delegated to him; and therefore since a Man may take an Estate in Remainder tho' he is not Party to the Deed, *a fortiori* one not Party to the Deed may receive a naked Authority or Power by it. *2 Roll. Abr. 8, 9. & vide Co. Lit. 52.*

But if any Corporation Aggregate, as a Mayor and Commonalty, or Dean and Chapter, make a Feoffment and Letter of Attorney to deliver Seisin; this Authority does not determine by the Death of the Mayor or Dean, but the Attorney may well execute the Power after their Death, because the Letter of Attorney is an Authority from the Body Aggregate, which subsists after the Death of the Mayor or Dean, and therefore may be represented by their Attorney; but if the Dean or Mayor be named by their own private Names, and die before Livery, or be removed, Livery after seems not good. *14 H. 8. 3. 11 H. 7. 19. Co. Lit. 52. b. 2 Roll. Abr. 12.*

If a Man makes a Deed of Lease for Lives rendring Rent, payable at four Quarters of the Year, with Letter of Attorney to *J. S.* to make Livery; *J. S.* may make Livery after three of the Quarters past well enough; for the Lessor in the mean Time continuing in Possession, has not any Prejudice. *2 Roll. Abr. 9.*

If *A.* be disseised of Land, and after makes a Charter of Feoffment to *B.* with Letter of Attorney to make Livery, who doth it accordingly; this is a good Feoffment tho' he was out of Possession at the Time of the Charter made, for the Authority given by the Letter of Attorney was executory, and nothing passed by Delivery of the Deed till Livery made. *Co. Lit.* 48. *b.*

If a Mayor and Commonalty generally, without naming the proper Name of the Mayor, make a Feoffment, and Letter of Attorney to make Livery, and the Mayor dies, and another Mayor is elected, and after that the Attorney makes Livery; this is good enough. *Bro. Corporations*, pl. 34.

A Lease was made for twenty-one Years, wherein was a Covenant, that after the Expiration of the said twenty-one Years the said Lessees shall enjoy for Term of their Lives. To make this a Remainder for three Lives, the Delivery of the Deed and the Livery of Seisin must be at the same Time; but if the Lessor first delivers the Deed, and the Attorney delivers Seisin after, the Livery is void, for by this Livery it cannot pass as a Remainder. *1 And.* 8.

If a Feoffment be made on Condition to re-enseoff Baron and Feme and the Heirs of their Bodies. The Feoffee makes a Gift in Tail accordingly, and Letter of Attorney to make Livery; before Livery executed the Baron dies; yet the Attorney may make Livery to the Widow, and she shall take in Tail according to the Gift. *Moor* 280.

A Demise was to *A.* for Life, *To hold from the Day of the Indenture aforesaid.* The Jury found that he demised the 10th of June 44 *Eliz.* by Indenture of the same Date: It is a Demise at that Time, and the Livery not being made by the Attorney till the 23d of July, was void. *Popham Ch. Just.* If the Deed had been delivered after the Day of the Date, and then Livery had been made by Attorney, it had been well enough, and had been so adjudged. *Cro. Jac.* 153.

A Lease for Life was made to commence at *Michaelmas*, and the Lessor made Livery after *Michaelmas*; this was a good Livery. So if he made a Letter of Attorney to make Livery after *Michaelmas*. But if he made a Letter of Attorney to make Livery generally, and the Attorney makes Livery after *Michaelmas*; this is a Disseisin to the Lessor. *2 Roll. Rep.* 366. And if Lessor or Attorney had made Livery before *Michaelmas*, it had been void. *2 Roll. Rep.* 109.

A Feoffment was made *Habendum* after *Michaelmas*, and the Attorney made Livery after *Michaelmas*; yet it was held void. Cited *per Popham, Cro. Eliz.* 585.

The Difference is where the Livery is made by the Lessor in Person, and where by Letter of Attorney, being in the same Charter generally made; but if the Letter of Attorney be to make Livery after *Michaelmas*, then in both Cases it is good enough; for there is no Intention that the Livery should operate futurely, but that Livery shall be made when it should operate, and the Estate should be good presently. *Cro. Jac.* 563.

(QQ) *In what Place Livery by Attorney may be made.*

AN Attorney cannot make Livery within View, because such Livery is made by Signs or Words instead of the Act of Delivery; besides the Power of the Attorney is to deliver the Possession, but that Power is not executed by the Livery in View, because the Possession is not in the Feoffee till actual Entry made by him, and consequently the Attorney has not executed his Authority. *Co. Lit.* 52. *2 Roll. Abr.* 9.

(RR) *How Livery must be made.*

IF the Land be in Lease, if the Letter of Attorney be made, the better way is to add this Clause, *Ac omnes alios inde expellendi*; otherwise it is a Question if he may enter upon the Lessee. *Dyer* 131, 71. *2 Roll. Abr.* 8.

But if it has not this Clause, it seems he may enter and make Livery. *Dyer* 71, 340, 49. *Co. Lit.* 52. *b.*

If a Man makes twenty several Deeds of Feoffment of one Acre of Land, all agreeing in Substance, and delivers Seisin upon all, it is good. *Bro. Feoffment de terres*, pl. 12.

If

If the Letter of Attorney be to deliver Seisin upon Condition, and he delivers it without Condition; this is not good, but he is a Disseisor. 11 H. 4. 3. 2 Roll. Abr. 9.

That which for the most part as to the Manner and Order of making it, is a good Livery of Seisin if it be made and taken by the Parties themselves, is good being made and taken by their Attornies or Deputies that have a good Authority, and do well pursue it; and therefore if the Conveyance be made of divers Lands, and they lie in one County, and a Warrant of Attorney is made to give Livery generally, and the Attorney makes it in one Part of the Land in the Name of all the Rest; this is a good Livery. *Et sic de similibus.* Dyer 283.

(SS) *Livery to one in the Absence of the other Feoffee, or to more Persons than is requisite.*

IF a Lease be made to *A.* and *B.* for Years without Deed, the Remainder in Fee to *C.* and Livery is made to *A.* in the Absence of *B.* in the Name of both; this is good Livery to vest the Remainder in *C.* *Co. Lit. 49. b.*

If a Letter of Attorney be made to two jointly, to make or take Livery of Seisin, and one of them alone doth it without the other; this is a void Livery.

But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it. *Co. Lit. 49.*

And so in all such like Cases where the Attorney does less than the Authority and Commandment, all that he does is void.

But for the most part where the Attorney does that which he is authorized to do, and more also, it is good for so much as is warranted, and void for the Rest. *Co. Lit. 52, 258. Perk. §. 187, 188, 189.*

And altho' Livery of Seisin cannot be made to one in Name of him and of another who is absent, by which any Estate of Freehold shall pass to him who is absent without Deed, because his Estate is only to commence by the Livery; yet when a Lease is made to two for Years without Deed, the Remainder for Life, the Lessees immediately have an Interest in the Land before any Livery made; and therefore Livery made to one who has Interest in the Name of him and the other, suffices to this Purpose. 5 *Co. 95. a.*

If a Lease for Years be made to *A.* and *B.* Remainder to *C.* for Life, a Diversity was taken by some between two Joint-Attornies, who have express Authority to take Livery and Seisin by Deed, and two Joint-Lessees, who have Power to receive Livery for the Benefit of another by Warrant in Law; for Livery made to one Attorney in Name of both, is not good; for he does not pursue his express Warrant, because he had no Warrant for himself only, they both making but one Attorney. But in Case of two Joint-Lessees, the Livery made to one Lessee in Name of both, is good; for they had an Interest in the Land before their Entry, and the Livery made to one in the Name of both makes an actual Possession in both, which is sufficient to support the Remainder to *C.* And in the one Case the Livery is made to the Lessees who have Interest, and in the other to him who made the Warrant of Attorney by his Attornies, who have but a bare Authority. 5 *Co. 94. b. 95. a. Co. Lit. 49. b.*

If *A.* makes a Deed of Feoffment to *B.* and *C.* with Letter of Attorney to make Livery, and he makes Livery to *B.* in the Absence of *C.* in the Name of both, it is good. *Co. Lit. 52.*

If a Man makes Letter of Attorney to make Livery to *W.* or to *S.* and he makes Livery to either of them, it is good. But if he makes Livery to both, it is void; for it is contrary to his Warrant: And hence it seems that the Feoffment is good by the Livery by the Letter of Attorney without Deed of the Feoffment. *Bro. Feoffment de terres, pl. 83.*

If a Man be disseised of *Blackacre* and *Whiteacre*, and a Warrant of Attorney is made to one to enter into both these Acres, and to make Livery, and the Attorney enters into one Acre only, and makes Livery of Seisin there *secundum formam Chartae*; the Livery of Seisin is void for all, for in this Case he does less than his Authority.

If a Letter of Attorney be to give Livery of Seisin to *J. S.* and the Attorney gives it to *J. S.* and *W. S.* this Livery is good to *J. S.* and void to *W. S.*

If a Warrant of Attorney be given to make Livery to one, and the Attorney makes Livery to two, or if the Attorney had Authority to make Livery of *Blackacre* and *Whiteacre*, and he made Livery of *Blackacre* and *Whiteacre*, tho' the Attorney has

has in these Cases done more, yet there is no Reason that should vitiate what he has done pursuant to his Power, since what he did beyond it is a perfect Nullity, and void. *Perk. §. 189.*

But if the Attorney were to deliver Seisin to two, and he made Livery only to one; that had been void, because he had no Authority to deliver the whole Possession to one exclusive of the other, and therefore it is void for the Whole. *Perk. §. 188.*

If a Letter of Attorney be given to two jointly to take Livery, and the Feoffor makes Livery to one in the Absence of the other in the Name of both; this is void, because they being appointed jointly to receive Livery, are considered but as one. *Co. Lit. 49. 2 Roll. Abr. 8.*

But if a Feoffment be made to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seisin, and *J. S.* gives Livery to *A.* in the Absence of *B.* in the Name of both; this is a good Livery, for tho' the intire Possession be delivered to one only, yet they be Jointenants by the Deed of Feoffment, such Livery to one makes no Alteration or Change in the Possession, because if the Livery had been made to both, each had been placed in the Possession; besides that every Man be presumed to accept a Gift for his Advantage, *A.* is looked upon as the Attorney of *B.* to receive the Possession for him; and therefore the Livery to *A.* enures to the Benefit of *B.* till he disagrees to it. *Co. Lit. 49. 2 Roll. Abr. 8.*

But if a Letter of Attorney be made to three *Conjunctim & Divisim*, and two only make Livery; this is not good, because not pursuant to their Authority; for the Delegation was to them all three, or to each of them separately; yet if the third was present at the Time of the Livery made by two, tho' he did not actually join with them in the Act of Livery, yet the Livery is good, because when they all three are upon the Land for that Purpose, and two make Livery in the Presence of the third, there is his Concurrence to the Act tho' he did not join in it actually, since he did not dissent to it. *Dyer 62. 1 Roll. Abr. 32. b.*

If a Letter of Attorney be given to *A.* to make Livery of Lands already in Lease, the Attorney may enter upon the Lessee in order to make Livery, because while the Lessee continues in Possession, the Attorney cannot deliver Seisin of it; and therefore to execute the Power given him by the Letter of Attorney, it is necessary he should have a Power to enter upon the Lessee. But by *Rolle*, It is the safer way to insert a Clause in the Letter of Attorney, for the Attorney to enter *& omnes alios inde expellend.* *Co. Lit. 52. b. Poph. 103. Dyer 131. a. 340. a. 2 Roll. Abr. 9.*

(TT) *Delivery of Seisin of Part in the Name of the Whole, or of more than the Authority extends to.*

IF a Man be seised of *Blackacre* and *Whiteacre*, and he makes a Deed of Feoffment of both, and a Letter of Attorney to enter into both these Acres, and to deliver Seisin of both of them according to the Form and Effect of the Deed, and he enters into *Blackacre*, and delivers Seisin *secundum formam Chartæ*; this Livery of Seisin is good altho' he does not enter into both the Acres, nor into one Acre in the Name of both; for when he delivers Seisin of one *secundum formam Chartæ*, this is Tantamount, and implies a Livery of both. *Co. Lit. 2. a.*

And if the Feoffment be made to two or more, and the Warrant of Attorney is to make Livery to them both, and the Attorney makes Livery of Seisin to one of the Feoffees *secundum formam & effectum Chartæ*; this is good to both, and yet he that is absent may waive the Livery. *Co. Lit. 52. a.*

If a Letter of Attorney be to give Livery of Seisin of *Whiteacre* only, and he makes Livery of *Whiteacre* and *Blackacre* also; this Livery is good for *Whiteacre*, and void for *Blackacre*.

In Ejectment it was held by Chief Baron *Hale*, and the Court, That where a Letter of Attorney is made to enter into any Part of the Lands in the Name of the Whole, and to make Livery, that the Attorney may enter into any Part accordingly, tho' in the Possession of several Tenants, and make Livery of the several Tenements severally. *Hardres 314.*

(UU) *Where Livery is void on Account of the Letter of Attorney being bad.*

IF Letter of Attorney to receive Livery on a Feoffment misrecites the Feoffment, the Livery is void. *Cro. Eliz. 603. 2 Roll. Rep. 274.*

(VV) *What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin.*

IF a Man makes a Deed of Feoffment with a Letter of Attorney to make Livery, he may revoke it before Execution of the Livery. 34 H. 6. 14. 2 Roll. Abr. 11. 5 Co. 90. b.

If a Man makes Charter of Feoffment with Letter of Attorney to deliver Seisin, and before Livery made, by Malady he becomes *Paralytick*, so that he is mute at the Time of making Livery, but by all Signs which a Man could perceive he agreed to the Delivery of the Seisin; this is a good Feoffment, and no Revocation of the Letter of Attorney. 25 Aff. 4. 2 Roll. Abr. 11.

If there be a Letter of Attorney to deliver Seisin, and before Seisin delivered by Virtue thereof, the Feoffor gives Authority *Ore tenus* to the Attorney to make Livery, he may give Seisin by Virtue of the Authority *Ore tenus* notwithstanding the Letter of Attorney; but then (as in Case the Letter of Attorney was in any wise defective) the Attorney must swear he did it by Virtue of the Authority *Ore tenus*; for if he did it by Virtue of the Letter of Attorney, the other Authority will not avail the Delivery. It was said he could not deliver it by Virtue of both Authorities; *Quæd Quære.* Allen 53.

If a Man makes a Charter of Feoffment of two Acres, whereof the one is in Lease for Years and the other in Demefne, and makes Letter of Attorney to make Livery, and after the Feoffor himself makes Livery of the Acre in Demefne in Name of the Whole; tho' the other Acre, which is in Lease, cannot pass by it, yet the Letter of Attorney is revoked for this Acre, for it appears that so was the Intent of the Feoffor. 2 Roll. Abr. 12.

If the Feoffor dies before Livery is made by the Attorney, the Letter of Attorney is revoked in Law, because by his Death the Land is descended to his Heir. Co. Lit. 52. b.

So if the Feoffor dies before Livery be made by the Attorney, the Letter of Attorney is revoked in Law, because Livery cannot be made to his Heir, for then he shall take by Purchase where he was named by way of Limitation. Co. Lit. 52. b.

If a *Corporation Aggregate*, as Mayor and Commonalty, Dean and Chapter, or such like, make a Charter of Feoffment, with Letter of Attorney to make Livery, and before Livery made the Mayor or Dean dies, yet the Letter of Attorney is not revoked, because the Corporation never dies. Co. Lit. 52. b.

But it is otherwise of a *Sole Corporation*, as a Bishop, Parson, &c. Co. Lit. 52. b.

If a Man makes a Deed of Feoffment of Land in two Villis with Letter of Attorney to make Livery, and before Livery made by the Attorney the Feoffor himself makes Livery of the Land in one Vill; this is a Countermand of the Letter of Attorney, so that the Attorney cannot take Livery in the other Vill. 2 Roll. Abr. 12.

If a Fine be passed between the *Grant* and the *Livery*, it is no Countermand of the Livery. Dalif. 111.

(WW) *How Livery of Seisin shall enure, and be taken and construed.*

LIVERY of Seisin is sometimes made single, and without any Relation to the Deed whereby the Estate upon which the Livery is created at all: And sometimes and most commonly it is made with Reference to the Deed in these or such like Words, [*Secundum formam Chartæ*]. In the first Case the Estate is oftentimes made upon the Livery; and there may be one Estate contained in the Deed, and another made by the Livery; also there may pass more Land by the Livery than is in the Deed; and by this Means when there is a Fault in the Deed so that the Land will not pass by the Deed, it may perhaps pass by the Livery: But in this Case then there must be apt Words used in the making of the Livery to create the Estate also, as well as to give the Possession.

But where the Livery of Seisin is made with Relation to the Deed, there it must take Effect according to the Deed, or not at all; for these Words, *secundum formam Chartæ*, are to be understood according to the Quantity of the effectual Estate contained in the Deed.

And therefore if one makes a Deed of Feoffment to another, and in the Deed there is contained no Condition at all; and when the Feoffor makes Livery, he makes Livery upon Condition; or if the Deed contain an Estate to him and his Heirs, and he makes Livery of an Estate in Tail or for Life; in these Cases there passes nothing by the Deed.

And yet if there be apt Words used to create such an Estate at the Time of the Livery made, such an Estate may be made by the Livery without the Deed, and then the Deed shall be void.

But if in these Cases the Feoffor says when he makes Livery on Condition in Tail or for Life, *secundum formam Chartæ*; in this Case there is a good Feoffment made according to the Deed, and the additional Words are void.

So if a Man makes a Lease for Years, and makes Livery *secundum formam Chartæ*; this is but a Lease for Years still.

And if *A.* gives Land to *B.* to have and to hold after the Death of *A.* to *B.* and his Heirs; this is a void Deed; and therefore if the Livery of Seisin be made *secundum formam Chartæ*, the Livery of Seisin is void also.

But if when he gives Livery of Seisin, he gives it to him and his Heirs, without these Words *secundum formam*, &c. or if in the making of Livery he says, *Here I deliver you Seisin of this Land, to have and to hold to you and your Heirs for ever*, or the like; this may make a Fee-simple.

And so if one makes a Deed of Feoffment of two Acres, and after makes Livery of Seisin of four Acres; in this Case if there be Words in the Livery of Seisin sufficient to make a new Estate, the other two Acres may pass also. *Lit. §. 359. Co. Lit. 48, 49, 122. Fitz. Estoppel 177. Feoffments and Facts 23. 7 Ed. 4. 25.*

If *A.* by Deed gives Land to *B.* to have and to hold after the Death of *A.* to *B.* and his Heirs; this is a void Deed; and therefore if upon this Deed Livery of Seisin be made before the Day by the Party himself, or after the Day by his Attorney, *secundum formam & effectum Chartæ*, the Livery is void also, for it cannot enter so.

And yet if a Lease be made for Life to begin *in futuro*, and at or after the Day comes the Lessor himself in Person, and makes Livery of Seisin *secundum formam Chartæ*; in this Case the Lease perhaps may become good by the Livery of Seisin. *2 Co. 55. 5 Co. 94. & Greenwood's Case, Mic. 17 Jac. B. R.*

If an Agreement be made between two, that the one shall enfeoff the other upon Condition of Surety of Money, and afterwards Livery of Seisin is made generally without any such Condition; in this Case, it is said by some, the Estate shall be on Condition still. *Co. Lit. 222.*

If there be a Fault in the Deed, as by the Misnaming of the Feoffor, &c. Feoffee, &c. or the like, and afterwards the Feoffor, &c. in Person makes Livery of Seisin upon this Deed to the Feoffor, &c. by this the Fault of the Deed may be holpen and cured. *Perk. §. 42.*

If one makes a Feoffment to himself and another, and gives Livery of Seisin to the other; this is a good Feoffment, and shall enure to the other wholly, and he shall take the Whole by the Feoffment and the Livery; and so if the Livery be made to one that is capable, and to another that is not capable; he that is capable shall take the Whole, and the other shall have nothing.

So if a Feoffment be made to two, and one of them dies before the Livery is made, and after the Livery is made to the Survivor; in this Case the Livery shall enure to the Survivor only, and he shall have all the Estate thereby.

So if a Feoffment be made without a Deed to a Corporation and to *J. S.* and Livery is made to *J. S.* alone; in this Case *J. S.* shall have the Whole, and the Corporation nothing at all. *Perk. §. 203, 204. 7 H. 7. 9.*

If a Feoffment be made to four, and Livery of Seisin is made to one, two or three of them; this shall enure to them all.

But if Lessee for Years make a Feoffment in Fee, and such a Letter of Attorney to the Lessor, and he delivers Seisin accordingly; this Livery shall bind him, for it shall be said as in his own Right, because the Lessee had no Freehold whereof to make Livery. *Co. Lit. 52.*

If a Lessor makes a Deed of Feoffment, and a Letter of Attorney to the Lessee for Years to give Livery, and he does it accordingly; this shall not be construed to extinguish or hurt his Term. *Co. Lit. 52.*

But if the Feoffment be without Deed, it shall enure to him wholly to whom the Livery is made.

And

And if one of them gives Warrant to the Rest to take Livery for him, and they do so; this shall enure to them wholly, and not to him at all for any Part. *Dyer* 33. 10 *Ed.* 4. 1. 5 *Co.* 95.

If the Tenant makes a Feoffment to his Lord and another, and gives Livery of Seisin to the other; this shall enure wholly to the other until the Lord agree to it, and then to them both. 10 *Ed.* 4. 12.

If one makes a Feoffment of one Acre of Land to *A.* and his Heirs, and another Deed of the same Land to *A.* and his Heirs of his Body, and delivers Seisin according to the Form and Effect of both Deeds; in this Case it shall enure by Moieties, *i. e.* he shall have an Estate-tail and a Fee-simple expectant in the Moiety, and a Fee-simple in the other Moiety. *Co. Lit.* 21.

If two several Deeds of Feoffment be made to two several Persons of one and the same Thing; he that can get the Seisin first shall have it. *Rem domino vel non domino vendente duobus, in jure est potior traditione prior.* *Ibid.*

If Lessee for Life makes a Feoffment and a Letter of Attorney to the Lessor to make Livery, and he makes Livery accordingly; in this Case this shall not enure to bar him of his Entry upon the Feoffee for the Forfeiture of his Lessee.

Feoffment of a Messuage in the Tenure of *Thomas Cotton*, and a Letter of Attorney to make Livery of a Messuage in the Tenure of *Robert Cotton*; adjudged that the Feoffment was good notwithstanding this Variance, for the Livery was made of the right House, and the Mistake of the Tenant's Name shall not make it void. *Dyer* 376. *Hob.* 171. *Vide* 1 *And.* 58.

In an Assise brought by Husband and Wife *de libero Tenemento* in *South'ton*, the Plaintiff was of a Messuage, forty Acres of Meadow, &c. *cum pertinentiis*, &c. The Defendant pleaded a Lease for Years made to him by *J. P.* at *S. per nomen* of a Capital Messuage, &c. in the County of *H.* and of all Lands, &c. which were demised with the said Capital Messuage, and which were in the Occupation of the said *J. P.* or his Assigns; and averred, that the Lands mentioned in the Plaintiff were occupied with the said Capital Messuage by the said *J. P.* To this Plea the Plaintiff demurred, for that the House and Lands were in several Counties; but adjudged that upon a Lease for Years the Lands in both Counties shall pass; but it is otherwise upon an Estate for Life or upon a Feoffment, because there must be several Liveries. *Dyer* 246.

The Feoffor being seised in Fee of three Acres, made a Feoffment of one Acre to *B. G.* to the Use of the Feoffor in Fee, and so of another Acre to another, and of the third Acre to another, to the same Use; and afterwards he made another Feoffment of all three Acres to another Person in Fee, with a Letter of Attorney to *R. M.* to deliver Seisin in the Name of all three Acres; adjudged this was a good Feoffment and Livery, and that all the three Acres passed. *Bendl.* 15.

A Deed of Bargain and Sale was made without the Words *Dedi & Concessi*, and at the Bottom of the Deed there was a Letter of Attorney to *B. G.* to make Livery; this Deed was given in Evidence at a Trial in an Action of Trespass; and it was objected that the Letter of Attorney was void, because the Attorney was not a Party to the Deed; but adjudged that this Sort of Conveyance is a common Assurance, and therefore good. *Cro. Eliz.* 905. 1 *Leon.* 25.

Lease for Years, and afterwards the Lessor bargained and sold the Lands to *T. S.* and his Heirs; which Deed being not inrolled, the Bargainor delivered Seisin on the Lands *secundum formam Chartæ indentatæ prædictæ*: The Question was, whether this was a Feoffment, and adjudged that it was; it is plain that the Bargainor intended that it should be so by the Livery. Another Question was, if the Lessee had attorned to the Bargainee, whether the Reversion would have passed; and it seemed that it would not, because there were no Words in the Deed to pass it as a Reversion; and it was said, where a Man has a Reversion, and he releases or confirms to another all his Right in the Lands, if he to whom the Release was made had nothing in the Land, altho' an Attornment is made, nothing operates by such Deeds, altho' there are Words in them to enlarge an Estate, *viz. Habendum* to them and their Heirs. 2 *And.* 68.

If a Deed of Feoffment with Letter of Attorney to make Livery be simple, and the Attorney makes Livery upon Condition, yet it is a good Execution of the Letter of Attorney, inasmuch as he has performed all which he was commanded, and more, (but the Condition is void). 26 *Aff.* 39. 2 *Roll. Abr.* 8.

If a Deed of Feoffment and Letter of Attorney to make Livery be simple, and after the Feoffor commands the Attorney to make Livery upon a certain Condition, and

and he does it accordingly; this is not a good Feoffment, but a Disseisin to the Feoffor; for it is a Revocation of the first Letter of Attorney, and then this cannot create a new Power to make the Feoffment without Deed. *Dubitatur*, 26 *Aff.* 39. *Roll. Abr.* 8.

If a Deed be acknowledged to be inrolled, and before Inrolment Livery is made; this will make it to be a good Feoffment, and not a Bargain and Sale. So where a Man for a valuable Consideration of Money makes a Deed and Letter of Attorney to deliver Seisin, and before Livery the Deed is inrolled within six Months; this shall be a good Bargain and Sale: But if the Livery is made before the Inrolment, the Estate shall then pass by the Livery. *Popb.* 49. 1 *And.* 113. 4 *Co. Hind's Case.* *And.* 3, 162, 203. 4 *Leon.* 4. *Hob.* 222.

If a Letter of Attorney be in the Deed, or a Covenant to make Livery, there nothing shall pass by the way of Use, *viz.* by Transmutation of Possession; but according to the Common Law by Transmutation of Estate only. 2 *Inst.* 672.

If a Man be disseised, and makes a Deed of Feoffment and a Letter of Attorney to enter and take Possession, and afterwards to make Livery *secundum formam Chartæ*; this is a good Feoffment tho' he was out of Possession at the Time of the Deed made, because the Feoffment takes Effect by the Livery, and not by the Deed.

In all Cases the Attorney must pursue his Warrant of Attorney that he hath to deliver Seisin in Substance and Effect. *Co. Lit.* 52. *b.*

Also the Authority given by the Letter of Attorney is executory; and nothing will pass by the Delivery of the Deed but only an Estate at Will (*Lit.* §. 70.) till Livery made. *Co. Lit.* 48. *b.*

(XX) *What must be done after Livery of Seisin.*

AFTER the Delivery of Seisin the Feoffor, or his Attorney, and all the Witnesses, must withdraw and leave the Feoffee in quiet Possession, and then there must be an Indorsement on the Back of the Deed to this Effect:

Memorandum, That the Day and Tear above written (or any other Day wherein the Livery is made) Livery of Seisin was made by the within written A. B. (the Feoffor) to the within named C. D. (the Feoffee) of all and singular the Messuages, Lands and Tenements within mentioned, To have and to hold to the said C. D. and his Heirs, according to the Form and Effect of the within written Deed.

Indorsement
when Livery
is made by
the Feoffor.

But if the Livery be made or received by Attorney, and the Warrant or Warrants of Attorney are not in the Deed, (which is the best way) then in the Indorsement it is necessary for the Attorney who delivers or receives the Seisin to say, that by Virtue of a Letter of Attorney bearing Date, &c. he received Seisin, (or he gave Seisin) &c.

When made
or received by
Attorney.

Note; If in the Indenture there is a Warrant or Warrants of Attorney or Attornies to make Livery, the Deed must be *Tripartite*, according to the old way, between the Feoffor of the first Part, the Feoffee of the second Part, and the Attorney or Attornies of the third Part. But if there are Attorney or Attornies, as well to make as to take Livery, then the Indenture ought to be *Quadripartite*, between the Feoffor of the first Part, the Feoffee of the second Part, the Attorney or Attornies to make Livery of the third Part, and the Attorney or Attornies to take the Livery of the fourth Part.

(YY) *Where Livery is presumed at Law, or supplied in Equity.*

THE Defendant would have avoided a Conveyance for want of Livery, but the Plaintiff on a Bill by him was relieved. *Totb.* 104. S. P. *Totb.* 105, 117.

The like for want of Livery or Attornment. *Totb.* 116.

A Feoffment being made by way of Mortgage, but no Livery and Seisin thereof made, a Bill was brought by the Executors of the Mortgagee to supply the Defect, and to be relieved against Judgments suffered by the Heir of the Mortgagor; and accordingly it was decreed; and that the Judgments ought not to incumber the mortgaged Premises till the Mortgage Money should be all paid, especially since the Mortgagor had covenanted for further Assurance. *Rep. in Canc. in Finch's Time* 28.

More Lands having passed in a Feoffment than were intended, was holpen in Equity notwithstanding a Verdict and Judgment at Law, supposing some Circumvention. *Totb.* 186.

Where a Person died before Livery and Seisin, and before Assurance perfected, it was ordered to be perfected. *Totb.* 237.

There were three Coparceners, and one for a valuable Consideration sold the Land, but before Execution he died; it was decreed against the Defendant in *Canc. M.* 14 *Car.* *Totb.* 106.

Defendant would have avoided a Lease for want of Livery, but because the Plaintiff had enjoyed the Premises twenty-five Years, it was decreed that he should enjoy it quietly. Chancery presumes Livery, and therefore decreed Plaintiff should hold out during the Continuance of his Life; tho' after long Possession Courts at Law will presume Livery. 1 *Vern.* 196. *Totb.* 116.

If a Man sells Lands in two Counties for Money, and makes Livery in one only, he shall be compelled in Conscience to perfect the Assurances by another Livery; for the Contract faileth in a Circumstance or Ceremony. *Cary's Rep.* 24.

A Deed of Lands in two different Counties, by way of Feoffment and Livery and Seisin, was indorsed of the Lands in one County only, but nothing mentioned of any Livery of the Lands in the other County; but decreed that by Reason of the Possession and great Length of Time (being upwards of seventy Years before) Equity will suppose and supply it; and said, that it would have been much stronger on the other Side had the Livery been indorsed of the Lands in one County in the Name of both; for that would have implied that none was of the other, and that one was designed for both. *Select Ca. Canc. in King's Time* 18.

In this Case it was insisted, that as to the Possession and Length of Time, the Intendment endeavoured to be made out from thence can have no Weight, because the same Persons that enjoyed the Lands under the Deed were also Heirs at Law, and as such must have enjoyed them otherwise tho' there had been no such Deed; yet Lord Chancellor declared, that was he to try this Matter [at Law], he should presume and so direct that Livery was executed as to all the Lands, according to the Deed, after this Length of Time; but however that this Court would aid a Defect of this Kind. *Fitz-Gibb.* 146.

A. made a Feoffment in Fee by way of Mortgage of several Houses in London for securing the Payment of 400 l. and Interest; and being likewise indebted to several other Persons by Bonds, he died before the Money due on the Mortgage was paid. After his Death the Bond-Creditors demand their respective Debts of his Heir, who had nothing to pay them but the Equity of Redemption of this Mortgage. One of the Creditors of B. undertook to satisfy the Mortgage, which he did, in order to let himself into the Estate, and hold it till his Bond-Debt was paid; but having discovered that there was no Livery and Seisin indorsed on the Feoffment, he brought an Action of Debt against the Heir upon the Bond of his Ancestor, and got Judgment; but before the Execution the Seal was opened on Purpose for a *Subpoena*, which was taken out, and a Bill filed, to help this defective Conveyance, which was supplied accordingly, and the Mortgagee had his Money. *Nel. Rep. in Canc.* 183.

And tho' the Heir of the Mortgagor, after discovering the Defect of Livery, suffered Judgments to be obtained by several Bond-Creditors, in order to prevent the Mortgagee's having his Money; yet the Heir was decreed to convey a perfect Estate of Inheritance, subject to Redemption on Payment of the Principal and Interest due on the said defective Deed; and a perpetual Injunction for quiet Possession against the Heir, and all other Defendants, and to stay all Proceedings at Law. *Rep. in Canc.* 11 *Finch's Time* 28.

If a Deed of Feoffment be given in Evidence at the Assises to be made forty Years past, but it cannot be proved that Livery was made, yet if Possession has gone all the Time according to the Deed, it is good Evidence to the Jury. And *Coke C. J.* said, he would direct them to find a Livery, for it shall be intended; but if the Jury find all this specially, he could not adjudge this to be a good Feoffment without Livery. 1 *Roll. Rep.* 132.

After Freehold Estate determined, Livery shall be intended, and needs not be pleaded by the Reversioner. *Plow.* 149.

A Tenant in Tail by Settlement on Marriage of B. his Son with M. made a Feoffment to the Use of himself for Life, Remainder to B. for Life, Remainder to first, &c. Sons by M. This Deed was indorsed generally, (*viz.* Livery made to J. S. appointed

pointed by *W. R.* the Feoffee thereto) *B.* and *M.* had *C. D. E.* the Plaintiff, and *F.* the Defendant, and six other Sons. *A.* levied a Fine to *W.* then his Eldest Son, to the Use of *A.* and his Heirs; *W.* dies; *A.* conveyed the Land to *F.* and died; (*C.* and *D.* the two Elder Sons, died, as it seems, and without Issue) *F.* entered, supposing that Livery was not well given. Lord Keeper decreed, *First*, That the Letter of Attorney should be supplied, and Livery admitted; tho' it was objected that this was in Effect to decree a Discontinuance, which is a wrong and unlawful Act; and that it was *Secondly*, to assist a Remainder Man in Tail in a third Remainder (for he was the third Son) against a legal Fine of his Father, Tenant in Tail, and whose Fine was a Bar to him in Law; and also against the Acceptance of the Fine by *W.* who joined with *A.* who had Power by the Recovery to have barred the Estate of the Plaintiff. But to this last the Lord Keeper said, the Grandfather might have the Conveyance, made by himself, in his own Hands: And it is apparently so; for he recites in that Deed, that he was Tenant in Tail, and he recites not the Feoffment made by himself. 1 *Ca. Chan.* 240. And that at any Trial at Law to be brought by *E.* (the Plaintiff) *F.* the Defendant should admit Livery and Seisin; and that this Decree was affirmed on a Rehearing. *Rep. in Canc. in Finch's Time* 174.

Lands were conveyed by Feoffment, as a Marriage-Settlement, on the Wife, but no Livery was made: The Husband died, and by his Will left to the Wife more than she would have by the Settlement, and gave the Lands to *A.* and *B.* Decreed that *A.* and *B.* execute Conveyances to her for Life, and deliver the Possession to her. *Rep. in Canc. in Finch's Time* 388.

Where the Deed under which the Plaintiff claimed appeared to be fairly executed by the Defendant's Father, and that there was no Defect therein, save only the Form of Livery and Seisin, and made on such valuable Consideration as Marriage. Decreed the Defendant to execute Livery and Seisin in the said Deed, and make farther Assurance of the said Premises to the Plaintiff and his Heirs; and the Plaintiff is decreed to enjoy the same against the Defendant. 2 *Rep. in Canc.* 218.

S E C T. IV.

Of Fines.

(A) *A Fine, what.*

A Fine is a Conveyance on Record, signifying an amicable Composition or final Agreement made between Parties (*fictitiously said to be*) in Suit, concerning Lands, Tenements or Hereditaments, by the Consent or Licence of the King, or his Justices in the Common Pleas, or others authorized, to end all Controversies between those that are Parties and Privies to the same, and all Strangers not claiming in due Time. Fine, what.

The Word *Fine* is ambiguously taken in our Law, for sometimes it is taken for a Sum of Money, or Mulct imposed or laid upon an Offender for some Offence done, and then also it is called a Ransom. Different Acceptations of the Word Fine.

And sometimes it is taken for an Income, or a Sum of Money paid at the Entrance of a Tenant into his Land.

And sometimes it is taken for a final Agreement or Conveyance upon Record for the settling and securing of Lands and Tenements.

And in this Sense it is taken here; and so it is defined by some to be an Acknowledgment in the King's Court of Land, or other Thing, to be his Right that doth complain.

And by others, a Covenant made between Parties, and recorded by the Justices.

And by others more fully, an Instrument of Record of an Agreement concerning Lands, Tenements or Hereditaments, duly made by the King's Licence, and acknowledged by the Parties to the same, upon a Writ of Covenant, Writ of Right, or such like, before the Justices of the Common Pleas, or others thereunto authorized, and ingrossed on Record in the same Court, to end all Controversies thereof both between themselves, which are Parties and Privy to the same, and Strangers not suing or claiming in due Time.

This

This Conveyance by Fine is so called, *Quia finem litibus imponit, & est exceptio peremptoria*; or it is called *Finalis concordia, quia finem ponit negotio, adeo ut neutra pars litigantium ab eo de cetero possit recedere.* Glanv. lib. 8. cap. 1, 2, 3.

The Civilians call it *Transactio judicialis de re immobili.* Wood's Inst. B. 2. c. 3.

A Fine is the End or Complement of all Differences, performing that good Office between Parties who are *re vera* litigant, or at Strife in good Earnest amongst themselves in a real Action about a Title to some Lands, Tenements, Rents, Common, or other Hereditaments; and this may not improperly be conjectured from the very Words of the Indentures ingrossed by the Chirographer, which are these: *This is the final Agreement made in the Court of the Lord the King, &c.*

But when the Case is otherwise, and the Fine only an Instrument on Record by Consent of the Parties without any real Controversy, then indeed it is only a formal Assurance of Course, from the Result of a feigned Difference; from whence it is termed *Fictio juris*, or a Fiction in the Law, because the Suit is but voluntary, and not coercive. *Brown's Intro. to Fines* 1, 2.

A Fine when levied by Consent is said by *Bracton* and *Fleta* to be *Amicabilis Compositio*, with whom the Lord Coke agrees in his Sentiments upon the Words *De Dono* and *Concessit*, whereby he seems to insinuate a Fine to be, *An Act to bind the Parties to each other by a voluntary Gift or Concession*; which being entred upon Record according to the Course of the Court, is available to the highest Degree of Assurance in the Law. *Bro. Intr.* 3.

A Fine in our Law-Books is commonly called a Feoffment on Record; but in *Salk.* 340. the Court denied a Fine to be a Feoffment on Record, and said it was improperly so called: But the Meaning was, that it had the Effect of a Feoffment to some Purposes, if he who levied the Fine was seised of the Freehold at the Time of levying it.

A Fine is said to be the most effectual Feoffment of Record where it is a Feoffment; and the most effectual Release where it is to be a Release. *2 Mod.* 110.

(B) Of the Origin and Antiquity of Fines.

A Fine was pleaded to be levied *2 Ed.* 1. but not pleaded as a Fine, because there was no Chirograph of it. *20 H.* 6. 3. *2 Roll. Abr.* 13.

But in *7 Ed.* 1. *Rot. Clausarum Membrana* 5. in *Dorso*, a Fine was levied between the King and *Bigod* Earl of Norfolk, in such Form as at this Day, &c. *Hec est finalis Concordia, &c.* *2 Roll. Abr.* 13.

And in *8 Ed.* 1. *Membrana* 11. a Fine was levied upon a Release of an Advowson.

And in *18 Ed.* 1. *Libro Parliamentorum*, amongst the Reasons of the Judgment there given, it is said, *Nec in Regno isto provideatur, vel sit aliqua securitas major seu solemnior, per quam aliquis vel aliqua statum certiores habere possit, vel ad statum suum verificandum aliquod solennius Testimonium producere quam finem in Curia Domini Regis levatum; qui quidem finis sic vocatur, eo quod finis & consummatio omnium Placitorum esse debet, & hac de causa providebatur.* *2 Roll. Abr.* 13. *2 Inst.* 511.

Fines were frequent before the Conquest. *2 Inst.* 511.

And *Plowd.* in his Commentary, p. 369. says, that *Catlin* cited some Fines before the Conquest, relating to the Possessions of the Abbot of Crowland.

Origin.

Fines seem originally to have been invented and allowed of for different Ends and Purposes than they are now applied to; for they were at first no more than a friendly Composition and Determination of the Matters in Debate between the Demandant and Tenant in the Lord's Court; and this way of composing Differences was easily admitted in those Days, because the Suitors of the Court, who were Judges of all Suits, were by these amicable Compositions the sooner dismissed from their Attendance at the Court; nor did the Lord of the Manor suffer by them, because on these Agreements the Parties litigating paid him a Fine for his *Conge de accorder*, as they do the King at this Day, which was equivalent to Amercements which were paid him in adversary Suits.

From an Observation of the peculiar Benefit and Security from Fines, and from the Countenance and Encouragement they received from the Courts of Justice, Men began to engage themselves, and oblige each other by Covenants to compose their Differences, and they were the usual Expences of adversary Suits, which being generally prosecuted with Warmth and Animosity by the Parties litigating, must necessarily

necessarily involve one or both Parties in Difficulties, which such friendly Compositions are free from; and the Judges considering these Agreements as the publick Acts of the Court, allowed them some Sanction with their own Judgments; and hence they came to be improved into that useful and common Assurance which we find to be at this Day, as they stand upon the Statutes 4 H. 7. c. 24. and the 32 H. 8.

The Antiquity of Feoffments is before particularly mentioned in the last Section; a Fine seems to be next in Antiquity, for the Reasons before given.

The Fine was in the Lord's Court, by it all Feudal Right which was in Possession, of which there are Instances in the Times of Henry the 2d and Edward the 2d, and it was called a Fine, on Account of a Fine which was paid to the Lord for such Agreement, because it transferred the Feudal Right held of the Lord. *Gilbert's Tenures* 93.

And notwithstanding in such Court all the Right the Tenant had in Possession passed, yet the Right of Action could not be transferred, because that would encourage Maintenance; therefore whatever such Grantee could seise passed by this Feudal Conveyance; but the Right of Distress and of Action did not pass without Attornment. *Ibid.*

The Feoffment conveyed the Feudal Possession *Coram paribus* out of Court; for it was necessary to convey sometimes before the Court was held, and then the Possession was delivered over *Coram paribus*; but as there were two Conveyances of Copyhold, one in the Lord's Court, and the other to the Customary Tenants; so in Freehold, where the immediate Grant was to the Feoffee, and not to the Lord, as in the Copyhold; yet they were two Sorts of Conveyances, one by Fine in open Court, the other by Feoffment *Coram paribus*; the Right only passed by Fine, because the Possession being in the Grantee, they might well stay till the next Court to transfer the Right; but where the Possession was to be parted with, or Service to be done, or Money paid, there the usual Way was *Coram paribus*, that the Feoffee might not lose the Profits in the mean Time, or the Possession be delivered before the Contract could be compleated. *Ibid.* 93, 94.

Thus it stood till sometime after the Conquest; but the after Kings endeavouring to retrench the Privilege of the great Lords, the first in *Magna Charta*, and after by the Statute of *Quia emptores terrarum*, began to admit of Alienations without Fine to the Lord, and the Acts of Court-Baron were only esteemed to create Notoriety among the Tenants of the Manor; from hence Grants in the Lords Courts were omitted, and the Attornments *in pais* were the only Notorieties of such Grants, no Fine being paid to the Lord; and the King's Courts creating a Notoriety all over the Land, the usual way was to make the Grants in the King's Court in this Manner: They used to suppose that the Parties had covenanted to alien, and all Writs of Covenant (as being an Action of Concern to the Justice of the Kingdom) were suable only in the King's Court, and by Consequence this Covenant to alien was suable there; and the Court being possessed of the Matter as an adversary Cause, they were admitted to make all Manner of Agreements touching such Suit depending, and these Agreements being amicably made by way of Composition before the King's Court, it became the Justice of the King's Court to see them performed; and therefore a *Scire Facias* issued to execute the Fine, and a *Quid juris clamat* to the Tenant. *Ibid.* 94, 95.

It was antiently the End of a Suit; for after there had been some Contention about the Thing by Suit, the Parties became agreed who should have it, and so a Fine was levied of it, and there was an End of the Matter; and hence it is said to be *Fructus* or *Effectus legis*, because it gives a Man the Fruit or Effect of his Suit.

And to this Day therefore a Writ doth always Issue before a Fine can be levied; and this is now one of the common Assurances of the Kingdom.

(C) *The Nature, Use and Effect of a Fine.*

A Fine is a Record as of great Antiquity, so of a high Nature, great Force, and much Credit and Esteem; and it is now become and serves for a formal Conveyance of Land, and one of the common Assurances of the Kingdom; for by this Means a Man may convey his Land to another in Fee-simple, Fee-tail, for Life or Years, with Reservation of Rent also.

It is therefore called a Feoffment of Record, for it countervails a Feoffment with Livery of Seisin in the Country, and it concludes all that the Feoffment does, and works further of its own Nature.

It is for many Purposes the best and most excellent Assurance of all others; for by the antient Common Law it was so high a Bar, and of so great Force, and of so strong a Nature in itself, that it concluded and barred not only such as were Parties and Privies thereto, and their Heirs, but all others of full Age, out of Prison, of good Memory, and within the four Seas, the Day of the Fine levied, if they did not make their Claim within a Year and a Day.

And it is still of that Force, altho' it be somewhat enfeebled by some Statutes, that either it passes all the Right and Interest of the Conusor to the Conusee, or else it works by way of Extinguishment and Estoppel, and perpetually bars the Conusor and his Heirs of all present and future Right, and Possibility of Right, or other Collateral Benefit to the Thing whereof the Fine is levied.

And if it be a Fine with Proclamations, in Time it becomes a perpetual Bar to all others also that have Right, except they take Care to prevent the Bar by their Claim, Action or Entry, within five Years after the Proclamations ended.

And it bars Intails peremptorily, whether the Heir does claim within five Years or not, if he makes his Claim by him that levies the Fine. *Shep. Touch. 6. cites Stat. of Fines, 18 E. 1. 1 Co. 3. Plow. 358, 265.*

This is esteemed a Conveyance of greater Security than a Feoffment, or the Investiture by Livery, being not only equivalent to the Notoriety of Livery, but having the constant and undoubted Credit of a Court of Record to protect and support it; and this further Convenience and Security, that it does not only transfer the Right of the Vendor, and all claiming under him, but likewise extinguishes the Right of others who omit to make their Claim in due Time.

A Fine is esteemed an Assurance or Conveyance of the highest Nature, and most Perfection in the Law, being much of the Quality of a Feoffment with Livery of Seisin executed thereupon, but of greater Efficacy, and therefore called a Feoffment upon Record, (*but see before the Division (A)*), by which Lands may be conveyed or transferred from one Person to another in *Fee-simple, Fee-tail, for Life or Years*, and thereby *Rent* may be also reserved. *Brown's Intr. 2.*

Estates may be likewise settled in the *King*, to the Intent that they may be intailed on the Crown to the Use of the Parties. Or,

Estates may be settled by Fine in the *Family* of those who have them in *Fee*, to continue the same in the *Blood*, by *Tail general or special*; or, In *Strangers*, that shall purchase the same by *Tail general or special*, or in *Fee*. *Ibid.*

Estates may be also granted by Fine for *Life or Lives*, the Remainder in *Tail* or in *Fee*, or the Reversion in *Fee*. *Ibid.*

Likewise *Annuities or Rent-Charges* may be granted by Fine for *Years*, for *Life*, in *Tail*, or in *Fee*. *Ibid.*

Some have wrote, that there neither is nor can be provided by the Laws of the Land, any greater or more noble Security by which any Person may make his Estate more secure, or produce a more solemn Testimony for the Confirmation of his Estate, than a Fine levied in the *King's Court* upon Record; yet it must be allowed that in some Respects a common Recovery exceeds it, for a Fine will bar the Heir in *Tail*, but not him in Remainder or Reversion, but a Recovery bars them all. *Brown of Fines 1.*

For more concerning the Effects of Fines, *vide post.* where is shewn in particular what Persons are barred by Fines.

(D) Of the several Kinds of Fines.

FINES are by some divided into single or double.

Single.

A *single Fine* is that by which an Estate is granted by the Cognisor to the Cognisee, and nothing is thereby rendered back again by the Cognisee to the Cognisor.

Double.

And a *double Fine* is that which contains a Grant, or Render back again from the Cognisee to the Cognisor, as of the Land itself, or of some Rent, Common or other Thing out of it; many Times limiting Remainders to Strangers not named in the Writ

Writ of Covenant, and sometimes with Reservation of Rent, Clause of Distress, and Grant of the same over.

No single or double Fine may be with a Remainder over to any other Person not contained in it, but it must be to the Conusee and his Heirs only; nor can any Rent be reserved upon a pure Fine *sur Cognissance de droit come ceo*, but upon a Fine of Grant and Render, and upon *sur Concessit* only; nor may it be on a Condition.

5 Co. 38.

That by a double Fine, or Fine with Render, almost any Kind of Contract about Land may be made, and drawn up in Form by a Fine of that Nature. See *West. Symb. 2 Part. Perk. §. 629. Bro. Fines 108.*

Also a Fine is either with Proclamations or without Proclamations, and executed or executory. Without Proclamations.

That without Proclamations is termed a Fine at the Common Law, and is levied in such Manner as was used before 4 H. 7. 24 which still remains of such Force as they were at the Common Law, to discontinue the Estate of the Cognisors if they be executed.

That with Proclamations, is termed a Fine according to the Statutes 1 R. 3. 7. With Proclamations.

4 H. 7. 24. And such a Fine is every Fine (that is pleaded) intended to be, if it be not shewed what Fine it is.

And these Fines with Proclamations are the best Sort, and most used; and it is said to be in the Election of the Cognisee to have it with or without Proclamations; and if there be Error in the Proclamations, yet the Fine shall be taken as a good Fine at Common Law without Proclamations. *Jenk. Cent. 6. Case 53. 2 Co. Inst. 519.*

A Fine also, whether with or without Proclamations, is either executed or executory. Executed.

Executed is such a Fine as of its own Force giveth a present Possession (or at the least in Law) unto the Cognisee, so that he needs no Writ of *Habere facias seisinam*, or other Means for the Execution thereof, but he may enter: Of which Sort is a Fine *sur Cognissance de droit come ceo que il ad de son done*, which is in Deed the best and surest Kind of Fine of all.

And this Kind of Fine always supposes a Feoffment or Gift precedent of the same whereof the Fine is had, which the Fine is to corroborate and strengthen.

Executory is such a Fine as of its own Force does not execute the Possession in the Cognisee, and of this Sort is a Fine *sur Cognissance de droit tantum*, when the Party that levies the Fine is seised of the Thing, and he to whom the Fine is levied has no Freehold therein, but it passeth by the Fine, and a Fine *sur Done*, Grant, Release or Confirmation. Executory.

And if these Kinds of Fines be not levied, or such Surrender made unto them that be in Possession at the Time of the Fines levied, the Cognisees must enter, or have Writs of *Habere facias seisinam*, according to their several Cases for the obtaining of their Possessions.

But if at the Time of levying such executory Fine, the Party unto whom the Estate is limited be in Possession of the Lands passed, he needs no Writ of Execution to put him in Possession, for then the Fine will enure by way of Extinguishment of Right, and does not alter the Estate or Possession of the Cognisee, however, perhaps, it betters it. The Fine *sur Cognissance de droit tantum* also serves sometimes to make a Surrender, and then it is therein recited that the Conusor has an Estate for Life, and the Conusee the Reversion; and sometimes it serves to grant a Reversion, and then the particular Estate is recited to be in another; and that the Conusor wills that the other shall have the Reversion, or that the Land shall remain to the other after the particular Estate spent.

And by some Fines are divided into four Kinds:

1. A Fine *sur Cognissance de droit come ceo*, &c.
2. A Fine *sur Done*, Grant and Render.
3. A Fine *sur Cognissance de droit tantum*.
4. A Fine *sur Concessit*.

But in Fact, there are but two Sorts of Fines for the Assurance of Lands, in a strict Sense, viz.

1. A Fine *sur Cognissance de droit*,
- And 2. A Fine *sur Concessit*.

These are simple and unmixed, and of which all the other Kinds are formed.

These

These two simple Kinds of Fines are branched out into six Divisions or Sorts, simple or compound, *viz.*

1. A Fine *sur Cognifans de droit*, come *ceo que le Cognifsee ad del done de Cognifor*.
2. *Sur Cognifans de droit tantum*, ove Grant ou Concessit.
3. *Sur Cognifans de droit*, ove Release.
4. *Sur Cognifans de droit*, ove Grant & Render.
5. *Sur Concessit tantum*.
6. *Sur Concessit & Reddidit*.

From whence it appears that a Fine *sur Cognifans de droit* is divided into four Branches, and the Fine *sur Concessit* into two.

First, Of a Fine *sur Cognifance de droit* come *ceo*, &c.

A Fine *sur Cognifance de droit* come *ceo que il ad de fone done*, single, is the principal, best and surest Kind of Fine; it is said to be executed, because of its own Force it gives present Possession (at least in Law) to the Cognifsee, so that he needs no Writ of *Habere facias seisinam*, or other Means for the Execution thereof; for it admits the Possession of the Lands of which the Fine is levied to pass by the Fine, so that the Cognifsee may enter, for that the Estate is thereby (in Law) in the Cognifsee; that is to say, to such Uses as are declared in the Deed to lead the Use thereof; for this is a general Maxim, that unless it be declared by Deed, or otherwise, to what Use the Fine was levied, such Fine shall be and enure to the Use of the Cognifor that levied the same. The Fine is levied with Proclamations, according to the Form of the Stat. 4 H. 7. c. 24.

If Rent be reserved upon this Sort of Fine, it is void.

Lessee for Years died Intestate, and afterwards a Fine with Proclamations was levied of the Lands held by this Lease, and the Conusee, and those claiming under him, enjoyed it under this Fine above fifty Years; and then he who had the Right of Administration to the first Lessee, supposing that the Term for Years was not bound by this Fine, because it was not a Freehold or Inheritance, and by Consequence not within the Stat. 4 H. 7. took out Administration; and two of the Judges held, that he had a good Title, but one of them afterwards altered his Opinion; and he with the Ch. Just. *Anderson* held, that the Statute did extend to bind the Right of a Term for Years, if the Lessee was in Possession before the Fine levied. *Goldf. 171.*

If *J.* and *B.* his Wife levy a Fine to *A.* in Fee, *sur Cognifance de droit* come *ceo*, &c. and then *A.* renders to *J.* for Life without Impeachment of Waste, the Remainder to *B.* his Wife for Term of her Life, the Remainder to *J.* and his Heirs; this is good. *Bro. Fines 108.*

B. G. who was a Debtor to the Queen, covenanted to convey Lands to the Lord Treasurer, &c. to the Use of the said *B. G.* and his Heirs, until Default of Payment, &c. and after such Default to the Use of the Queen, her Heirs and Successors, until the Debt should be paid out of the Profits, &c. and after the Debt paid, then to the said *B. G.* his Heirs and Assigns for ever; and he levied a Fine to the aforesaid Uses, and afterwards he bargained and sold the Lands to another; the Debt was not paid; the Queen seised the Lands, and granted them to *R. W.* *quousque* the Debt should be paid, and afterwards it was paid by Perception of the Profits; adjudged that notwithstanding the Bargain and Sale made by *B. G.* he should have his Lands again, because at that very Time when he made it he had an Estate, but it was determinable upon Non-payment of the Debt, and after the Debt paid, then a new Estate was limited to him, (*viz.*) an absolute Fee-simple to him and his Heirs, so that by the Bargain and Sale the determinable Fee-simple passed, and the absolute Fee could not, because it was not then in Being, for that was to arise upon the Payment of the Debt, which was not paid at the Time of the Bargain and Sale; but if the Conveyance had been by Fine or Feoffment instead of the Bargain and Sale, then this Possibility of an absolute Fee had passed to the Vendee by the forcible Operation of such Conveyances. *1 Leon. 33.*

Husband and Wife seised of a Rent-Charge in Fee in Right of the Wife, levied a Fine of it to two Conusees, and to the Heirs of one of them, to the Use of both of them and their Heirs for ever; adjudged that they were two Jointenants of the Rent, for otherwise there would be a Fraction of the Estate, (*viz.*) one would be in by the Common Law, and the other by the Statute of Uses. *Hutt. 112.*

In a special Verdict in Ejectment the Case was, there is a Parish called *Ribton*,^{Place.} and a Vill called *Ribton*, but not co-extensive with the Parish; Tenant in Tail bargained and sold his Lands in the Parish, but out of the Vill, and covenanted to levy a Fine, and suffer a Recovery to the Uses in the Deed of the Land in the Parish, which was afterwards suffered of the Lands in *Ribton*; and the Question was, whether the Lands in the Parish did pass or not; it was argued that it did not, because where a Place is named in a Recovery, (as in this Case *Ribton* was named) it shall be intended a Vill; and tho' it appears by this Deed that the Lands in the Parish should pass, yet that Intention shall not carry the Words farther than they are contained in the Record; and tho' the Deed, the Fine and Recovery make but one Conveyance, yet each has its several Effect; but adjudged that since common Recoveries are become the common Assurances of Mens Estates, they shall have a favourable Construction; but this Case was the stronger, because the Jury found that the Tenant in Tail had no Lands in the Vill, therefore this Recovery would be void if it did not pass the Lands in the Parish. 2 Vent. 31. 1 Mod. 78. 1 Vent. 143. 2 Mod. 333. See Cro. Jac. 120.

The Bargainor by Deed of Bargain and Sale conveyed the Reversion of certain Lands in *Whitchurch* and *Goring*, to one *Libb* and his Heirs, after a Term for Years then in Being, and before the Inrolment he levied a Fine of the same Lands to the same *Libb* and his Heirs; and after the Fine was levied, the Deed of Bargain and Sale was inrolled, pursuant to the Statute, within the six Months; adjudged that tho' the Deed was delivered before the Fine was levied, yet *Libb* the Conusee shall be in by the Fine, and not by the Deed, because the Fee-simple passed to him by the Fine, and shall not afterwards be divested out of him by the Inrolment, since it was absolutely established in him by the Fine; it is true the Inrolment shall relate to the Delivery of the Deed, but that is to prevent and protect the Estate from all intermediate Incumbrances, but never to divest any Estate lawfully settled in the Bargainee before that Time. 4 Co. 70. 1 And. 285. Cro. Eliz. 917. Moor 337. Telv. 124. Ow. 70.

Lessee for Years assigned over his Lease to another in Trust for himself, and afterwards purchased the Inheritance; then he levied a Fine with Proclamations, and the Trustee did not claim the Lease within five Years; adjudged that by this Fine and Non-claim the Interest of the Lessee was barred tho' he had the Possession only under the Trustee, for the Trust is included in the Fine. Cro. Car. 77.

Tenant for Life, Reversion in Fee to an Ideot, whose Uncle levied a Fine with Proclamations, and having Issue R. who had Issue B. S. he died, and afterwards the Ideot died without Issue, and then B. G. entered as Heir to him; it was adjudged that he might, and that he was not barred by the Fine of his Grandfather; for tho' there was a Necessity of naming him in deriving the Descent of the Inheritance to B. G. his Grandson, who was Son and Heir of R. who was Son and Heir of the Grandfather, who was Uncle and Heir of the Ideot, who was last seised of the Inheritance; yet this was not a naming him by way of a Title but by way of Pedigree, for he made no Claim from him, but from the Ideot who was last seised, &c. Cro. Car. 514. March 94. W. Jones 456.

Tenant for Life, Remainder to the Heirs Male of his Body, Reversion in Fee to the Elder Brother of the Tenant for Life; he levied a Fine with Warranty to B. G. and afterwards died without Issue Male, leaving Issue only one Daughter, then the Elder Brother died without Issue; adjudged that this Fine and Warranty shall make a Discontinuance of the Fee, and divest him in the Reversion of it in whom it was placed, and gain a new Estate and Fee to the Cognisor upon which the Fine and Warranty shall enure, and by Consequence bar the Daughter; for the Warranty did not immediately descend upon her, but upon the Elder Brother, who had the Right in Reversion; yet when he died without Issue, it then descended on her as Heir to her Uncle, and by Consequence she is barred by the Fine. Cro. Car. 111.

Tenant for Life, Remainder for Life to his Brother, Remainder in Tail to their Nephew: The two Brothers intending to bar this Intail to their Nephew, one of them, who was the Tenant for Life, made a Lease for Years of the Lands, and agreed with the Lessee that he should make a Feoffment, who did it accordingly; afterwards both the Brothers released to the Feoffee with Warranty, both which Warrants descended upon their Nephew, who was their Heir, and also a Remainder Man in Tail; but adjudged that both the Warranties commenced by Disseisin, because the Feoffment was made by Covin; then it was moved, that if the Nephew, not knowing of this Disseisin, had levied a Fine to a Stranger, whether that should bar his

his Right and enure to the Benefit of the Disseisor; and adjudged that it should not, but it should enure to the Benefit of the Cognisor, that is to his own Benefit, for otherwise a Disseisin being made in a secret Manner, might be a Means to disinheric any one who should levy a Fine for the Benefit of himself, or of his Wife and Children. *Cro. Car.* 347.

A Fine *sur Conusance de droit come ceo que il ad de son done*, generally implies that a Fee-simple passes thereby: But it is only so by Implication, and therefore there is no Repugnancy to limit an Estate for Life, &c. to the Conusee; for the Generality of the precedent Donation may be thereby expressed to be for Life only, or in Tail: And the general Intendment of the Conusance may be qualified by an express Limitation. *Vide* 41 *Ed.* 3. 14. *Co. Lit.* 9. b. 1 *Salk.* 340, 341.

Tenant in Tail of Lands called *Eftons*, levied a Fine of Lands in *Eftlington* and *Efton*, whereas the Lands called *Eftons* lay in another Parish; adjudged that the Lands called *Eftons* did pass, tho' the Parish in which they lay was not named, because this being an amicable Assurance, would pass Lands in a *Lieu Conus.* *Godb.* 440.

There were two Towns *A.* and *B.* in one Parish, likewise called *B.* a Fine was levied of Lands in *B.* not distinguishing the Town of *B.* from the Parish of *B.* and whether the Lands in *A.* should pass, was the Question; adjudged they should not, for both *A.* and *B.* were distinct Towns, and tho' the Parish of *B.* might comprehend both, yet the Lands in *A.* shall not be comprised in the Fine levied of Lands in *B.* generally, unless *A.* had been an Hamlet of *B.* and the Fine had been levied of Lands in the Parish of *B.* and then the Lands in both the Towns had passed. *Cro. Jac.* 120. *W. Jones* 300. *Cro. Car.* 269, 276.

In Trespass the Question was, whether a Fine *sur Cognisance*, &c. could be levied of a Close by a *Lieu Conus* in a Town, without mentioning the Town, Vill or Hamlet where it lies; and adjudged that it might, because it is but an amicable Agreement between the Parties. *Cro. Jac.* 574.

Where the Cognisor is to pass the Manor of *D.* to *B.* the Cognisee, by a Fine executory, and he levy a Fine to him by the Name of the Manor of *D.* and of so many Acres of Land in *Dale* and *Sale*, being the Towns in which the Manor lieth, and afterwards the Cognisor purchaseth other Lands in these Towns, the Fine shall not be executed of the new purchased Lands, but shall extend only to these Lands which he had an Intent and Power to pass. *Poph.* 104.

Lease for Years to commence after the End and Determination of a former Lease then in Being; the first Lease ended, the second Lessee did not enter, but he in Reversion did, and afterwards levied a Fine with Proclamations, and the five Years passed without Entry or Claim of the second Lessee; adjudged that he was barred now by this Fine, and bound by the *Stat.* 4 *H.* 7. for that Statute mentions Interest to be barred by Fines, and the Lessee in the principal Case had an Interest in the Lands. 5 *Co.* 123.

Secondly, Of a Fine sur Concessit.

A Fine *sur Concessit* is where the Cognisor is seised of the Lands contained therein, whereof the Cognisee has no Freehold, but it passes by the Fine.

This Fine is said to be *executory*, so that the Cognisee or Cognisees therein must enter, or have a Writ of *Habere facias seisinam*, according to their several Cases for the obtaining the Possession, if the Parties to whom the Estate is limited at the Time of levying such Fine be not in Possession of the Thing granted; but if they be in Possession at such Time, there needs not any such Writ, or any Execution of the said Fine to put them in Possession, for then the Fine will enure by way of Extinguishment of Right, and does not alter the Estate or Right of the Cognisee, however perhaps it may better it.

If a Tenant in Tail levies a Fine *sur Concessit* for Life with Proclamations, and the Tenant for Life dies; in this Case the Bar of the Fine is determined. *Moor, Case* 1026.

In a special Verdict in Ejectment the Case was, the Husband being seised in Right of his Wife of a Reversion in Fee expectant upon the Determination of a Term for Years, settled the Tenements to the Use of his Wife *Bridget* for Life, Remainder to *Francis Lee* an Infant, and *Elizabeth* his Wife, and the Heirs of *Francis* and *Elizabeth* to be begotten, Remainder to the Husband for Life, Remainder to the right Heirs of his Wife *Bridget*; afterwards the Husband and *Bridget* his Wife, by Fine

sur Concessit, did grant the said Tenements & *totum* & *quicquid habent* therein, *ad terminum vite ipsorum Willielmi* (the Husband) & *Bridgittæ* & *eorum diutius viventis*, &c. with Warranty, and this was in Trust for the Purchaser of the Inheritance; the Lessee for Years attorned, and afterwards in the same Term the Father of *Francis Leigh*, and *William* and *Bridget* his Wife, levied a Fine *sur Cognissance de droit* to the Earl of *Salisbury* the Purchaser; this Warranty of the Father descended on *Thomas Leigh*, who was the Son and Heir of *Francis*, who was the Son and Heir of him who entered into this Warranty; and the Question was, whether he was barred by it; and this depended upon the Operation of the Fine *sur Concessit*, for if it enured as a Grant of the Estate in Possession of *William* the Husband and *Bridget* his Wife, then it displaces the Remainder to *Francis*, and makes Room for the Warranty to bar; but if it passes only the Estate of *Bridget*, the Wife in Possession, and the Remainder of *William* for Life, only as a Remainder, and not in Possession, then it doth not devert the Estate of *Francis* in Tail, and so it is not barred by the Warranty: The Court inclined, that it passed the Whole of *William* and *Bridget* in Possession, and not by Fractions. 2 Lev. 1154.

Tenant for Life, Remainder in Tail, he in Remainder levied a Fine to the Tenant for Life, and to her Husband *sur Concessit tenementa*, &c. to him and his Wife for the Life of the Wife, and after Proclamations made, the Conusor died; adjudged this Fine was no Discontinuance to bar the Estate-tail but only during the Life of the Tenant for Life; and after that is determined, the Estate-tail is neither barred nor altered. Cro. Jac. 40. Moor 747.

A Fine *sur Concessit* has been always taken to be the most harmless (and of less Operation in the Law) than any other, and compared only to a Grant of *Totum statum suum*, & *quicquid habet*, &c. by which no more is granted than what the Conusor had at the Time of the Grant, and consequently that it shall not work a Disseisin (to a third Person). Also that no more shall pass by such a Fine than what lawfully may (without Prejudice to another); and rather than it shall be construed to work a Wrong, the Estate shall pass by Fractions, and the several Interests remain separate notwithstanding such Fine. 2 Mod. 112.

Indeed there is a Fine *sur Concessit* which expresses no Estate of the Grantor, and this is properly levied by Tenant in Fee or in Tail, (and passes the whole Estate, &c.) but when particular Tenants pass over their several Estates by such Fine, they generally grant *Totum*, &c. *quicquid habent in tenementis prædictis*, not expressing what particular Estates they have therein. *Ibid.*

Note; When this Fine was first invented, the Judges in those Days looked upon the Words *Quicquid habent*, &c. to be insignificant; and therefore 17 Ed. 3. 66. they were rejected, where two Husbands and their Wives levied such a Fine with those Words; and the Judge would not pass it, because if the Parties had nothing in the Land, nothing passed by such Fine. Vide 44 Ed. 3. 36, &c. accord. &c. 2 Mod. 110, 111, 112, &c.

Thirdly, Of a Fine *sur Concessit tantum*.

A Fine *sur Concessit tantum*, is to transfer an Estate for Life or Years from one Person or more to another, or to several Persons with or without Impeachment of Waste, if the Estate be granted for Life or Lives.

Fourthly, Of a Fine *sur Concessit & Reddidit*.

A Fine *sur Concessit & Reddidit*, is of the very Nature of a Fine *sur Concessit tantum*, only it differs in Form; of which see the Second Part of this Work.

Fifthly, Of a Fine *sur Cognissance de droit tantum*.

A Fine *sur Cognissance de droit tantum*, is also said to be executory, and much of the Nature of a Fine *sur Concessit*; it is used commonly to pass a Reversion, and then it is expressed by such Fine that the particular Estate is in another, and that the Cognisor willeth that the Cognisee shall have the Reversion, or that the Land shall remain to him after the particular Estate spent.

And sometimes it is used by Tenant for Life to make a Release (in the Nature of a Surrender) to him in Reversion, but not by the Word *Surrender*; for it is said a particular

particular Tenant, as for Life, cannot surrender his Term to him in Reversion or Remainder by Fine, but he may grant and release to him by Fine. 44 Ed. 3. 36. 3 Co. 86. Dyer 216. Plow. 268.

A Fine upon a Lease, as it seems, may not enure to an Use, that is, it may not be intended to the Use of any other but to him to whom it is levied, unless an Use be expressed in the Fine, or in another Deed; and if a Disseisor be, and the Disseisee levies a Fines upon a Release, thereby the Right is gone, and a Stranger may levy such Fine to Tenant for Life, and it shall be no Forfeiture of his Estate. 3 Leon. 36, 37. 3 Co. Inst. 36.

A Fine upon a Release may not enure to an Use. 3 Co. Inst. 36.

Sixthly, Of a Fine *sur Cognifans de droit tantum*, ove Grant ou Concessit.

A Fine *sur Cognifans de droit tantum*, ove Grant ou Concessit, sometimes called a Fine *sur Done*, Grant, is partly of the Nature of a Fine *sur Cognifans de droit*, and partly of the Nature of a Fine *sur Concessit*, only it is levied without Proclamations, and executory by Writ of *Habere facias seisinam*, as a Fine *sur Concessit* is.

It is sometimes used by Tenant for Life to surrender his or her Estate to him or them in the Reversion or Remainder; or to grant the Reversion after the Death of Tenant for Life.

It may also be expressed in such Fine that the particular Estate is in another Person, whom the Recognisor is willing to have the Reversion or the Remainder thereof.

Seventhly, Of a Fine *sur Done*, Grant & Render.

A Fine *sur Done*, Grant & Render, is that which is called a double Fine, as is before observed, being in a Manner two Fines, (that is to say) a Fine *sur Cognifance de droit come ceo*, and a Fine *sur Concessit*, both formed into one, whereby the Cognifsee after a Release and Warranty made to him by the Cognifor of the Lands contained therein, doth grant and render back to the Cognifor the Lands, &c. or some Part thereof, and many Times limiting thereby Remainders to Persons that are Strangers, and not named in the Writ of Covenant: This Fine is partly executed, partly executory, and as to the first Part of it, is altogether of the same Nature with a Fine *sur Cognifance de droit come ceo*; but as to the second Part, containing a Grant and Render back (as aforefaid), it is taken in Law to be rather a private Conveyance or Charter between Party and Party, and not as a Writ of Judgment upon Record.

This Render is sometimes of the whole Fee, and sometimes of a particular Estate with Remainder or Remainders over, or the Reversion; and sometimes with Reservations of Rents with Distress, and sometimes with a Grant thereof over by the same Fine.

Note; A Render must be made upon a *Come ceo sur Release*, or other Fine executed.

A Fine was levied of an Advowson *sur Cognifance de droit tantum*, with a Grant and Render of the next Presentation to the Conufor, and of the second Presentation to the Conufee, and so to present by Turns; and this was held good. 9 Eliz. Dyer 259.

Assise for a Rent-Charge, in which the Case was thus, viz. Husband and Wife were seised of two Manors, and they by Fine conveyed the same (*inter alia*) to the Conufee, by the Name of two Manors, &c. and he by the same Fine rendered back to them an yearly Rent of 50*l.* and to the Heirs of the Wife, and also rendered the two Manors to them for their Lives, Remainder over in Tail; the Husband and Wife died, the Rent descended to the Plaintiff as Son and Heir to the Wife, and he had Judgment in the Assise; and upon a Writ of Error brought, the Error assigned was, that the Fine was pleaded of the two Manors (*inter alia*), by which it may be reasonably intended that other Lands passed besides the Manors, and therefore the Assise brought against him alone, who was Tenant of the Manors, is not good, because all the Tenants of the Land ought to be named; this was adjudged a material Exception; the second Error was that the Grant of the Rent was void, because the Land was granted at the same Time, and to the same Person, and the Grantee cannot have both; but as to this it was adjudged, that the Law shall marshal it so as to make the Grant of both to be good; for in the first Place the Rent shall pass, and then it shall be as a Purchase of the Remainder of the Land in Fee, which shall not extinguish the Rent. Cro. Eliz. 226.

If a Grant and Render in a Fine of Land be immediately, *in Primo gradu*, to one that is no Party to the Writ, this is not good, but immediately, or *in Secundo gradu*, &c. such a one may take; as if two levy a Fine, and the Grant and Render back again is to one of them only, this is good enough. 2 Co. Inst. 514.

So if a Writ of Covenant be brought by *A.* against *B.* of the Manor of *D.* and *B.* levied a Fine to *A.* *Come ceo*, &c. in this Case *A.* may grant or render the same to *B.* for Life, or in Tail, the Remainder to *P.* in Fee; and this is good as in a Deed by way of Remainder. 2 Inst. 514. Bro. Fines 111, 117, 118.

W. H. was seised in Fee, as Heir on the Part of his Mother, and he and his Wife levied a Fine to *W. R.* and *L. R.* with Warranty, and then by the same Fine did grant and render the same Lands to the Husband and Wife in Tail, Remainder to the Heirs of the Husband; they both died without Issue; adjudged that the Conusees had once the Estate in them, and that the Fine and Render was a Conveyance at Common Law; and if so, then the Render made the Conusor a new Purchasor, and by Consequence the Lands shall go to the Heir of the Part of the Father. 1 Salk. 337.

The Render of a Rent (if any be) must be to one of the Parties to the Fine, and not to a Stranger. Dyer 63, 69. 2 Co. in Lord Cromwell's Case.

A Man may not reserve to himself a less Estate by way of Remainder than the Fee; as if *A.* levies a Fine of his Land to *B.* and *B.* re-grants and renders it to *A.* for Life, this will be void. 14 H. 4. 31. 34 Ed. 4. 36. Dyer 33, 34, 69.

There may not be a Condition or Clause of Re-entry for Non-payment of Rent inserted in this Kind of Contract; and yet some hold, that a Fine levied to one in Tail, upon a Condition, with a Remainder over, is good. 1 Co. 76. 6 Co. 33. 2 Co. in Cromwell's Case. Dyer 33, 69. See 27 H. 8. 84. Plow. 34. 24 E. 3. 62.

Whereby it seems a Fine may be levied to one upon Condition, with Remainder, but not with Re-entry.

In Replevin the Case upon the Pleadings was, a Feoffment was made, rendring 3 l. per Ann. Rent, with a Clause of Distreis, and the Feoffor covenanted to make a further Assurance of the Land; afterwards he levied a Fine to the Feoffee, with a Render of 3 l. Rent; adjudged that he might avow for the old Rent upon the Feoffment notwithstanding the Fine; and that the Render is not a Grant of new Rent, but a Confirmation of the old. Moor 298.

A Fine upon a Grant and Render was levied in the Reign of *Ed. 4.* and a *Scire Facias* brought, and Judgment given, and a Writ of Seisin awarded, but not executed; afterwards another Fine *sur Cognissance de droit come ceo* was levied of the same Lands, and five Years passed, and the Writ of Seisin of the first Fine being not executed, another *Scire Facias* was now brought to execute it, to which *Scire Facias* the Fine *sur Cognissance de droit* was pleaded in Bar; and the Question was, whether it should bar it, or not; it was insisted that it should not, because the first Fine was executory, and *in Custodia Legis*, by which it is preserved, and a Fine *sur Cognissance* cannot effect a Thing executory, for the Estate ought to be turned into a Right, otherwise it cannot be barred by such Fine; but the Estate of him in this first Fine is not turned into a Right by the second Fine, and by Consequence not barred; besides the Stat. 4 H. 7. is a general Law, and in the Affirmative, and therefore shall not take away the Statute of *William* the 2d, which gives the *Scire Facias*; but the Court inclined, that the second Fine, and five Years passing, was a Bar to the first Fine not being executed. March 194.

A Render of a Concord may not be of any other Thing than what is in the Writ of Covenant, unless it be of a Rent, or Common issuing out of it. 18 E. 4. 12.

But a Fine may be (as hath been said) with a Render back again of some Estate in the same Land that passeth by the Fine, or some Rent out of it; so that in this Kind of Fine there may be a Reservation of Rent, a Clause of Distreis, or *Nomine pena*, and a Warranty; and therefore if *A.* levy a Fine to *B.* *sur Cognissance de droit come ceo*, &c. and *B.* by the same Concord grants and renders the Land back again to *A.* for Life, without Impeachment of Waste, the Remainder to *C.* the Wife of *A.* for her Life, the Remainder to *A.* and his Heirs; this is a good Concord, and by this Devise a Jointure may be, and is oftentimes made for a Woman.

In Replevin the Case was, *B.* and *G.* levied a Fine of the Place where, &c. *sur Cognissance de droit come ceo*, and the Conusee by the same Fine rendered back the Lands to *B.* in Tail, reserving a Rent to himself; and also that if the Tenant in Tail should die without Issue, then the Lands should remain to *G.* the other Conusor in Fee; afterwards *B.* the Tenant in Tail died without Issue; it was a Question, whether

whether the Rent and the Reversion passed, it being by one Fine; and adjudged that both did pass, and that it should enure as several Fines; but where a Gift is made in Tail, rendering Rent to the Donor, the Remainder over in Fee; this being a Deed is good Reservation of the Rent, and the Remainder only without the Rent shall go to him to whom it is limited over. *Cro. Eliz.* 727.

And a Lease for Life or Years may be made by Fine with a Render. The Lessee must acknowledge the Land to be the Right of the Lessor that is seised of the Land, as that, &c. and then the Lessor must grant and render the same back to the Lessee (that is Conusor in the Fine) for Life, or for certain Number of Years, (as the Agreement is) reserving Rent with Clause of Distress; and this is a good Fine and a common Devise for this Purpose; but if the Lessor be Tenant in Tail, it seems this Kind of Fine will not bind the Issue in Tail.

And yet if a Tenant in Tail and N. do by Fine acknowledge the Land to be the Right of a Stranger, as that, &c. and then the Stranger (that is the Cognisee) doth grant and render the Reversion to the Tenant in Tail; this will be a good Fine to bar the Issue in Tail also, and will likewise pass the Rent and Reversion to the Tenant in Tail also. *Bro. Fines* 118. 6 Co. 33. 1 Co. 76. pl. 435. *Dyer* 279. *Perk.* §. 629.

To have a Lease for Years to bind a Tenant in Tail: The Tenant in Tail and the Lessee did acknowledge the Tenements to be the Right of one A. a Stranger, who did grant and render the same Fine to the Lessee for Years, the Remainder to the Lessor and his Heirs; this was with Proclamations; this is a good Lease to bar the Issue in Tail. 44 E. 3. 45.

Husband and Wife levied a Fine to the Conusee, who by the same Fine granted and rendered to them and to the Heirs of the Husband, and rendered other Part of the Lands to the Wife in Tail, Remainder over; now there being a plain Variance in this Case, for after the Whole was rendered to the Husband in Fee, then Part to the Wife in Tail; the Heir of the Husband brought a Writ of Error, and assigned this Variance for Error; but adjudged that there is no Occasion of a precise Form in a Render upon a Fine, because it is only an amicable Assurance upon Record. 5 Co. 38.

Adjudged that where the King is Tenant in Tail by the Gift of any of his Ancestors, being Subjects, he may upon a Fine by Grant and Render bar the Estate-tail; but in such Case it would be necessary for the Conusee to have likewise a Grant from the King by express Words to enter upon the Lands, because the Fine upon a Grant and Render being only executory, it may be a Question, whether the Conusee may enter upon the Possessions of the King without such a Grant. 7 Co. 32.

By a Fine with a Render a Lease for Years may be made thus also: If one that is Tenant in Tail within the 11th of Henry 7. accept of a Fine *sur Cognissance de droit come ceo*, &c. and then by the same Fine render back the Land to the Cognisor for one hundred Years; this will be a Discontinuance, and bind the Issue by this Statute. 2 Leon. Case 206.

H. seised in Fee as Heir of the Part of his Mother, together with his Wife, levied a Fine to A. and B. with Warranty; and A. and B. by the same Fine did grant and render the Lands to the Husband and Wife in Tail, Remainder to the Heirs of the Husband: The Husband and Wife dies *sans Issue*; and the Question was, whether the Heir *a parte paterna*, or *a parte materna*, should take the Lands by this Fine? It was argued, *a parte materna*, that the Seisin of the Conusee is fictitious; for if the Conusee were Tenant for Years, the Term would not thereby be extinguished; and that he is like to a Surrendree of a Copyhold, nothing but a mere Instrument; and therefore that nothing was altered by the Fine, but that the Use and Estate remained as before. But on the other Side it was said, that the Conusee could not render if he had not the Estate in him; and that the Render was a Re-enseoffment; and of that Opinion was the Court, who held, that the Estate was (by this Fine) once put in the Conusee, and the Fine and Render is a Conveyance at Common Law, and the Render makes the Conusor a new Purchasor as much as a Feoffment and Re-enseoffment at Common Law. 1 Salk. 337.

(E) *Of the Parts of a Fine.*

THERE are five essential Parts of a Fine, viz.

1. *The original Writ against the Cognisor.*
2. *The Composition or King's Licence to alienate the Lands contained in the Writ of Covenant.*
3. *The Concord.*
4. *The Note of the Fine.*
5. *The Foot of the Fine.*
6. And to this may be added a sixth Part, if the Fine be to be levied with Proclamations.

First, *As to the original Writ.*

The *Writ of Covenant* is the usual original Writ, taken out by the Cognisee or Cognisees against the Cognisor or Cognisors to the Fine, for without an Original a Fine cannot be levied; yet a Fine may be levied upon any Writ of Right, or other Writ whereby Land is demanded or recovered. It begins thus:

Midd', Command A. B. that justly, &c. he perform, &c. to D. the Covenant, &c.

A Writ of Covenant lies properly upon a Covenant in the Realty, where one by Deed grants to another, to acknowledge unto him by Fine, certain Lands or Tenements to him and his Heirs; in which Case the Grantee shall have a Writ of Covenant against the Grantor to levy a Fine of those Lands.

This Writ of Covenant is now become the *only Original* now used to ground a Fine upon, tho' a Fine may yet be levied upon a *Quid juris clamat, Per quæ servitia, De Rationabilibus divisis, Warrantia Chartæ*, or upon any Writ of Right, or other Writ whereby Lands, Tenements or other Hereditaments are demanded, or may be recovered in a real Action, but the Use of these Writs are chiefly antiquated.

Secondly, *As to the Composition or King's Licence.*

The *Composition* or *King's Licence* to alien the Land, for which the King has a Fine or Sum of Money, which is called the *King's Silver*.

For this is properly that Money which is due to the King in the Court of Common Pleas, in Respect of a Licence there granted to any Man for passing a Fine, and is Part of the Revenues of the Crown.

Note, That if the *King's Silver* be entered and indorsed upon the Writ of Covenant by the Clerk for that Purpose, altho' the Cognisor dies before the Fine comes to the Chyrographer, yet this Fine is good for the other two Parts, viz. the *Note* and the *Foot* of the Fine are but Abstracts taken out of this. *Brown's Treat. of Fines* 8.

Thirdly, *As to the Concord.*

The *Concord* is the Agreement between the Parties that intend the levying the Fine, wherein is declared how and in what Manner the Things contained in the Writ shall pass; and as the Writ of Covenant is the Foundation, so this is the Substance of the Fine. It begins thus, viz.

And the Agreement is such, to wit, that the aforesaid A. hath acknowledged the Tenements aforesaid, with the Appurtenances, to be the Right of him the said B. &c.

The Concord is the Foundation or Substance of the Fine, for if upon this the *King's Silver* is entered, altho' the Conusor dies afterwards, yet the Fine is good, and the *Note* and the *Foot* of the Fine are but Abstracts out of the *Præcipe* and Concord by the Chyrographer. *Vide 5 Co. 38, 43.*

See more hereafter concerning the *Concord* of a Fine.

Fourthly, *As to the Note of the Fine.*

The *Note* is an Abstract taken out of the Writ of Covenant and Concord by the Chyrographer before it be ingrossed. It begins thus:

Oxon, ff. Between A. B. Plaintiff, and C. D. Deforcient, &c.

Fifthly,

Fifthly, *As to the Foot of a Fine.*

The Foot of a Fine is an indented Piece of Parchment, containing the Effect and Substance of the Fine; as the Parties to the same, the Thing granted, the Day, Year and Place, and before whom the Concord was made. It begins thus:

This is the final Agreement, &c.

And this is called the Foot, because it is the last Part of the Fine.

And when this is done, the Fine is ingrossed of Record, and the Indentures made by the Chyrographer, and delivered for the Party to whom the Cognifance is made, and then the Fine is said to be ingrossed. 5 Co. 38, 43. 2 Inst. 514.

The Foot of the Fine is also taken for all the casual Parts of a Fine (that emerge from the Writ of Covenant to the Caption of the Concord) filed together.

Sixthly, *As to Proclamations made upon a Fine.*

Altho' Proclamations made upon a Fine are not the essential Parts of the Fine, yet they are a necessary Adjunct, for upon every Fine made according to the Statute of 4 H. 7. c. 24. they must be made, and being made, they make a Bar accordingly to what does pass. Poph. 63. Moor 356.

And according to that Statute the Chyrographer or his Deputy proclaims them in the Court of Common Pleas every Term.

These Proclamations were appointed first by the Stat. 1 Rich. 3. 7. (tho' before that Time, by the Stat. *de finibus levatis*, Fines were openly to be read at two certain Days in the Week, (by the Discretion of the Justices); and by the Stat. of Rich. 3. Fines at the Common Law have the same Force they had before, and might be levied according to that Statute, or the Common Law, at the Election of the Parties.

The Proclamations were to be made four several Days in each Term, during four succeeding Terms, by the Stat. 1 R. 3. 7. 4 H. 7. 24. 32 H. 8. 36.

But by the Stat. 31 Eliz. c. 2. Fines in the Common Pleas shall be proclaimed four Times only, viz. once in the Term wherein the Fine is ingrossed, and once in each of the three Terms then next following.

If any Proclamation be made upon a Sunday it is Error, because it is not *die juridicus*. Dyer 128.

Proclamations are absolutely requisite to a Fine *sur Cognifans de droit come ceo*, &c. (but not to a Fine *sur Concessit*) for they make a Bar according to what passes.

Note; A Writ of Covenant was Teste 24 April, return' Quinden' Pasch', which was in Truth the 15th of April, and so the Return was nine Days before the Teste; but this being a common Assurance between and by the Consent of the Parties, shall be amended, but not in other Writs. 5 Co. 45. Moor 571. S. C. contra, that it is not amendable.

Where the Sheriff is one of the Deforceants, the Writ must be directed to the Coroner, otherwise it is not good. Cro. Eliz. 300.

A Fine was, *Hæc est finalis concordia facta, &c. a die Sancti Michaelis in tres Septimanas Anno 10 Willielmi tertii coram Thoma Trevor, &c. & postea in Crastino Sancta Trin' Anno primo Annæ concess' & recordat' coram Justiciariis ejusdem, &c.* The Question was, of which Term this should be a compleat Fine; adjudged it should be of that Term in which the Concord was made, and of which the Writ of Covenant was returnable; for the Concord is the compleat Fine, but the *Concess. recordat.* is only Leave to inrol it. 1 Salk. 341. 6 Co. 68. Hob. 330. 2 Vent. 47.

(F) *Who may be Cognifors.*

IN every Fine (as before observed) there is a Suit supposed wherein the Party that is to have the Thing is called the Plaintiff, and sometimes the Conufee or Recognifsee; and he who parts with the Thing is called the Deforceant, and sometimes the Conufor or Recognifor.

Any Person Male or Female, Body Sole or Corporate, that hath Capacity to grant, or is able to be a Grantor by a Deed, may levy a Fine and be a Conufor therein.

But there are certain Persons prohibited by Law, which the Judges or Commissioners that take the Conufance of Fines ought not to admit or receive, and yet if they

Writ.

Concord.

All Persons
that may
grant.

they do admit them, and a Fine be levied by such Persons, the Fine is good and unavoidable, *Fieri non debet, sed factum valet*: And of this Sort are *Madmen, Lunatics, Villains, Ideots*, Men that have the *Lethargy*, doting *old Persons* that want Discretion, *Drunken Men*, and Men that are forced to it by *Threatning, Imprisonment*, or the like; Also such as are born *blind, deaf and dumb*; but a Man that becomes so accidentally may be received, and ought not to be refused.

Also Persons *attainted of Felony or Treason* ought not to be received to levy a Fine; but such Persons being admitted to levy a Fine, the Fine will be good against all Persons but the King and the Lord of whom their Lands whereof the Fine is levied are held for their Times.

Also *Infants* ought not to be received to levy a Fine; and yet if an Infant be admitted to levy a Fine, and he does not avoid it by Writ of Error during his Minority, as he may if it be not a Fine *sur Grant & Render in Tail or for Life* the Fine will be good for ever against him and all others.

And if he dies during his Nonage, before he hath avoided it, it seems his Heir can never avoid it; and yet upon this Point the Judges of the Common Pleas have been divided on a solemn Argument; and of this Just. *Dod.* in 17 *Jac.* made a *Quere.*

If an Infant or Feme Covert be to take by Fine, he or she needs not be examined, when they are Conusors in a Fine. 24 E. 3. 62. 3 H. 6. 41. Infant, Feme Covert.

Persons who by our Law were accounted civilly dead, as Monks, Friars, and the like, might neither be Cognisors nor Cognisees in Fines, nor would a Fine levied by or to any of them be good. 22 E. 4. 4. 15 E. 4. 21. 19 H. 6. 25. 5 H. 7. 25. Persons civilly dead.

And a Fine *sur Cognissance de droit come ceo, &c.* may not be levied to any Person, but to one that is Party to the Writ of Covenant; yet a Vouchee after he has entered into the Warranty to the Demandant, it is said, may confess the Action, or levy a Fine to the Demandant; for he is then supposed to be Tenant to the Land. Party to the Writ.

So a Fine or Release from the Demandant to the Vouchee is good, and yet they are not Parties to the Writ; but a Fine levied by the Vouchee to a Stranger is void. Co. 29. 7 Ed. 4. 13. 5 H. 7. 40.

Corporations Civil, that have an absolute Estate in their Possessions belonging to their Corporations, as a Mayor and Commonalty, &c. may together and with a joint Consent levy a Fine of the Land belonging to their Corporation as a single Person may do; but no one of the Corporation, tho' he be the Head thereof, nor any of the Members, without the general Consent of the whole Corporation, can levy a good Fine. Corporations.

Also *Bishops, Deans and Chapters, Heads and Fellows of Colleges*, and such like, who have an Estate of Freehold in *Ecclesiastical Lands* in Right of their Churches, &c. are forbidden and restrained by divers Acts of Parliament from levying any Fines of their Lands belonging unto them; but of the Lands such Persons have in their own Right, they may levy Fines as other Persons may do. 21 Ed. 4. 13. *Plowd.* 11, 78, 122, 124, 538, 575. 11 Co. 78. Spiritual Persons.

Also *Women that have Husbands* ought not to be admitted alone without their Husbands to levy Fines, and yet if such a Woman alone levies a Fine of her own Land which she has in Fee-simple, and her Husband does not avoid it (as he may if he will) by Writ of Error, Entry or otherwise during his Life; or after her Death during his own Life, if he be Tenant by the Curtesy; this is now a good Fine, and will bind her and her Heirs for ever, except she be an *Infant* at the Time of the Fine levied, and her Husband happen to die during her Minority; for then in that Case if it be not a Fine *sur Grant & Render* to her in Tail or for Life, she may avoid it during her Minority; but if the Coverture continues unto her full Age, in that Case she cannot avoid it except her Husband joins with her in it, but the Husband and Wife ought to be received together to levy any Fine of her Land. Feme Covert.

He who has an Estate in Fee-simple in Land in the Right of his Wife, is forbidden to levy a Fine without her. Stat. 32 H. 8. c. 36. & 28. Husband and Wife.

The Persons that levy a good Fine must be such, and must have such an Estate in the Land as they are not prohibited by any Law to levy the Fine, otherwise the Fine will be void. Such as have an Estate.

But such Persons who are outlawed, or waived in personal Actions only, may levy a Fine. Persons outlawed.

Also he that has an Estate of the King's Gift or Provision, cannot levy a good Fine of it to bind the King, or to bind the Issue in Tail, by 32 H. 8. c. 28. Tenant in Tail of the King's Gift.

- Intruder upon the King. Also a Fine levied by the Heir that is an Intruder upon the King's Possession, is void. 1 H. 7. 5. 24 Ed. 3. 65.
- Jointenant, &c. A Jointenant, Tenant in Common or Partner, may levy a Fine of the Land so held by him, to a Stranger or to another Jointenant, Tenant in Common or Partner. 26 H. 8. 9. Dyer 69, 334. Plow. 338, 378. 11 E. 4. 68.
- Tenant in Fee-simple. Also Tenant in Fee-simple, in Remainder or Reversion.
- Tenant for Life. Tenant for Life, it is said, may levy a Fine *sur Grant & Release* of the Lands which he holds for Life, to hold to the Cognisee for Life of the Tenant for Life. 44 E. 3. 36. But if the Estate be larger, it is a Forfeiture of his Estate. 4 H. 7. Noy 30.
- Tenant in Tail after Possibility, &c. And so the Law is the same of such Fines by Tenant in Tail after Possibility, Tenant in Dower, or by the Curtesy. 39 E. 3. 16. But it seems to be no Forfeiture of a Rent. 2 H. 5. 7.

(G) Who may be Cognisees.

- All Persons that may take by Grant. ANY Person who has a Capacity to take by a Deed of Grant, so as to be a good Grantee, may be a good Cognisee in a Fine.
So any Man or Woman *Sole or Covert*, of *full Age* or *under Age*.
Any *mad* or *lunatick* Persons, *Idiot* or *Men de non sane memory*.
So any Man in or out of *Prison*, or *beyond Sea*.
Any Person *attainted* of *Felony* or *Treason*, or *outlawed* in a personal Action, a *Bastard*, a *Clerk convict*, an *Alien*; any of these may be a good Cognisee, and take by a Fine as well as by a Deed; and a Fine levied to any such Person will be good. 5 Ed. 3. 9. 3 H. 6. 42. 24 Ed. 3. 62.
- Corporations. So Corporations Spiritual and Temporal, Civil or Corporal, may be Cognisees in Fines. But before the ingrossing of such a Fine, there goes always a Writ to the Justices of the Common Pleas, *Quod permittant finem ill. levare*.
- Party to the Writ. A Fine *sur Cognisance de droit come ceo*, &c. may not be levied to any Person but to one who is Party to the Writ of Covenant; yet the Vouchee after he has entered into the Warranty to the Demandant, it is said, may confess the Action, or levy a Fine to the Demandant, for he is then supposed to be Tenant to the Land.
So a Fine or Release from the Demandant to the Vouchee is good, and yet they are not Parties to the Writ. But a Fine levied by the Vouchee to a Stranger is void. 3 Co. 29. 7 Ed. 4. 13. 5 H. 7. 40.
- Infant, Feme Covert. If an Infant or Feme Covert be to take by Fine, he or she needs not be examined, as when they are Cognisors. 24 E. 3. 62. 3 H. 6. 41.
- Persons civilly dead. But such Persons as are *civilly dead*, as Friars, Monks, and the like, cannot be Cognisees in a Fine, and therefore a Fine levied to such Persons is void.

(H) By what Names, Cognisors and Cognisees may give and take in a Fine.

- Name and Surname. THE Cognisors and Cognisees in Fines ought to be rightly called by their Names of Baptism and Surname.
- Two of one Name. And if there be two of one Name, it is most proper and safe to distinguish them by the Distinction of Elder or Younger, and the like.
- Names of Dignity. But Kings, Queens, Princes, Dukes, Marquisses, Earls, Viscounts or Barons, are seldom named by their Surname, but by their Christian Name and Dignity; as George the Second, King of England, &c. Frederick Prince of Wales; John Duke of Lancaster, &c.
- Titles of Honour. But Knights, Esquires and Gentlemen, are called by their Christian Name and Surname, together with their Additions of Honour; as A. B. Bart. C. D. Knt. E. F. Esq; G. A. Gent. &c.
- By Curtesy. And the Addition of Bishop, Dean, Prebendary, &c. it is said, are rather used out of Curtesy than Necessity, for the Fine may be good without them. 21 E. 4. 8. 1 Aff. pl. 11. 7 H. 4. 22. 14 H. 6. 15. 1 Brownl. 30. But they are usually named by their local Titles; as Thomas Archbishop of Canterbury, Primate and Metropolitan of all England; John Archbishop of York, Primate and Metropolitan of England; Robert Bishop of Winchester, &c. Edward Dean of the Cathedral Church of St. Paul London;

London; William one of the Prebends of the Cathedral Church of the Blessed St. Peter Westminster, &c.

A Corporation or Fraternity must be described by the very true Name of the Corporation; as it is named in the Patent, Charter and Foundation of it. 11 H. 4.

12 H. 4. 20. 7 H. 6. 27. 37 H. 6. 29.

Some small Difference in a Name, it is said, will not hurt; as *Margery* for *Margaret*, Where a Difference in a Name will hurt.

Agnes instead of *Anne*.

Yet a Fine levied to *A.* and *Sibel* his Wife, where her right Name was *Isabel*, was held void. 1 Aff. pl. 11. Bro. 344.

But if a Fine be levied by a Man and his Wife, and the Wife is named wrong, it is said this Fine shall bind her by Estoppel. Bro. 344. Wife wrong named.

Yet if a Woman has two Husbands living, and with her second acknowledges a Fine by his Name; this Fine it seems is void.

But if a Woman levies a Fine with her right Husband, and by a wrong Christian Name, she is concluded by such Fine, and cannot avoid it during her Life. Bro.

Fines 17. 1 Aff. pl. 7. 7 H. 4. 22.

If a Feme Sole after the Teste of the Writ of Covenant, & *Dedimus potestatem*, takes the Cognisance of a Fine of her, and before the Day in Bank to record and ingross it marries, yet the Fine shall be good and recorded by the Name she had when Sole. Feme Sole marries before Day in Bank.

But her Death at such Time will make the Fine void.

See before Chap. 4. §. 5.

Death after Day in Bank.

(1) Of what Fines may be levied with Respect to the Estate of the Parties.

If either the Cognisor or Cognisee at the Time of the Fine levied be seised of any Estate of Freehold in *Fee-simple*, *Fee-tail*, or *for Life*, in Possession, Reversion or Remainder, whether the same be by Right or Wrong, the Fine will be a good Fine in this Respect.

And therefore if one that is seised of Land in *Fee-simple*, or *Fee-tail*, general or special, levies a Fine of this Land to a Stranger, this is a good Fine.

So if a Stranger levies a Fine to him of this Land, this is a good Fine.

So also a Fine levied by or to a Tenant for Life of the Land he so holds, is good in this Respect: But he must take heed of a Forfeiture in this Case; for if a Tenant for Life levies a Fine *sur Cognisance de droit come ceo*, &c. to a Stranger, or levy a Fine *sur Grant & Release* to a Stranger, to hold to the Cognisee for a longer Time than for the Life of the Tenant for Life. However in this Case the Fine be a good Fine, yet this is a Forfeiture of Estate of the Tenant for Life, whereof he in Reversion or Remainder may take present Advantage.

And yet if such a Tenant for Life levies a Fine *sur Grant & Release*, to hold to the Cognisee for the Life of the Tenant for Life, or grant his Estate by such a Fine to him in Reversion or Remainder, or by Fine grants a Rent out of the Land for longer Time than for his own Life; in these Cases the Fine is good, and there is no Forfeiture of the Estate of the Tenant for Life.

So likewise if a Fine be levied to a Tenant for Life by a Stranger, who thereby acknowledges all his Right to be in the Tenant for Life, and releases and quits Claim to him and his Heirs, and goes no further; this is a good Fine, and no Forfeiture of the Estate of the Tenant for Life, for his Estate is not changed thereby, and it may enure to him in Reversion; but if the Stranger says further in the Fine, *Come ceo que il ad de son done*, this is a Forfeiture. Shep. Touch. 13, 14, cites Stat. 27 E. 1. c. 1. 41 E. 3. 14. 44 E. 3. 56. 39 E. 3. 16. 17 E. 3. 62. 24 E. 3. 26. 1 H. 7. 22. 2 Co. 56. 9 Co. 106.

But if neither the Cognisor nor Cognisee be seised of any Estate of Freehold in Possession or Reversion of the Lands whereof the Fine is levied at the Time of the Levying of the same, but have only a *Lease for Years*, or *not so much*, the Fine is void, and of no Force as to any Stranger; however it may be good between the Parties by way of Estoppel.

And therefore if a Lessee for Years, or a Disfeisee, or one that hath Right only to a Remainder or Reversion levies a Fine to a Stranger that hath nothing in the Land; this Fine is void, or at least voidable, as to and by a Stranger thereunto, and he that hath

hath Cause may shew that the Freehold Estate and Seisin of the Land was in another before and at the Time of the Fine levied, and that *Partes finis nihil habuerunt tempore levationis finis*, and by this avoid it.

And yet a *Vouchee* after he hath entered into the *Warranty* may levy a Fine unto the *Demandant*, but not to a *Stranger*.

And a *Disseisor* may levy a Fine to a *Stranger* that hath nothing in the Land; and this is a good Fine, for he hath the Fee-simple by wrong in him.

Also the *Issue in Tail* may be barred by way of *Estoppel*, by a Fine levied by his Ancestor being Tenant in Tail, altho' neither Conusor nor Conusee have any Estate of Freehold in the Land. *Shep. Touch.* 14. cites 5 Co. 123. 3 Co. 88, 93. Co. Lit. 251. 3 H. 7. 9. 5 H. 7. 41. 3 H. 6. 21. 27 H. 8. 4.

A *Jointenant*, *Tenant in Common* or *Coparcenor*, may levy a Fine of his Part to a *Stranger*, and this will be a good Fine.

And so also it seems may one *Coparcenor* or *Tenant in Common* to another.

One single Member of a Corporation Aggregate of many cannot levy a Fine of the Lands of the Corporation, as the Major or Master of a College cannot levy a Fine without the Commonalty, or his Fellows, &c. But such Persons may levy Fines of the Lands they are solely seised in their own Right, as other Men may do.

Such as have Estates of Freehold in Ecclesiastical Lands in the Right of their Churches, Houses, &c. as Bishops, Deans and Chapters, Prebends, Parsons, and the like, may not levy a Fine of such Lands, for if they do, it will not bind the Successor. 11 Co. 78.

He that has an Estate of Fee-simple in Lands in the Right of his Wife, ought not to levy a Fine thereof without her, and if he does, she and her Heirs may avoid it after his Death.

Also he that has an Estate of Lands given in Tail by the King, or by the Provision of the King, ought not to levy a Fine of this Land, for it is void against the Issue in Tail and the King.

Also he that has an Estate of Lands that are prohibited to be sold by Act of Parliament, ought not to levy a Fine of such Land.

Also she that hath an Estate of Lands of her Husband, or of any of his Ancestors assured to her for her Jointure, Dower, or in Tail, by the Means of her Husband or any of his Ancestors, may not levy a Fine of this Land; for if she grants a greater Estate than for her own Life, this worketh a present Forfeiture. *Shep. Touch.* 14, 15. cites Stat. 32 H. 8. c. 28, 36. 12 Ed. 4. 12. 6 Co. 55. Bro. Fines 121. 5 Co. 3, 4. Stat. 1 H. 7. c. 20.

Tho' a Fine levied by Lessee for Years, or at Will, be void, yet it is otherwise by one having a defeasible Right. 1 Will. 520.

A. seised in Right of his Wife of a Share in the New-River Water in Fee; they both make a Mortgage by way of Lease for 1000 Years by Deed without a Fine, reserving a Pepper-Corn Rent. The Husband died, upon which the Wife received the Profits, and paid the Interest. The Mortgagee brought his Bill to foreclose the Wife; it was held, that there ought to have been a Fine, it being the Wife's Inheritance, and therefore she was not barred. 2 Will. 127.

(K) Of what Fines may be levied with Respect to Things.

A Fine may be levied of all Things, whereof either a *Præcipe quod reddat*, or a *Præcipe quod faciat*, or a *Præcipe quod permittat*, or a *Præcipe quod teneat*, lies: It may be levied of Things Ecclesiastical or Temporal that are inheritable and in esse at the Time of the Levying of the Fine: So a Fine may be levied of an

Honor,	Warren,	Common of Estovers,
Manor,	Fair,	Hundred,
Stoke,	Mine,	Way,
Island,	View of Frankpledge,	Ferry,
Barony,	Waif,	Franchise,
Castle,	Stray,	Liberties,
Messuage,	Mill,	Privileges,
Cottage,	Toft,	Seigniorie,
Meadow,	Curtilage,	Reversion,
Pasture,	Dovehouse,	Toll,
Wood,	Garden,	Stallage,
Underwood,	Orchard,	Picage,
Chapel,	Land,	Pontage,
River,	Felons Goods,	Acquittal,
Chantry,	<i>Felo's de se</i> ,	Services,
Parsonage,	Fugitives,	Portion of Tithes,
Rectory,	Persons attainted,	Oblations,
Advowson,	Persons outlawed,	Obventions,
Vicarage,	Deodand,	Corodies,
Tithes impropriate,	Hospital,	Offices,
Estovers,	Furzes,	Barn,
Foldage,	Heath,	Stable,
Corody,	Moor,	Malthouse,
Office,	Reedy Ground,	Brewhouse,
Piscary or Fishing,	Rent,	Marish Land, whether Salt
Chace,	Common of Pasture,	or Fresh.
Park,	Common of Turbary,	Alder Ground, &c.

A Fine may be of a *Rent-charge* which had no Being before, or of a *chief Rent*, or Rents. other Rent which had a Being before, but not of an *Annuity*.

A Fine cannot be levied of *Money agreed to be laid out in Land*, and settled in Tail; but a *Decree in Equity* can bind such Money equally as a Fine could the Land. *Money.*

1 Will. 130.

The Exception must always be of such Things as will lie in the Writ, *Regist.* Of what the Exception may be. *Origin.* 228, 229, and of such a Thing as is comprehended in the Writ.

(L) Of what Fines may not be levied, with Respect to Things.

BUT a Fine levied of *Antient Demesne Lands* will not be good. 32 H. 8. c. 7. 8 Co. 145. But see the Stat. 11 & 12 W. 3. c. 14.

Fines levied of any Lands prohibited to be sold by Act of Parliament, are void. Stat. 32 H. 8. c. 36 & 28.

(M) By what Names Things must be expressed in Fines.

Certain and apt Words must be used to express the Things to pass by the Fine; Apt Words. for a Fine levied *de Tenemento*, or *de Hereditamento*, or *de duobus Tenementis*, is void, or at least voidable for Error, because of the Uncertainty and Unaptness of the Words. Cro. Eliz. 196. Leon. 88.

For the proper Word to express a Tenement or Hereditament in a Fine is *Messuage*, as of one *Messuage*, or two *Messuages*, &c.

- Manor.** One *Manor* may also be *Parcel* of another *Manor*, and pass by the Name of that *Manor*. 20 *Aff. pl.* 54.
A *Manor* may pass by his proper Name without naming of the *Town* or *Place*, *Towns* or *Places* wherein it lies, as *De manerio de D. cum pertinen'*. 19 *E.* 4. 9.
Other Things may pass in *Fines* by the same Names they are granted in *Deeds*, as *de scit. ambit' & praein'* nuper *Monasterii de D. scit. manerii de D. grangia de D. parco, D. praebeud' de D.*
- Castle, Honor, Hundred.** Also a *Castle, Honor* or *Hundred*, may be *Parcel* of a *Manor*, and pass by the Name of the *Manor* whereof it is *Parcel*; or it may pass by its own proper Name, as of the *Castle of A. with the Appurtenances*, or of the *Honor of A.* 1 *E.* 3. 4. 2 *E.* 3. 36. 20 *Aff. pl.* 54.
- Reversion.** A *Reversion* of *Land* may pass by the Name of a *Reversion*, or by the Name of the *Land* itself. 43 *E.* 3.
- Foldage.** A *Foldage* may pass by the Name of *D. libertate unius Faldagii cursu ovium, cum pertinen'* in *F.* or *de libero Faldagio ovium cum pertinen'* in *F.* or *de libera Falda.*
- Demefnes, &c.** *Demefnes, Rents, Seigniories, Courts, Pleas, &c.* whereof a *Manor* consisteth, pass by the Name of *Manerium cum pertinentiis.* 3 *Inst.* 512.
- View of Frankpledge. Waifs.** A *View of Frankpledge*, and such like Things, may pass by their own Names, as of a *View of Frankpledge*, of *Goods* and *Chattels* waived, of *Felons, Fugitives, Outlawry*, put in *exigend'*, *Felo's de se*, *Deodands, Treasure-Trove* and *Strays*, with the *Appurtenances* in *M.*
- Presentation.** When a *Fine* is but for the *Presentation* to a *Church* only, it must be of the *Advowson of the Vicarage of the Church of S.* and not with the *Appurtenances*.
- Vicarages endowed.** And of *Vicarages* endowed, the *Writ* must be of the *Advowson of the Vicarage of the Church of S.* and not with the *Appurtenances*.
- Not endowed.** And where the *Vicarage* is not endowed, it must go under these Words: *Of the Advowson of the Church of S.*
- Parsonages, Rectories, &c.** And *Parsonages, Rectories, Advowsons, Vicarages* and *Tithes* impropriate, pass not by the Words, *Of the Advowson of the Church*, but by this, *Of the Rectory of the Church of S.* with the *Appurtenances*.
- Highwood.** *Highwood* and *Underwood* may pass by the general Name of *Wood*, as *Of twenty Acres of Wood.*
- House boot, Hay-boot, Plough-boot.** *House-boot, Hay-boot* and *Plough-boot*, by the Name of *Estovers*, as *Of reasonable Estovers in Wood, viz. in ten Acres of Wood of the said A. in D.*
- Fishing.** A *Fishing* may pass by the Name of *Separali Piscaria in aqua de S.*
- Foldage.** A *Foldage* may pass by the Name of *de libertat. unius Faldagii & cursu ovium.*
- Chapel, Hospital.** A *Chapel* or *Hospital* will pass by the Name of a *Messuage.* 13 *Aff.* 2.
- House, Shop, Curtilage, Garden, &c.** So by the Name of a *Messuage* with the *Appurtenances*, may pass a *House*, with a *Shop, Curtilage, Garden, Orchard*, also a *Dove-house* and *Mill*, as *Parcel* thereof. *Bract. lib. 5. c. 28. §. 1.* *Plow.* 169, 170, 171.
- Toft, Chamber.** So by the Name of *Cottage*, a *Toft*, a *Chamber*, a *Cellar, &c.* may pass, and yet these also may pass alone by their own single Names *de uno Messuagio, uno Curtilagio, &c.*
- Part of intire Things.** *Part of an intire Thing* may pass by the Words, *Of one Moiety, third Part*, or of *two Parts in three Parts to be divided*, as the *Case* requires.
So, *Of the Moiety of all the Tithes of Corn and Hay of the Land called B. with the Appurtenances in H.*
- Manor divided.** But if an *intire Thing*, as a *Manor* or *Messuage* be parted; as if the *Manor* of *S.* be divided into two *Parts*, and the *Division* be so made as that the *Manor* for that *Part* be not extinct, and a *Fine* is to be levied of *Part* of it, it must pass by the Name of the *Whole*, as *Of the Manor of S.*
- Messuage, &c. divided.** So if a *Messuage* and *twenty-three Acres of Land* be parted, the *Part* divided may pass by the Name of one *Messuage* and *ten Acres of Land*, and not, *Of a Moiety of one Messuage and twenty-three Acres of Land.*
- Mill.** *Mill* is good without adding *Wind*, or *Water* or *Corn*, yet the latter is most usual. 44 *E.* 3. 13.
- Land how demanded.** *Land* may be demanded by a certain *Number of Acres*, as of *ten Acres of Land, twenty Acres of Meadow, twelve Acres of Pasture, &c.* or by the certain *Measure* of the *superficial Quantity* thereof; as *De Hida, Carucata, Bovata, Virgata, Aera, Roda, Furlingo Terrae, &c.*

In like Manner *Boscus*, *Subboscus*, *Bruera*, *Mora*, *Juncaria*, *Mariscus*, *Alnetum* & Wood, &c. *Ruscaria*, may be demanded by the Number of Acres thereof. 16 Aff. 9.

Turbary may be demanded by the Name of *Mora*.

Turbary.

Rent by the Number of the Things, or that which is to be rendred; as ten Pounds, Rent, ten Marks, twelve Shillings, Six-pence, &c. 21 E. 3. 44.

But Note, That it is usual in Fines to comprehend more Numbers of Acres than are intended to pass; and this will not hurt, for in such Case no more shall pass than what is intended and agreed upon between the Parties. *Poph. Rep.* 105.

More Acres contained in the Fine than intended to pass.

And every Thing excepted ought to be certainly named, but it needeth not to say *cum pertinentiis* after the Thing excepted. 40 E. 3. 35.

How Things excepted must be named.

(N) *The Order of placing Things in Fines.*

MANY of these may be granted together in one Fine; as fifty Messuages, four Tofts, five hundred Acres of Land, and fifty Shillings of free Rent, as Occasion requires.

So of a Dove-house, three Gardens, 2l. 6 s. 4 d. Rent, and of the Rent of four Capons, one Pound of Wax, and the like, all in one Fine. 3 Co. 45. 6 Co. 67. 7 Co. 38.

Where the original Writ is of many Things, they must be expressed thus: Suppose it were of a Manor, House, Rectory, &c.

Words for the dividing of Things.

First, Of one Manor; Secondly, *Also* of a Rectory; Thirdly, *And also* of a Messuage; for the fourth Thing, *And likewise*; for the fifth, *Moreover*; for the sixth, *And furthermore*; for the seventh, *And likewise*; and for the eighth, *And moreover*; and if there be more, then to begin again.

The Nature and Quality of the Things must be observed; as Land, Meadow, Pasture, &c. and the Place where they lie.

The more worthy Things must be put first; as a Castle before a Manor, a Manor before a Messuage, a Messuage before Land, Arable before Meadow. *Plow.* 168. 7 H. 6. 39.

Things general before Things special; as before Meadow, Pasture, Wood, Heath, Marsh, &c. must be placed Land, that being the Genus thereto.

So *Boscus* must precede *Alnetum*, *Salicetum*, &c. as Wood is the Genus to Wood-Ground.

For the placing of Particulars in a Writ of Covenant is in all Things as in a *Præcipe quod reddat* of Lands.

And for this there is a Rule in the Register (*Reg. Orig. fo. 2.*) which is thus set down after this Manner:

^{suagium,} ^{um,} ^{endinum,} ^{umbare,} ^{dinum,} ^{ra,} ^{tum,} ^{tura,} ^{cus,}
Mes^{ra,} Toft Mol Col Gar Ter Pra Pas Bos
Bosc Mora.
^{ria,} ^{cus,} ^{tum,} ^{caria,} ^{ditus,}
Junca Maris Alne Pis Red Seclare Priora.

Also intire Things must be set down before their Parts; as *De manerio de C. & medietat. manerii de B. cum pertinen. &c.*

Parts of Things excepted, must succeed those Things out of which they be excepted; and if there be divers Parcels in one Writ, that Parcel out of which the Exception is to be made ought to be last placed; as thus, *De manerio de D. cum pertin. in C. except uno Messuagio, duobus Acris Terræ & Advocacione Ecclesiæ de C. &c.* *Regist. Orig. fo. 6.*

And yet if this Order be not observed, but the Things be otherwise placed in the Writ, if it be suffered to pass, the Fine will be good enough.

(O) *Of naming the Places where the Things lie.*

THE County, Town, Parish or Hamlet, where the Things lie that are intended to pass by the Fine, ought to be certainly named.

A Fine is good altho' it name the Lands to lie in a Hamlet, or in a Town decayed; but it is good to name the Town wherein the Hamlet is, and that with Addition for Distinction, if there be divers Towns of the same Name in that County.

If there be two Towns *Walton* and *Street* in the Parish of *Street*, and a Fine is levied of such Lands in *Street*; in this Case the Lands in *Walton* will not pass by this Fine, *Walton* being a distinct Town or Village by itself; and altho' *Street*, the Parish, comprehends both, yet in the Fine the Lands in *Walton* shall not be said to be comprized, unless *Walton* had been a Hamlet of *Street*, and the Fine had been levied of Lands in the Parish of *Street*, then all would have passed well enough. *Cro. Jac.* 120.

If there be divers Towns of one Name in the same County, it is best to make an Addition for Distinction.

If a Manor extends itself into divers Towns, as *A. B. C.* it is the best and safest to name all the Towns, or none of them at all, as *Of the Manor of S. in A. B. and C.* or *Of the Manor of S. with the Appurtenances*; for if any one of the Towns be omitted, none of the Manor in that Town will pass; but it seems that if the Manor be only named, and not said in what Town it lies, the Fine may be good. *9 E. 4. 6.*

Also where divers Manors be of one Name, with Distinction of North and South, as North S. and South S. it is good in all the Proceedings of the Fine to express which of the Manors is intended to be passed. *Cro. Eliz.* 196. *Bro. Fines* 44, 91.

(P) *Of the Præcipe and Concord of a Fine.*

The Præcipe
what.

THE Præcipe is an Abstract of the Writ of Covenant, and is as a Title to the Concord, being placed before it in the Nature of an *Exordium* or Introduction; wherein is recited the Parties Names, Parcels, &c. as in the Writ.

Concord
what.

What the Concord is, is mentioned before.

See the Forms of both in the Second Part.

Of what a
Concord may
be.

The Concord or Agreement may be made of an *Estate in Fee-simple, Fee-tail*, for Life or for Years; it may be also of divers *Remainders*, and that to them that are no Parties but *Strangers* to the Fine; it may be also *single* or *double*, with a Render back again in some Estate of the same Land or some Rent out of it, so a Concord may have in it a Reservation of Rent, a Clause of Distress, or *Nomine pænæ* and a Warranty.

And therefore if *A.* levies a Fine to *B.* *sur Cognissance de droit come ceo*, &c. and *B.* by the same Concord grants and renders the Land back again to *A.* for Life without Impeachment of Waste, the Remainder to *C.* the Wife of *A.* for her Life, the Remainder to *A.* and his Heirs; this is a good Concord, and by this Devise a Jointure may be and is oftentimes made to a Woman.

And if a Man would have a Lease for Life or Years made of Land by Fine, the Lessee must by the Concord acknowledge the Lands to be the Right of the Lessor, (who is seised of the Land) as that, &c. and then the Lessor must grant and render the same Land back again to the Lessee (the Conusor) in the Fine for Life, or for a certain Number of Years, as the Agreement is, reserving a Rent with Clause of Distress, &c. and this is a good Fine, and a common Devise for this Purpose.

But if the Lessor be Tenant in Tail, it seems this Fine will not bind the Issue in Tail.

And yet if *A.* Tenant in Tail, and *N.* do by Fine acknowledge the Land to be the Right of a Stranger, as that, &c. and then the Stranger that is Cognisee doth grant and render the Land again to *N.* for Life or Years with Clause of Distress, &c. and then grant and render the Reversion to the Tenant in Tail; this is a good Fine, and will bar the Issue in Tail also, and will likewise pass the Rent and the Reversion to the Tenant in Tail.

So if a Stranger that hath nothing in the Land levies a Fine *sur Cognissance de droit come ceo que il ad*, &c. to him in Remainder in Tail, depending upon an Estate for Life, and the Cognisee by the same Fine renders to the Cognisor for ten Years, to begin at *Michaelmas* following, and dies, and all the Proclamations are made after his Death, and then the Tenant for Life dies after the Time the Lease is to begin; this is a good Fine, and so a good Lease to bar the Issue in Tail.

If *A. B.* and *C.* levy a Fine to *D.* and *D.* renders the Land back again to *A.* for Life, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, and the Remainder to a Stranger in Fee; this, or any such like Concord as this, is good.

And

And if *A.* and *B.* join in a Fine of a Messuage to *C.* and *D.* and to the Heirs of *C.* who do grant and render a Rent-charge of 30 *l.* out of the Land to *A.* for his Life, to begin after the Death of *B.* to be paid at the Feasts of, &c. *Proviso semper quod præd' concessio præd' annualis reddit' 30 l. non aliquatit' se extendat ad onerand' personas dict' C. & D. sed tantummodo ad onerand' dict' messuag' tota vita ipsius A.* and then they grant and render the Messuage to *A.* during the Life of *H.* the Remainder to *B.* in Tail, the Remainder to the right Heirs of *B.* this is a good Fine.

But in such a Fine *sur Grant & Render*, these Things must be regarded :

1. None may take the first Estate by the Concord but the Cognisors, or one of them.

And therefore if *A.* acknowledges a Fine to *B.* and *B.* renders and grants the Land to *A. Habendum sibi & E. uxori ejus*, and the Heirs of their Bodies ; so if the Husband levies a Fine of his Wife's Land, and the Cognisee grants and renders the Land to the Husband and Wife, this is not a good Concord.

2. The Render of the Rent must be to one of the Parties to the Fine, and not to a Stranger.

3. A Man cannot reserve a less Estate to himself than Fee ; and therefore,

If *A.* acknowledges a Fine to *B.* and *B.* renders to *A.* in Tail, the Remainder to himself for Life ; this Remainder is void.

So if *A.* by Fine acknowledges Lands to *B.* and *B.* grants and renders the Lands to the Conusor in Tail, the Remainder to *B.* in Tail, the Remainder to *B.* in Fee, the Limitation of this Estate in Tail to *B.* is void, and he can never have Execution of it.

So if *A.* acknowledges Lands to *B.* and *B.* grants and renders to *A.* for Life.

4. The Agreement must be possible and sensible ; for if there be three Conusors in a Fine, and the Conusee renders to one of them for Life or Years a Rent, and grants the Reversion to another of them for Life or Years, rendring a Rent, and grants the Reversion in Fee or in Tail to the third ; this is not a good Concord.

5. There can be no Condition or Clause of Re-entry for Non-payment of Rent inserted into the Concord ; and yet some hold a Fine levied to one in Tail upon a Condition with a Remainder over, is good.

And such Concords as these ought not to be received, and if they be received, the Fine in most Cases may be avoided for these Faults ; but if a Fine be received with a Condition inserted into the Concord, this is a good Fine, and not avoidable by Writ of Error or otherwise.

1. No single Fine can be with a Remainder over to any Person contained in it, but it must be to the Conusee and his Heirs only.

2. No Rent can be reserved upon a Fine that is *sur Conscience de droit come ceo*, &c. but upon a Fine *sur Grant & Render*, or *sur Concessit* only ; for if one levies a Fine *sur Conscience*, &c. rendring Rent, this Reservation is void.

3. No single or double Fine shall be received with any Covenants or other Agreements than are before mentioned ; but in all these Cases also when the Fine is received and levied, it seems it is good and unavoidable, and that only the Remainder in the first Case, the Rent in the second, and the Covenants in the last, are void, and the Fine good for the Residue.

A particular Tenant, as for Life, &c. cannot surrender his Term to him in Reversion or Remainder by Fine, but he may grant and release it to him by Fine.

One may grant his Tenements which *H.* doth hold for Life, and which after the Death of *H.* ought to remain to him, to *H.* for Life, rendring Rent with Clause of Distress, saving a Reversion, and a Fine of this Form is good.

In the Concord the Particulars or Parcels need not, nor is it usual for them, to be recited over again, as in the *Præcipe* for the Writ of Covenant, (or in any other original Writ whereon the Fine is to be levied) ; but it will be sufficient to say,

And the Agreement is such, to wit, that the said *A.* hath acknowledged the Tenements aforesaid with the Appurtenances to be the Right of him the said *B.* &c.

And by the Words *Tenements aforesaid*, any Number or Quantity of distinct Things or Parcels will be well enough expressed.

But if the *Præcipe* be of intire Things by themselves, as *Of a Manor or Manors with the Appurtenances in A.* then you must say in the Concord,

And the Agreement is such, to wit, that the aforesaid *A.* hath acknowledged the Manor or Manors aforesaid to be the Right, &c.

Of reciting
Things in the
Concord.

Neither will *Messuages* named by themselves in a *Præcipe*, pass by the Word *Tenements* in the Concord: Also an

Honor,	Common,	A Liberty,
Castle,	A Warren,	Franchise,
Island,	Fishing,	Office,
Barony,	Rectory,	Bailiwick,
Hundred,	Tithes,	Fair,
Borough,	Oblations,	Market,
Knight's Fee,	Toll,	Passage,
The Site of a Manor,	Stallage,	The Moiety or Part of an
A Park,	Pontage,	intire Thing,
Prebendary,	View of Frankpledge,	<i>Wreccum Maris</i> ,
Rent,		The Advowson of a Church,
or Portion of Tithes,		must be particularly named in the Concord as well as in the

Præcipe.

Exception in
a Concord.

A Concord may be with an Exception of some Part, but this Exception must always be of such Things whereof the Writ will lie and are mentioned therein, they must be certainly named, and must succeed the Things out of which they be excepted, as,

Command A. B. *that justly, &c. he perform the Covenant to C. D. of the Manor of D. with Appurtenances in C. (except one Messuage, two Acres of Land, and an Advowson of the Church of C. &c.*

And the Agreement, &c. that the aforesaid A. hath acknowledged the Tenements aforesaid with the Appurtenances (except before excepted), &c.

And in all these and such Cases where the Concord is not formal, the Judges ought not to receive the Fine nor suffer it to pass; but if they do, and the Fine be finished, it cannot afterwards be avoided by Writ of Error, or otherwise, for these Faults.

Dividing
Things.

The Manors and Tenements contained in the Writ may be divided; as if a Fine be levied between A. and B. of two Manors, to be the Right of the said A. as that which, &c. for which A. doth grant and render one Manor to B. for Life, with two Parts of the other Manor which N. holdeth in Dower, to have the one Manor, and two Parts of the other Manor to B. for Life, the Remainder after his Death to A. in Tail, and that after the Death of N. the third Part shall remain to another.

So if a Fine be levied of the Manor of G. with the Appurtenances by A. unto C. which A. acknowledgeth the Right in C. as that, &c. and C. grants and renders the same to A. in Tail, the Remainder of the fourth Part of the Manor towards the West to the said A. and her Heirs, the Remainder of another fourth Part towards the East to J. in Fee, and so of the other two fourth Parts, or incertainly by three third Parts, in Remainder to A. B. and C. in Remainder severally; and these are good Concords.

If T. and E. his Wife levy a Fine to R. D. and T. C. of divers Manors and Lands in A. B. and C. and in the Fine there are divers Grants and Renders, and one Grant and Render is of the Manors of A. and B. and the Lands therein to T. and E. and the Heirs of T. and in another Render 100 Acres, Parcel of one of the same Manors is granted to E. in Tail, the Remainder to the right Heirs of a Stranger; notwithstanding this Repugnancy, the Concord, and consequently the whole Fine, is good.

As a Concord cannot be without an original Writ, so it must pursue the original Writ, and cannot be of any foreign Thing, *i. e.* such a Thing as is not contained in the Writ, except it be consequent thereunto; as when the Writ is of Land, there may be in the Concord of a Rent out of this Land, but there may be more Things in the *Præcipe* than are named in the Concord.

The End and Intent of a Fine, which is to pass a Right, and limit Estates from one to another, appears by the Concord thereof.

How the
Right is to be
limited.

Tho' there be divers Cognisees, yet the Right shall be limited to one of them only, and the Estate limited to his Heirs only whose Right it is acknowledged to be (As thus) A. is Cognisor, B. and C. Cognisees.

And the Agreement is such, to wit, that the aforesaid A. hath acknowledged the Tenements aforesaid with the Appurtenances to be the Right of the said B. as those which the said B. and C. have of the Gift of the aforesaid A. and those he hath remised and quitted Claim from himself and his Heirs to the said B. and C. and the Heirs of the said B. forever. And, &c.

But the King's Tenant may acknowledge the Right to be in divers.

The Estate shall be limited to his Heirs only to whom the Right is limited, and not to the Heir of all the Cognisees, as in the Example before.

It is also said, that the Release and Warranty must be by one of the Cognisors, Release and from him and his Heirs only; for in a Fine from divers, the Fee must be supposed to be in one of them only, 21 E. 3. 33. but the Practice is generally otherwise.

And it is otherwise where a Fine is of Lands in Gavelkind.

Indeed in a Fine from a Man and his Wife it seems sometimes to that Purpose.

The Form whereof see in the Second Part.

And so it may be from two others, the Fee being in one of them.

But generally where there are divers Cognisors in a Fine, the Release is from them and their Heirs.

And in these Cases each of the Conusors may warrant a-part if they will, and one may give a general Warranty, and the other a special Warranty; and it is the usual Practice to warrant a-part where there are divers Cognisors.

But for these Matters see the Second Part, Title Fines.

Lands bought of divers Persons by several Purchasors, may well pass in one Fine, Several Purchases in one Fine. and then the Writ of Covenant must be brought by all the Vendees against all the Vendors, and every Vendor must warrant against him and his Heirs only.

And these joint Fines are proper when the Purchases are of small Value.

And one Concord may be of Lands in several Counties, and the Fine *pro Licentia* Lands in several Counties. Concord of all extracted intirely; but there must be several Writs of Covenant returnable all at one Day. *Dyer 227. pl. 24.*

A Fine shall be said to be of the same Term the Concord was made, (*i. e.* if the King's Silver be paid) as was resolved in the Case of *Lloyd ver. Viscount Say and Seal*, in *Mic. 10 Ann.* where a Fine was thus: Of what Term a Fine shall be.

This is the final Agreement, made in the Court of the King at Westminster in three Weeks from the Day of St. Michael in the 10th Year of William the Third, before Thomas Trevor, &c. And afterwards on the Morrow of the Holy Trinity, first of Ann. agreed and recorded before the same Justice.

Here the Concord was of one Term, and the Recordat of another; so the Question was, of which Term this should be said to be a compleat Fine. *Per Cur.* It is a Fine of the Term the Concord is of, and of which the Writ of Covenant is returnable; for the *Concordia facta in Cur.* is the compleat Fine, the *Concessit Recordat* is only the Leave of the Court to enrol it. *Vide 6 Co. 68 Hob. 330. 2 Vent. 47. 1 Salk. 341.*

The Conusance of a Fine, and a Grant and Render therein, shall be expounded and taken as a Charter or other Conveyance between Party and Party, because it is a Conveyance upon Record, and not as a Writ of Judgment upon Record. Exposition of Conords.

And therefore if *A.* and *B.* by a Fine acknowledge the Manors of *S. T.* and *W.* to be the Right of *C.* and *C.* doth render the Manors of *S.* and *T.* to *A.* by one Render, and after by another Render limits 100 Acres, Parcel of the Manor of *S.* to *B.* this shall be a good Concord, and be expounded according to the Intent of the Parties, viz. that *B.* shall have the 100 Acres, and *A.* all the Residue of the Manor.

If a Fine be levied to two Men *& heredibus*, without the Word [*suis*]; this is void for Incertainty in a Fine as it is in a Deed.

If a Fine be levied *Come ceo que il ad de son done*, hereby a Fee-simple will pass without any Word of Heirs. And so also it is in Case of a common Recovery.

If the Lands be limited in the Concord of a Fine to *B.* for Life, and after to the Children of *C.* begotten, and *C.* hath at the Time of the Fine levied two Daughters only; in this Case the Sons and Daughters that are born after shall take nothing by this Fine; and no Averment of Intent will help in these Cases; and yet an Averment lieth upon a Fine of the Uses thereof, and of no other Matters, as upon a Deed.

(Q) *In what Courts Fines may be levied.*

THE only Court of Westminster for setting out Fines, is the Court of Common Pleas, and thither they must be certified.

Also by the *Stat. 2 E. 6. c. 28.* Fines may be levied in the County Palatine of Chester.

And by *37 H. 8. c. 19.* of Lands in the County Palatine of Lancaster.

And by *5 Eliz. c. 27.* within the County Palatine of Durham.

And

And if any other Persons than such as hereafter mentioned shall take Cognisance of or record Fines, or if they be levied in another Court, or otherwise than as is before set forth, they will be void, or voidable at the least for Error. 2 *Inst.* 514, 515. *Stat.* 2 *Ed.* 6. c. 28. 37 *H.* 8. c. 19. 5 *Eliz.* c. 27.

(R) *Before what Persons Fines may be acknowledged.*

THE Persons or Judges before whom a Fine is to be levied are of two Sorts; for some are Judges only at the Time of the Cognisance and Certificate thereof, and others are Judges to whom the Cognisance is to be certified, and before whom it is to be recorded.

The first Sort are such as have Power to take such Cognisance either *ex Officio*, and by Virtue of their Offices, or by some *Commission* general or special granted to them by the King out of Chancery. *West's Symb.* Tit. *Fines*.

Judges.

As all or any two of the Justices of the Common Pleas may in open Court take Knowledge of Fines, and record them by Virtue of their Office. *Stat.* 15 *E.* 2. *Stat. de Carlisle.* *Jenk. Cent.* 4. Case 28.

Or the Chief Justice of that Court may by the Prerogative of his Place take Cognisance of Fines in any Place out of the Court, and certify the same without any Writ of *Dedimus Potestatem*. *Dyer* 224. *Crompt. Jurif.* 92.

And so also (it seems) may two of the Justices of that Court with the Consent of the Rest, or one of them with a Knight (but this is not usual at this Day). *Stat.* 15 *Ed.* 2. *Bro. Fines* 20.

Also Justices of Assise by the general Words of their Patents may take and certify Cognisances of Fines without any special *Dedimus Potestatem*, but at this Day they do not use to certify them without a special Writ of *Dedimus Potestatem*.

And Fines have been levied before Justices Errant. *Dyer* 224. *Bro. Fines* 120.

But formerly neither the Lord Chief Justice of the Court of Common Pleas, nor any other Judge of that or any other Court, could take the Cognisance of Fines out of the Court of Common Pleas without a *Dedimus Potestatem*, as appears in *F. N. B.* 146. g. where *Fitzberbert* says,

"And if he who ought to levy the Fine and make the Cognisance cannot come for Infirmary, or other reasonable Cause, to make the Acknowledgment in Court, then he ought to sue out a *Dedimus Potestatem* directed to some Justice, that he may go to him and take his Cognisance, and certify the same to the Justices of the Common Pleas, and the Writ of Covenant ought to be sued out before the *Dedimus Potestatem* be returned into the Common Pleas, and the *Dedimus Potestatem* ought to rehearse that the Writ of Covenant depending in the Common Pleas is depending before the Justices; and the Writ shall be thus:

Rex Dilecto & fideli suo W. Rikbil, &c. and so goes on with a *Dedimus Potestatem*, directed out of Chancery to the Lord Chief Justice of the Court of Common Pleas, to authorize and empower him to take the Cognisance of a Fine of a Plough-Land out of Court.

Upon which *Brown* in his *Introduction of Fines*, p. 38. notes, That there had not been any Occasion for a *Dedimus Potestatem* to be directed to the Lord Chief Justice of the Common Pleas, to take the Acknowledgment of a Fine, if he had a Power annexed to his Office (as they say every Chief Justice of that Court for the Time being now has) to take Cognisance of Fines *ex Officio* out of Court.

Commissioners.

Also Cognisances of Fine are taken by a special Writ issuing of the Chancery called a *Dedimus Potestatem*, whereby Commission is given in divers Cases to a private Man for the Speeding of some Act appertaining to a Judge upon a Surmise that the Parties that are to do the same are not able to travel; and by this Writ upon such a Surmise, Power may be given to any Serjeant at Law alone, or to any Knight and Gentleman together, to take the Cognisance of such Persons, and they may by Virtue thereof take the same either of all or some of the Parties; and that (as it seems) in any Place accordingly.

But a Justice, or other Person being Cognisee in a Fine, may not take Cognisance thereof himself.

See more concerning *Dedimus Potestatem*, *post*.

And all those who have Power to take the Conufance of Fines are to take great Their Duty. Care of whom they take the fame, and whom they do admit to make fuch Conufances before them.

And therefore they are to fee that they know the Parties that are to be Cognifors, that they fuffer not one Man to make a Conufance in another Man's Name, and that they do not take any Conufance from any Perfon prohibited by Law.

And if a Wife joins with her Husband in the Conufance, the Judges or Commissioners muft take Care to examine her apart from the Husband, whether fhe parts with her Right in the Land willingly, or by Compulfion of her Husband; for altho' fhe be made to do it by Compulfion of her Husband, yet fhe has no way to relieve herfelf when it is done.

And Judges for the recording of Fines are the Juftices of the Common Pleas only, Judges of recording Fines. and therefore all Cognifances of Fines muft be certified thither, for in that Court only, and not in any other of the Courts of Record at *Westminster*, or in any other inferior Court, or Antient Demefne, are Fines to be levied.

But by fpecial Grant a Fine may be levied in a bafe Court; and by Acts of Parliament Fines may be and are levied in the Counties Palatine of *Lancaster*, *Chefter* and *Durham*, of Lands lying within thofe Places.

And if any Perfons do take Conufance of Fines, or other than fuch as before that have Power, or any other Perfons or Judges fhall record Fines, or they fhall be levied in any other Court or Place than as before, fuch Fines are void.

At this Day any Juftice of the Common Pleas, King's Bench, Judge of Affife, Baron of the Exchequer, Serjeant at Law, the Attorney or Solicitor General, any apprentice or Barrifter at Law, Doctor or Batchelor of Divinity, or other dignified Clergyman, Doctor of the Civil Law, Proctor, or publick Notary, Doctor of Phyfic, Gentleman of the Country, (provided a Knight or Serjeant at Law be joined with them) may take the Acknowledgment of a Fine by *Dedimus Potestatem*; but with this Difference, that a Judge of the King's Bench or Common Pleas, a Baron of the Exchequer, Judge of Affife, or Serjeant at Law, may take the Cognifance of a Fine before the *Dedimus Potestatem* be fued out; whereas the other Perfons cannot.

Pro. Intr. 52.

(S) *How to fue out and levy Fines in general.*

THE Manner and Order of fuing out or levying a Fine is thus: *First*, There is an original Writ fued out, and this may be a Writ of *Mefne*, *Warrantia Chartæ* or *Confeftudinibus & Servitiis*, or any Writ of Right, (for upon thefe or any other Writ whereby Land is demanded or may be recovered a Fine may be levied) but the moft ufual Writ whereupon a Fine is levied is a Writ of Covenant.

And notwithstanding it is the common Practice to take out a *Dedimus Potestatem*, and have the Conufance of a Fine before any original Writ be fued forth, yet the original Writ is always fupposed in Law to precede the *Dedimus Potestatem*, and therefore doth and muft evermore bear Teftes before it, or elfe it is erroneous.

After the original Writ fued forth, there is a *Precipe*, which is the titling of the Writ whereupon the Fine is levied, and the Concord and Agreement of the Parties, both which are fairly written (and that moft commonly in Parchment); after this the Party or Parties that is or are to acknowledge and levy the Fine, is or are to come in Perfon before him or them that have Power to take the fame Conufance, who are to take Notice of the Perfons, that if there be any Woman that has a Husband and amongst the Conufors in the Fine, they do examine her whether fhe be willing and do it freely without the Compulfion of her Husband.

After this, all the Parties that are to levy the Fine are to declare themfelves before the Judges or Commissioners (having Power to take the fame Conufance) to be willing to pafs their Right in the Lands according to the Agreement, and to fubfcribe their Names or Marks to the Concord: And if it be taken by a fpecial *Dedimus Potestatem*, it is to be returned and certified under the Hands and Seals of the Commissioners into the Court of Common Pleas, that it may be there recorded and finifhed.

(T) *How to acknowledge a Fine at the Bar.*

FIRST make your *Præcipe* in Paper for the Curfitor of the County to make the Writ of Covenant, and having received it from him sealed, then write a *Præcipe* and Concord thereof in Parchment, and deliver them all to one of the Serjeants at Bar, the Cognifors being also present.

Then the Serjeant will desire the Justices to record the Appearance, which being granted the Serjeant says,

The King's Silver.

Then the second Prothonotary, or his Clerk, answers,

What will be give.

Then the Serjeant will answer thus,

What he will have.

Then the second Prothonotary, or his Clerk, answers again,

Draw the Concord.

Then the Serjeant will say, *With your Leave the Concord is as follows, to wit, &c.* reciting the Substance of the Concord, with Relation to the Lands in the *Præcipe*.

And after, that if any of the Cognifors be a Feme Covert, or married Woman, the Serjeant will direct her to go up to the Puisne Judge to the Bench, to be examined of her Consent to part with her Right in the Land, whether she does it freely, or by Compulsion; and then the Judge takes the Concord in Parchment, and reads her the Contents, and examines her privately apart; and that done, she delivers it to the Prothonotary to be recorded.

After it is recorded, you must pay the Fees of the Court, and then take the *Præcipe* and Concord, and annex it to the Writ of Covenant, and pass it thro' the several Offices as hereafter directed.

(U) *How to sue out a Fine before the Lord Chief Justice of the Common Pleas.*

FIRST, Draw your *Præcipe* and Concord under it fairly on Paper.

Vide the Forms in the Second Part, Tit. Fines.

Then ingross them in the like Manner on Parchment.

And you may also for Dispatch write the Caption underneath.

Then go with the Cognifor or Cognifors to the Lord Chief Justice of the Common Pleas, at his Chamber, and deliver your Paper or Parchment to the Clerk of the Fines, who will inquire of him that comes with the Parties to the Acknowledgment of the Fine, if he knows them, and see that he subscribes his Name to the Fine; which done, he will get the Lord Chief Justice's Hand to the Caption of the Concord, ingrossed in Parchment, (and also to the Copy thereof in Paper, which is to remain with the Clerk of the Fines).

Then carry the Concord in Parchment to the Curfitor of the County where the Lands lie, and there get your Writ of Covenant made, which (before it be sealed) you are to carry to the *Alienation-Office*, and there compound it, and get it entred and indorsed; then carry it back to the Curfitor, who will get it sealed.

This being done, you must make a Warrant of Attorney, &c.

See of passing Fines after Caption, post.

(V) *How a Fine must be acknowledged before a Judge of Assise in the County.*

1. **D**RAW the *Præcipe* and Concord in a fair Hand upon Paper.

2. Carry the *Præcipe* and Concord so drawn, to the Curfitor of the County where the Lands comprized in the Fine lie, who will thereby make the Writs of Covenant and *Dedimus Potestatem*.

3. Then carry the Writ of Covenant to the Commissioners of the *Alienation-Office*, before it be sealed, (Q.) and there compound the King's Fine.

4. Then get the Writ of Covenant indorsed, entred and signed by the Commissioners of the *Alienation-Office*, together with the Receiver's Hand thereto, for what Money is paid for the Value of the Lands.

5. Then

5. Then carry the Writs of Covenant and *Dedimus* to the Curſitor, who will get them ſealed. *Qu. If not always ſealed before Writ of Covenant is carried to the Alienation-Office.*

6. Then carry them to the Clerk of the Fines belonging to the Judge of Aſſiſe, who will draw the Concord, (Q.) and return the ſaid Writs with the Judge's Hand to the ſame, and then he muſt put in his Warrant of Attorney, &c. as in other Caſes. *Bro. Intr. 47, 48.*

This may be the regular Method, but in the *Inſtructor Clericalis* the Method is thus:

1. Leave the *Præcipe* and *Concord* with the Judge's Clerk.

2. And when the Judge comes to Town, beſpeak of the Curſitor of the County a general *Dedimus*, directed to that Judge, and his Clerk will return the Subſtance of the Concord on the Back of the *Dedimus*.

3. Then get a Writ of Covenant, and compound it, and paſs it thro' all the Offices, as in other Caſes.

(W) *The Manner of acknowledging and levying Fines before Commissioners.*

WHEN the Cogniſance of a Fine is to be taken in the Country, it is moſt frequently taken before Commissioners, or Perſons authorized by a Writ called *Dedimus Poſteſtatem*.

The Perſons who may take the Acknowledgment of Fines are mentioned before; therefore it only remains now (as to Fines taken by Commissioners) to ſhew,

First, In what Caſes a *Dedimus Poſteſtatem* may iſſue.

Secondly, How to ſue it out.

Thirdly, How the Commissioners are to take the Acknowledgment, and return or certify the ſame into the Common Pleas Court.

Fourthly, How the Fine muſt be transmitted to and allowed by a Judge of the Common Pleas.

And in the next Place to ſhew the Method of paſſing the ſame (as well as Fines taken by other Perſons) thro' the ſeveral Offices till the ſame is compleated.

First, *In what Caſes a Dedimus Poſteſtatem may iſſue.*

If a Man levies a Fine, and is going into the King's Service, he may have a *Dedimus Poſteſtatem* directed to a Juſtice to take his Acknowledgment. *Bro. Intr. 40.*

And of a Woman that is pregnant, &c. *Ibid.*

And the Writ muſt make mention thereof. *Ibid.*

If he in Reverſion will levy a Fine of his Reverſion to another upon a Writ of Covenant ſued out againſt him, in that Caſe the Acknowledgment ſhall be taken in the Common Pleas; but if the Fine be not ingroſſed till the Tenant for Life has attorned, (and the Fine is ſaid to be ingroſſed when the Chirographer has made the Indentures thereof, and delivered them to the Conuſee) after which the Conuſee ſhall never have a *Quid juris clamat* againſt the Tenant for Life; but the Courſe is, when he in the Reverſion, upon a Writ of Covenant ſued againſt him, makes Conuſance of the Reverſion by Fine, &c. then the Conuſee thereupon ſhall have a *Quid juris clamat* againſt the Tenant for Life. And if the Tenant for Life be ſo infirm that he cannot travel, then he may ſue out a *Dedimus Poſteſtatem* directed to ſome Juſtice to take Cogniſance, &c. and to certify the ſame into the Common Pleas. *Bro. Intr. 40, 41.*

And a *Dedimus Poſteſtatem* ſhall be granted where the Lord by Fine grants the Services of his Tenant to another upon a Writ of Covenant ſued out againſt him, if the Conuſee ſues out a *Per quæ ſervitia* againſt the Tenant, then if he be feeble he may ſue out a *Dedimus Poſteſtatem* to take his Acknowledgment, &c. and to certify the ſame, &c. *Bro. Intr. 41.*

But now the Courſe is, to admit the Defendant in a *Quid juris clamat*, or *Per quæ ſervitia*, to make Attornment after Plea pleaded; and that eſpecially where he pleads ſuch a Plea that he forfeits his Eſtate, if it be found againſt him, &c. then it is clear that he may make an Attorney after the Plea pleaded, as the Courſe is, and if he be adjudged to attorn, to award a *Diſtringas ad attornand'* againſt him, &c. *F. N. B. 147. A.*

If

If one has divers Writs of Covenant depending against several Persons in divers Counties, &c. he may have one Writ of *Dedimus Potestatem* directed to one Justice to take their Acknowledgments severally, and to certify them, &c. *Bro. Intr.* 39.

A Fine was taken by *Dedimus*, but it was not mentioned in what County the Lands did lie; the King's Silver was entred, but the Fine remained at the Chirographer's Office, not yet ingrossed, and the Conusor died; it was held to be a good Fine by Virtue of the *Dedimus*, and might be ingrossed as a Fine at Common Law, and not by the *Stat. 4 H. 7.* because if the Party had been living, he might have it with or without Proclamations, but being dead, no Election can be made. *Dyer* 254. *Vide 4 Leon.* 96.

A Fine was taken by *Dedimus* in Hilary Vacation of Carrill and his Wife, who was then about the Age of nineteen Years; the Writ of Covenant was dated in January, returnable *Craftino pur'*, and the *Dedimus* was dated three Days after, and the Queen's Silver was entred in Easter Term, four Days before the Death of the Wife, (*viz.*) *Die veneris in septimana Paschæ*; but the Fine was not ingrossed *usque diem Mercurii prox.* whereupon the Heir of the Wife moved, that the Fine might not be recorded; but adjudged, that because the Caption was well taken by the *Dedimus*, and the Queen's Silver entred, tho' the Wife died before the Fine was ingrossed, yet it was a good Fine, and should bar her Heir. *Hil. 5 Eliz. Dyer* 220. 3 *Mod.* 140. 2 *Vent.* 47. S. C. *Hob.* 330. 12 *Co.* 124.

Secondly, *How to sue out a Dedimus Potestatem, and when it is necessary to sue out a Writ of Covenant at the same Time.*

Make a *Præcipe* on Paper with the Commissioners Names underwritten.

Carry it to the Curfitor of the County, and at the same Time you may bespeak a Writ of Covenant, but that is usually let alone till the *Dedimus* is returned; yet if it be a Fine of the preceding Term, it is the best way to have a Writ of Covenant at the same Time; for if the *Dedimus* is not taken and returned in Time, you must be obliged to petition the Master of the Rolls for a Writ of Covenant returnable of the preceding Term.

The *Dedimus* must be sent down into the Country, the *Præcipe* and Concord annexed to it, and then to be taken and returned by the Commissioners.

Thirdly, *How the Commissioners are to take the Acknowledgment of a Fine and Return, or certify the same into the Court of Common Pleas.*

Deliver the *Dedimus Potestatem* to the Commissioners, with the *Præcipe* and Concord ingrossed in Parchment, with Wax and Seals unto it.

The Commissioners ought to take Care that they know the Cognifors, and their Fitness and Capacity to be so; and if Husband and Wife be Cognifors, she ought to be examined solely and apart, whether she does it of her own free Will, or by Threats and Compulsion.

The Cognifance being taken, the Commissioners must return the *Dedimus Potestatem*, as in Second Part, Tit. *Fines*.

And then annex the Concord to the Back of the *Dedimus*, and the Commissioners must set their Seals to the Concord, and their Hands to the *Dedimus*, under the Return thereof.

The Caption also must be entred under the Concord, and the Commissioners Names subscribed thereto.

If the *Dedimus* be to two jointly to do it, one of them in this Case ought not to do it; or if it be to three jointly, two of them ought not to do it, for it will be Error; therefore Care must be taken concerning their joint and several Power; so if one of the Cognifees be one of the Commissioners, and he himself takes it, it is Error. *F. N. B.* 146, 147. *Dyer* 220. *Cro. Eliz.* 249.

And after the Commissioners have taken the same Cognifances by *Dedimus Potestatem*, they are to certify the same truly, and the Day and Year when it was taken, and not another Time, and to return the Commission into the Court of Common Pleas under their Hands and Seals within a Year after the taking of the same Cognifance, at the farthest.

And if they refuse to return or certify it, the Party grieved may by a Writ called *Cognitionibus admittendis*, or a *Certiorari*, compel that Commissioner that hath it in his Custody, or his Executor or Administrator, if he be dead, to certify it.

But if any of the Cognisors happen to die before it be certified, then it cannot be certified at all, for it cannot now be made a good Fine.

And so also (as some hold) if the King dies. But if the King's Silver be entred in Paper or upon the Back of the Writ of Covenant, (as the Use is) and the Party dies after this; in this Case the Fine may go on, and will be a good Fine notwithstanding the Death of the Party.

If a Man has a Writ of Covenant against one to levy a Fine, and upon that a *Dedimus Potestatem* is directed to the Justice to take the Cognisance of the Party, and the Justice takes the Acknowledgment by Force of the Writ, and afterwards will not certify the same into the Common Pleas, then the Party may sue out a *Certiorari* directed to the same Justice, rehearsing the whole Matter, and how he had taken the Cognisance, commanding him by the said Writ to certify the said Acknowledgment into the Common Pleas, &c. and thereupon he may have an *Alias* and *Pluries*, and also an *Attachment*, &c. against the said Justice, if he will not certify the same, or return the *Certiorari*, and shew Cause why he ought not to certify, &c.

And if the Justice be dead who took the Acknowledgment, the Conussee may have a *Certiorari* directed to the Executors of such Justice to certify the Cognisance; and may also have upon such a *Certiorari* an *Alias* and *Pluries*, or a *Causam nobis significes*, &c. and thereupon an Attachment may in like Manner be had against the Executors of such Justice upon the Refusal to certify as aforesaid; by which it appears that tho' a *Certiorari* be sent to the Justice to return the Acknowledgment before the Justices of C. B. yet the Party who is Cognissee in the Fine ought to sue out another Writ to be sent and directed to the Justices of that Court to receive such Acknowledgments as are taken; the Forms of both which Writs may be seen in the Register amongst the Writs of Covenant. F. N. B. 147. B.

There is also another Writ of *Certiorari* directed to the Treasurers and Chamberlains of the Exchequer, to certify the Transcript of a Fine into the Chancery, and a Writ of *Mittimus* out of the Chancery, directed to the Justices of the Common Pleas for the Transcript of the said Fine, &c.

And there is another Form of a Writ of *Certiorari*, directed to the Chirographer of the Court of Common Pleas, to certify into the Chancery the Tenor of a certain Note of a Fine levied in a former King's Reign, &c. as appears by the Register. F. N. B. 147. D.

Fourthly, How a Fine must be transmitted to and allowed by a Judge of the Common Pleas.

By a Rule of the Court of Common Pleas made in the 13th Year of George 1. it was ordered, That no Fine whatsoever taken and acknowledged before any Commissioners, by Virtue of a Writ of *Dedimus Potestatem* to them directed, should be allowed to pass, unless some Person present when such Fine was taken and acknowledged did personally appear before the Lord Chief Justice, or some other Justice of that Court, and was examined upon Oath touching the due Execution thereof, and particularly whether such Person knew the Parties acknowledging such Fine.

Which Rule having been found by Experience to be attended with Inconveniences, and having not answered all the good Purposes for which it was intended; for Remedy thereof, and the better to ascertain the Practice for the future, in Hilary Term 17 Geo. 2. it was ordered by the said Court, That from and after the first Day of the then next Michaelmas Term, instead of an Oath made *viva voce* of the due Acknowledgment of such Fines, an Affidavit or Affidavits in Writing on Parchment shall be made and annexed to every Fine so taken as aforesaid, in which Affidavit or Affidavits the Person or Persons making the same shall swear, That he or they knew the Party or Parties acknowledging such Fine; that the same was duly signed and acknowledged; that the Party or Parties acknowledging, and also the Commissioners taking the same, were all of full Age and competent Understanding; that the Females Covert (if any) were solely and separately examined apart from their Husbands, and freely and voluntarily consented to and acknowledged the same, and that the Conusor or Conusors, and every of them, knew the same to be a Fine to pass his, her or their Estate or Estates; which Fine, together with such Affidavit or Affidavits annexed, shall be transmitted to the said Lord Chief Justice, or some other Justice of the said Court, for his

his *Allocatur* thereon, and such Affidavit or Affidavits shall remain annexed to such Fine, and be left with the same in the proper Office. And it was ordered, That all and every such Affidavit and Affidavits as aforesaid, except where the Person or Persons at the Time of their acknowledging the Fine are in *Ireland* or some other Parts beyond the Seas, shall be made by some Attorney or Attornies of the Courts of *Westminster-Hall*, or of the great Sessions in *Wales*, or of the Counties Palatine of *Chester*, *Lancaster*, and *Durham*, and shall be sworn before a Person duly authorized to take Affidavits in the said Court.

And it was further ordered, That if any such Affidavit or Affidavits as aforesaid, shall be made and annexed to any Fine and transmitted to the Lord Chief Justice or any other Justice of the said Court for his *Allocatur* thereon, before the said first Day of *Michaelmas* Term, the same shall be received and allowed instead of an Oath made *viva voce* of the due Acknowledgment of such Fine.

The Form of which Affidavit you may see in the Second Part.

You pay for the Judge's *Allocatur* 4 s.

(X) *How to pass a Fine (after it is allowed) thro' the several Offices till it is finished.*

HAVING before shewn how a Fine must be acknowledged at Bar, or before a Judge or Commissioner, and how to sue out and return a *Dedimus*, &c. it now remains to shew what is afterwards to be done to compleat the Fine.

The Fine being allowed, if the Writ of Covenant be not made out, leave the *Dedimus* and Caption (when taken by *Dedimus*) with the Cursitor, and he will make out the Writ of Covenant, for which you pay 7 s. 6 d.

Then carry the Writ of Covenant to the *Alienation-Office* to be compounded.

After it is compounded, carry it back to the Cursitor, and he will mark how much the King's Fine is.

Then carry the Writ of Covenant to Mr. Prothonotary *Borret's* Office, to be returned, for which pay 1 s. 6 d.

Returning
Writs of Co-
venant.

But Writs of Covenant upon Fines of Messuages, Lands or Tenements, or Rents issuing out of them, lying in *London* or the Liberties thereof, or in *Middlesex*, whether singly or jointly, with Messuages, Lands or Tenements elsewhere, not to be returned until the Attorney prosecuting the Fine gives Notes in Writing to the said Clerk for the said Returns, or his Deputy, as well of the Name and Place of Habitation of the Attorney to the Fine, as of their own Names and Habitations, as also of the particular Street, Lane or Place where such Messuages, &c. are situate; and of the Persons Names who are in Possession of such Messuages, Lands or Tenements, or who are to pay the Post-Fines thereupon due to the King. And such Notes to be kept on a File, to be on Application to the said Clerk taken Account of by the Secondaries of the Counties in *London*, or Under-Sheriff of *Middlesex*. Reg. E. 6 W. & M.

Next make out a Warrant of Attorney upon a Piece of Parchment, (*see the Form in the Second Part*) which carry with the Writ of Covenant to the Clerk of the Warrants, and he will file the Warrant and sign the Writ; pay him 4 d.

Then annex the *Dedimus* and Caption to the Writ of Covenant, and carry them to the *Custos Brevium* in *Brick-Court* in the *Temple*, who will indorse upon the Writ when Proclamation was made; pay him 3 s. 8 d.

Then carry them to the King's Silver-Office in the *Temple* to be entred; pay 1 s. 8 d.

Note, That till it was entred in this Office and the King's Silver paid, it was not formerly accounted a Fine in Law; but now it is said to be a late Resolution, that it is a Fine in Law from the Caption.

Rasures.

And when taken as above, not to pass the King's Silver-Office, and the King's Silver be recorded, unless Oath be made before some Judge of this Court of the due Execution, and of the Day and Year when each Cognisor executed the same, where a Rasure in the Day or Year shall appear in the Caption; and no Fine so acknowledged before such Commissioners in Case of such Rasure, to be received and entred by the Clerk of the King's Silver, before there be an *Allocatur* of a Judge obtained. And Fines taken and acknowledged before the said Lord Ch. Just. or any Judge of Assize, or Serjeant at Law, if the Date of the Caption appears to have been rased, not to pass the King's Silver-Office, nor the King's Silver be recorded, before there be an Order under the Hand of some Judge of this Court obtained. And after any Fine has passed

passed the said Office, and the King's Silver of such Fine is recorded, neither the *Præcipe* nor Caption of any such Fine or Writ of *Dedimus Potestatem*, or Writ of Covenant, by which such Fine is passed, must be rased or altered before there be an Order under the Hand of a Judge of this Court for doing thereof, and for amending all Entries made from such Writs first obtained. *Reg. E. 9 A.*

All Caveats and Orders for stopping Fines (*illegally acknowledged*) to be renewed every Term, and Copies thereof left with the Clerk of the King's Silver, who is to demand only 3 s. 4 d. per Term, or be void. *Reg. E. 29 C. 2.* Caveats.

From the King's Silver-Office carry it to the *Chirographer's* Office in *Hare-Court* in the *Temple*, and the Clerk who belongs to the County where the Lands lie will make the Indentures and deliver them to you. Then the Fine is finished.

(Y) Of Fines by or to Husband and Wife, or one of them.

IF the Husband without the Wife levies a Fine of the Wife's Lands, she and her Heirs may avoid it after his Death; but if she does not make her Claim, &c. within five Years after her Husband's Death, then she is barred of her Right for ever notwithstanding the Stat. 32 H. 8. and so are her Heirs barred for ever. *Dyer 72. Plow. 373. Lit. §. 731.* Baron alone of Feme's Land.

The Husband alone levied a Fine with Proclamations of the Lands of his Wife, and died, and five Years passed without Action or Entry by the Wife; adjudged that she is barred by the Stat. 4 H. 7. and that she is not aided by the Stat. 32 H. 8. because that Statute doth not mention Fines with Proclamations. 6 Ed. 6. *Dyer 72. 8 Co. 72. Dyer 224. 2 Co. 93.*

And if one seised of Land in Fee marries a Wife, and after makes a Lease of this Land to A. for Life, the Remainder to B. in Fee, and B. levies a Fine with Proclamations, and the Husband dies, and the Wife does not make her Claim, &c. within five Years after the Death of her Husband, hereby she is barred of her Dower for ever, notwithstanding the Estate for Life in A. but if the Remainder of B. had been put to a Right at the Time of the Fine levied, she might have avoided the Fine by Plea, *Quod partes finis nihil habuerunt, &c. Anne Twist's Case, M. 18 Jac. C. B.* Of his Land.

And if the Husband levies a Fine of his own Land and dies, and his Widow having no Impediment does not make her Claim within five Years after his Death, hereby she is barred of her Dower for ever. 2 Co. 93. *Dyer 224. Goldsb. 148. 3 Co. Inst. 216. 3 Leon. 221.* Dower.

If a Jointure be made to a Woman after the Coverture, and her Husband and she levy a Fine of it, by this she is without Question barred of her Jointure in the Land; but it is thought that this will be no Bar to her of her Dower in the Residue of the Land of the Husband, and especially where the Fine is *sur Cognissance de droit come ceo, &c.* *Dyer 358.* Jointure. Dower.

For that the Election to have Jointure or Dower is not given to her till her Husband's Death. 1 Leon. 285.

If Husband and Wife be Tenants in special Tail, and the Husband alone levies a Fine, and dies, the Wife may enter, but the Issue is barred. *Moor 28. Case 90.* Husband alone.

If Lands be given to a Man and his Wife in Tail, the Remainder to the Right Heirs of the Husband, and the Husband alone levy a Fine of this; this will not Bar the Wife except she suffer five Years to pass after his Death without making Claim, &c. and therefore if the Fine be to the Use of the Husband and his Heirs in Fee, he may dispose it as a Fee-simple, and his Issue hath no Remedy. *Dyer 351.* He and Wife Tenants in special Tail.

And if Husband and Wife be Tenants in special Tail, and they levy a Fine at Common Law, and take back an Estate to them and their Heirs; by this the Estate-tail is not barred, for here she is not examined; and yet against a Fine levied by herself she shall not be remitted, for in this Case she is examined. *Lit. §. 670.*

She is not examined but when a Right is to pass from her.

If a Husband makes a Feoffment of the Land of his Wife upon a Condition which is broken, the Feoffee levies a Fine, the Husband dies in the fourth Year after the Proclamations, having Issue by his Wife, and after the Wife dies, and five Years pass, the Heir is barred to enter as Heir to his Father upon the Condition, but he shall have five Years after the Death of his Father as Heir to his Mother for her Right, *Quando duo jura in una persona concurrunt æquum est ac si essent in diversis.* *Plow. 397.* Heir.

If

Two Huf-
bands.
Fine levied
with second.
Mifnomer.

If a Woman during her first Husband's Life marries a second, and with him and by his Name acknowledges a Fine, it shall not bind her, because she is misnamed. 7 H. 4. 22, 23.

And if she levies a Fine with her right Husband by a wrong Christian Name, she is bound by *Estoppel* during her Life, and the Tenant may plead that she by such a Name levied the Fine. 1 Aff. pl. 11. Bro. Fines 117.

Feme Covert
alone.

A Woman that has a Husband ought not to be admitted alone without her Husband in any Case to levy a Fine.

But if she be admitted to levy a Fine without her Husband of her own Lands, wherein she has a Fee-simple, the Husband may *avoid it by Entry*, or otherwise, during her Life, (or if he be Tenant by Curtesy he may do it after her Death) but if he does not, it is a good Fine, and will bind her and her Heirs for ever.

Except she be an Infant at the Time of the Fine levied, and her Husband happens to die during her Minority; for in this Case (if it be not a Fine *sur Grant & Render* to her in Tail, or for her Life) she may avoid it during her Minority: And yet if in this Case the Coverture continues till her full Age, she may not avoid it unless her Husband joins with her in it.

Baron and
Feme to-
gether.

But the Husband and Wife together may, and ought to levy a Fine either to dispose of her own Land, or to Bar her of any Jointure or Dower upon her Husband's Land. 12 Co. 122, 7, 8. 27 Aff. 51. 3 Co. Inst. 515.

In *Formedon* in Remainder the Case was, There were three Sisters, the Eldest was Tenant in Tail, as to a fourth Part of the Lands, Remainder to the other two in Fee; the Tenant in Tail married, and then she and her Husband joined in a Fine *sur Cognissance de droit come ceo, &c.* to the Use of them both, and to the Heirs of the Body of the Wife, Remainder in Fee to the right Heirs of the Husband; and this was with Warranty against them, and the Heirs of the Wife, who afterwards died without Issue; and then the two Sisters brought a *Formedon* against the Husband, who pleaded this Fine and Warranty; and upon a Demurrer it was objected against the Form of pleading this Fine which was of a fourth Part, without saying into how many Parts to be divided; but adjudged that it is good in a Fine, being a common Assurance, but not in a Writ; then as to the Matter in Law, whether this Warranty was a Bar to the Demandants; and adjudged that it was, because the Husband warranted during his own Life only, and took back as large an Estate as he warranted, so that the Warranty as to him was destroyed as soon as created. 1 Mod. 181. 1 Leon. 114.

The Husband and Wife covenanted to levy a Fine of the Lands of the Wife to the Use of the Heirs of the Body of the Husband on the Wife to be begotten, Remainder to the Husband in Fee; they both died without Issue; and in Ejectment the Question was, whether the Heir of the Husband, or the Heir of the Wife, should have these Lands; and adjudged that the Heir of the Wife had the Title, because this Limitation to the Heirs of the Body of the Husband, is meerly void; for taking it as a Remainder, there is no precedent Estate of Freehold to support it, for here can be no Estate for Life to the Husband by Implication, because the Estate is the Wife's Estate, to which in Law he is a Stranger; and taking it as a springing Use, then it must be executory, because it is to arise after a dying without Heirs of his Body, which the Law will not expect; but a Feoffment to the Use of T. P. and the Heirs of his Body, to commence four Years from thence, or to commence after the Death of T. P. without Issue, if he die without Issue within twenty Years, is good as a springing Use, because the whole Estate remains in the Feoffor till that Time. 2 Salk. 675.

Wife within
Age.

If the Wife be *within Age*, and she and her Husband levy a Fine of her Land, they may *reverse it by Writ of Error*, and it shall be reversed as to both of them. 1 Leon. 115, 317.

Upon a Writ of Error to reverse a Fine levied by Husband and Wife for the Nonage of the Wife, they shall have present Restitution; for when they join in a Fine of the Lands of the Wife, all the Estate passes from her, and the Husband is joined only for Conformity; and therefore the Law permits the whole Estate to be restored to her tho' her Husband is living. 2 Co. 77.

The Wife was an Infant, and she and her Husband levied a Fine of her Lands, which was exemplified; they were both brought into Court by Rule, upon the Complaint of him in Remainder; and all this Matter appearing, the Fine was vacated in C. B. and the Exemplification was brought into Court and delivered up; the

the *Vacat* was *quoad* the Wife only, and he in Remainder was ordered to bring an Information against the Commissioners who took the Caption of the *Dedimus*, &c.

3 Lev. 36.

A. seised in Right of his Wife, made a Mortgage by Lease for 1000 Years by Deed without Fine, reserving a Pepper-Corn Rent; A. died, his Wife received the Profits and paid the Interest: On a Bill to foreclose the Wife, it was held that there ought to have been a Fine, it being the Wife's Inheritance, and therefore she was not barred. 2 Will. 127.

Where the Caption of a Fine is taken of a Feme Sole upon a *Dedimus*, and she marries before the Day of recording it; yet the Fine shall be engrossed and recorded as the Fine of a Feme Sole, because she had done all towards passing the Fine which was in her Power to do, and it shall bind her and her Heirs; and by the Opinion of some, her Husband shall be bound by this Fine, because the Marriage was the Act of both; but if she had died before the Return of the *Dedimus*, then the Writ of Covenant had abated, because her Death was by the Act of God. Dyer 246.

In a special Verdict in Replevin the Case was, a Feme Covert alone declared the Uses of a Fine intended to be levied by her Husband and herself of her own Lands, and before the Fine was levied the Husband alone declared other Uses; it was agreed on all Hands, that the Uses declared by the Wife were void, and that the Uses declared by the Husband were only good against himself during the Coverture, and no longer. 2 Co. 56. Moor 196. 1 And. 164. 4 Leon. 88.

No Fine or other Act of the Husband's only of or upon any the Lands that are the Inheritance of a Freehold of his Wife during the Coverture between them shall hurt the Wife, but that she or her Heirs, or such as shall have Right to the Land, may avoid it; but the Fine of the Husband and Wife together of her Lands is good, and shall bind her and her Heirs. Stat. 37 H. 8. c. 28.

She that has an Estate of the Land that was her Husband's, or any of his Ancestors, assured to her for Jointure, Dower or Intail by her Husband, or any of his Ancestors, may not levy a Fine of his Land to grant a greater Estate thereby than for her own Life; if she does, it will make a present Forfeiture by Stat. 11 H. 7. c. 20.

And if such a Woman accepts of a Fine *sur Cognissance de droit come ceo*, &c. and by the same Fine renders back the Land to the Cognisee for 100 Years; this is within this Statute a Forfeiture.

So if a Woman that has Title of Dower, will before she be endowed enter and levy a Fine; this will be within the Statute, and a Forfeiture of her Estate, by 12 H. 7. Cro. Jac. 689. 1 Leon. 206.

But a Lease for twenty-one Years by such a Woman Tenant in Tail by her Husband's Gifts, &c. altho' it be not warranted by 32 H. 8. yet it seems this is no Forfeiture within 11 H. 7. Cro. Jac. 689.

(Z) Of Fines by Tenant for Life, Tenant in Tail, &c.

If either the Cognisor or Cognisee at the Time of the Fine levied be seised of an Estate of Freehold in Fee-simple, Fee-tail or for Life, in Possession, Reversion or Remainder, whether the same be by Right or Wrong, the Fine will be good as to Point of Estate.

And therefore if one that is seised of Land in Fee-simple or Fee-tail, general or special, levies a Fine of this Land to a Stranger, this is a good Fine; but if neither of the Parties have any Thing in the Land passed, the Fine in many Cases will be void and useless, and it may be avoided by this Plea, *viz.* That neither of the Parties had any Thing to do with the Land. 41 E. 3. 14. 22 H. 6. 43. 3 H. 7. 9. 27 H. 8. 4.

If a Fine be levied by or to a Tenant for Life of the Land he doth so hold; this Fine will be good as to the Estate of the Parties to the Fine, but he must take heed of a Forfeiture in this Case. For,

If a Tenant for Life levies a Fine *sur Cognissance de droit come ceo*, &c. to a Stranger, or levies a Fine *sur Grant & Release* to a Stranger, to hold to the Cognisee for longer Time than for the Life of the Tenant for Life; in this Case tho' the Fine be a good Fine, yet it is a Forfeiture of the Estate of the Tenant for Life, whereof he in Reversion or Remainder may make present Advantage, and enter.

But if such a Tenant for Life levies a Fine *sur Grant & Release*, to hold to the Cognisee for the Life of Tenant for Life, or grants his Estate by such a Fine to him

in Reversion or Remainder, or by Fine grants a Rent out of the Land for longer Time than for his own Life; this Fine is good, and there will be no Forfeiture of the Estate of Tenant for Life by it.

So likewise if such a Fine be levied by Tenant for Life to a Stranger, who thereby acknowledges all his Right to be in the Tenant for Life, and releases and quits Claim to him and his Heirs, and goes no further; this is a good Fine, and no Forfeiture of the Estate of the Tenant for Life, for his Estate is not charged thereby, and it may enure to him in Reversion.

But if the Stranger says further in the Fine, *Come ceo que il ad de son done*; this is a Forfeiture. 27 Ed. 1. 1. 44 Ed. 3. 36. 1 H. 7. 5.

The same Law is of such Fines for Tenant in Tail after Possibility, &c. and Tenant by the Curtesy, 39 E. 3. 16. and yet such a Fine of Rent out of the Land is no Forfeiture.

A Tenant for Life in Tail after Possibility, &c. or in Dower, may not by Fine grant and surrender his Estate to him in Reversion; but he may grant and release it by a Fine. 17 Ed. 3. 62. 24 Ed. 3. 26.

If neither the Cognisor nor Cognisee be seised of any Estate in Freehold, in Possession or Reversion of the Land whereof the Fine is levied, at the Time of levying thereof, but have only a Lease for Years, or not so much; in this Case the Fine will be of no Force as to any Stranger, however it may be good between the Parties themselves to conclude them by way of Estoppel; and therefore if the Lessee for Years levies a Fine *sur Cognissance de droit come ceo*, this will not be a good Fine, because he has no Freehold in him. Jenk. Cent. 6. Case 45.

If a Lessee for Years, or a Disseisee, or one that has a Right only to a Reversion or Remainder, levies a Fine to a Stranger that has nothing in the Land; this Fine will be void, or at least voidable as for or to any Stranger to the Fine; and he that has Cause to except against it, may shew that the Freehold Estate and Seisin of the Land was in another before, and at the Time of the Fine levied, and that *Partes finis nihil habuerunt tempore levationis finis*, and by this avoid the Fine.

And yet a Disseisor may levy a Fine to a Stranger that has nothing in the Land, and this will be a good Fine, for he has the Fee-simple by Wrong in him; and if the Disseisee suffers five Years to pass without Claim, the Disseisee is barred. Plow. 353. 6 Co. 105. 3 Co. 87.

If Tenant in Tail levies a Fine *sur Cognissance de droit come ceo*, &c. with Proclamations according to the Statute; this is a Bar to the Estate-tail, but not to him in the Reversion or Remainder, if he makes his Claim or pursues his Action within five Years after the Estate spent. Co. Lit. 372.

If a Gift be made to the Eldest Son and the Heirs of his Body, the Remainder to the Father and to the Heirs of his Body, and the Father dies, and the Eldest Son levies a Fine *sur Cognisans de droit come ceo*, &c. with Proclamations according to the Statute, and dies without Issue; this shall bar the second Son, for the Remainder descends to the Eldest. Co. Lit. 372. b.

If Tenant in Tail be disseised, or have Right of Action, and the Tenant of the Land levies a Fine *sur Cognisans de droit come ceo*, &c. according to the Statute, and five Years pass, the Right of the Estate is barred. Co. Lit. 372. b.

If the Donee in Tail of the Gift of the King had levied a Fine *sur Cognisans de droit come ceo*, &c. with Proclamations, according to the Form of the Statute of 4 H. 7. this had barred the Estate-tail, altho' the Reversion was in the King.

But since by the Statute of 34 H. 8. such a Fine levied by the King's Donee in Tail, the Reversion continuing in the Crown, is no Bar to the Estate-tail. Co. Lit. 372. b.

If Tenant in Tail be disseised, or makes a Feoffment in Fee, and afterwards levies a Fine *sur Cognissance de droit come ceo*, &c. with Proclamations, according to the Form of the Statute, unto the Disseisor or a Stranger; this will for ever bar the Issues in Tail. 3 Co. 90.

Where the Issue in Tail claims by the same Title, and is driven to make his Conveyance to the Lands by him that levied the Fine; in every such Case the Fine will bar him. 9 Co. 138. Dyer 354.

If Tenant in Tail dies before all the Proclamations are passed, yet being once perfected, tho' after his Death, the Fine shall bar his Issue. 3 Co. 86.

So notwithstanding the Issue in Tail be *deins Age, hors del Realm, de south Coverture, de non sane Memorie*, or in Prison at the Time of the Fine levied, and the Proclamations passed, yet he will be barred thereby. 3 Co. 84.

Where

Where the King is *Tenant in Tail* of the Gift of any of his Ancestors as Subjects, he may levy a Fine of such Estate, and bar his Issue, and upon a Grant and Render he may destroy the Estate-tail. *Co. Lit.* 372. 3 *Leon.* 76, 77.

A Fine levied by *Tenant in Tail of the Gift of the King* will be no Bar to the King, nor to the Issue in Tail, tho' it will bar all other Persons. *Dyer* 279.

Where one is *Tenant in Tail* of Lands, whereof the Remainder is in the King, and the Tenant in Tail levies a Fine *sur Cognissance de droit come ceo, &c.* with Proclamations according to the Statute; there the Issue shall be barred notwithstanding the Statute of 34 H. 8. *Moor*, Case 258.

So where one is *Tenant in Tail* of Lands, (whereof the Reversion is in the Crown) who is disseised, and afterwards the Disseisor levies a Fines *sur Cognissans de droit come ceo, &c.* with Proclamations, according to the Form of the Statute, and the five Years incur without any Claim made by the Tenant in Tail; he shall be thereby barred himself, but not his Issue, according to the Statutes of 32 & 34 H. 8. *Moor*, Case 665.

A Fine may bar the Issue in Tail tho' he be not Tenant in Tail at the Time of the Levying thereof, provided the Land be intailed upon him. *Cro. Car.* 670.

If Lands be given to an Eldest Son and the Heirs of the Body of the Father, the Father being then dead) and he levies a Fine of this Land, this will bar the Younger Brother. *Per Cur', Trin.* 21 *Jac. C. B.*

But if the Issue in Tail do not make his Title by him that did levy the Fine, there the Fine will not bar; and therefore if my Father be Tenant in Tail, and his Brother disseise him and levy a Fine, and he and my Father die, this Fine shall not bar me as Issue in Tail, because I do not make my Title to the Land by him; but if I suffer five Years to pass, and do not make my Claim, &c. by this Means I may be barred by the Fine. *Dyer* 3.

And if the Fine be levied of another Thing than the Thing itself intailed; as if the Tenant in Tail grants by Fine a Rent, Common, or the like, out of the Land intailed, this Fine will not bar the Issue.

So if a Rent be intailed, and the Tenant in Tail of the Rent disseise the Terrentenant of the Land out of which the Rent doth issue, and then levies a Fine of the Land, this is no Bar to the Issue of the Rent. *Plow.* 435.

Altho' the Fine be a double Fine with a Grant and Render, yet it is within these Statutes, and will bar the Issue in Tail as well as a single Fine, so as the Grant and Render be of the Land itself, and not by any Profit apprender out of it.

And therefore if Husband and Wife be Tenants in special Tail, and they levy a Fine with Proclamations, and the Conusee grants and renders the Land to them and their Heirs, this Fine will bar the Issue in Tail.

And if Tenant in Tail join with *J. S.* and levy a Fine to a Stranger, and the Stranger doth grant and render the Land again to *J. S.* for Years, and to the Tenant in Tail in Fee afterwards; the Issue in Tail is barred by this Fine.

So if there be Tenant for Life, the Remainder in Tail, and he in Remainder in Tail accepts of a Fine from a Stranger, and grants and renders to the Stranger again for Years with a Remainder over; hereby the Issue in Tail is bound. 3 *Co.* 353. *Co. Lit.* 353. *Bro. Fines* 118. *Dyer* 279.

If Tenant in Tail accepts of a Fine of the Land intailed from a Stranger, and then grants and renders a Rent out of the Land to the Stranger by the same Fine; this will not bind the Issue in Tail to pay the same Rent. *Plow.* 435.

If Tenant in Tail makes a Feoffment on Condition, and dies, having two Sisters inheritable to the Tail, and one of them levies a Fine with Proclamations *sur Release* to the Feoffee of the Whole; in this Case it is doubted whether the other Sister be barred of her Half or not. *Dyer* 117.

Altho' the Tenant in Tail dies before all the Proclamations be finished, yet when they be finished, as they may be after his Death, the Issues in Tail are bound by the Fine; for howsoever by the Death of the Tenant in Tail the Right of the Estate-tail descends to the Issue, yet when the Proclamations are passed, this Right that descends is bound by the Statutes, and the Issue cannot by any claim, &c. save the Right of the Estate-tail that descends unto him. 3 *Co.* 86, 87.

Altho' the Issue in Tail be within Age, out of the Realm, under Coverture, *Non compos mentis*, or in Prison at the Time of the Fine levied, and the Proclamations passed, yet the Estate-tail is barred by the Fine.

And therefore if *A.* be Tenant for Life of Land, the Remainder to *B.* in Tail, the Reversion to *B.* and his Heirs expectant, and *B.* levies a Fine to *C.* and his Heirs, and

and has Issue, and dies before all the Proclamations are passed, the Issue in Tail being then out of the Realm; the Proclamations are made, and after the Issue in Tail comes into the Realm and claims the Remainder in Tail upon the Land; in this Case the Estate-tail is barred for ever. 3 Co. 84, 91.

These Statutes extend to Fines levied by Tenant in Tail by Conclusion, and the Issue shall be bound by the Fine of their Ancestor unto whom they are privy in Estate and Blood, altho' *Partes finis nihil habuerunt Tempore finis*.

And therefore if the Issue in Tail in the Life of his Ancestor when he hath only a Possibility; as if there be Grandfather, Father and Son, and the Grandfather be Tenant in Tail, and the Father levies a Fine of the Lands before the Grandfather's Death, and then the Grandfather dies before the Father, and after the Father dies; in this Case the Issue is barred by this Fine. 3 Co. 90. Dyer 279. Plowd. 435. So also if the Grandfather survives the Father.

But in Case of a Collateral Descent, if the Collateral Ancestor dies in the Life-time of his Father without Issue, this Fine is no Bar, but if he survives his Father, *contra*.

So if Lands be given to the Grandfather and his Wife in special Tail, and the Grandfather dies, and the Father disseises the Grandmother, and levies a Fine with Proclamations, the Grandmother dies, and then the Father dies; in this Case the Son is barred. *Cur*, Trin. 21 Jac. C. B. Godfrey and Wade's Case, Dyer 48.

So if Lands be conveyed in Tail to a Woman for her Jointure within the Statute of 11 H. 7. c. 20. and whilst she lives the Issue in Tail levies a Fine of the Lands; by this the Issues inheritable to the Estate-tail are barred for ever. 3 Co. 50, 51. 9 Co. 140.

So if Tenant in Tail makes a Feoffment to be disseised, and after levies a Fine with Proclamations for a Stranger, hereby his Issues are barred for ever. Plowd. 434, 435.

So if Tenant in Tail dies, and his Issue before his Entry (having a Freehold in Law only) levies a Fine with Proclamations; this shall be a Bar to his Issues, and to his Collateral Heirs and Brothers of the Half Blood. *Cur*, 21 Jac. C. B.

So if a Tenant in Tail has four Daughters, and one of them levies a Fine in the Life-time of the Father; this will be a Bar to her Issue for the fourth Part of the Land. *Idem*.

But in these and such like Cases where the Issue in Tail levies a Fine in the Life-time of the Tenant in Tail, the Tenant in Tail himself may after levy a Fine of the Land, and thereby bar his Issue, and the Conusee also to whom his Issue hath levied a Fine; and therefore in all these Cases it is supposed that the Tenant in Tail dies, and suffers the Right to descend to his Issue. 3 Co. 50, 51. 9 Co. 140.

If Lands be given by Will to one when he shall come to his Age of twenty-four Years, to hold to him and the Heirs of his Body, and he after his Age of twenty-one Years levies a Fine of this Land with Proclamations; this is a Bar to the Issue in Tail.

If a Disseisor makes a Gift in Tail, and the Donee makes a Feoffment to A. and after levies a Fine with Proclamations to B. that has nothing in the Land; this Fine will bar the Issues in Tail, and they shall not avoid it by pleading that *Partes finis nihil habuerunt*, &c. but it is no Bar to the Disseisee, for he may avoid it by his Plea when he will. 3 Co. 50, 51. 9 Co. 141. 10 Co. 50.

And *a fortiori* therefore if a Fine be levied by the Tenant in Tail that has only an Estate of Freehold in Remainder or Reversion, it is good; as if A. be Tenant for Life, the Remainder to B. in Tail, and B. levies a Fine; altho' this be no Discontinuance, yet it is a Bar to the Estate-tail. 3 Co. 84, 89.

But if Tenant in Tail has Issue a Son and a Daughter, and the Son living, the Tenant in Tail levies a Fine and dies without Issue, and then the Tenant in Tail dies; by this the Daughter and the Estate is not barred.

So if the Younger Son levies a Fine in the Life of the Father, and then the Tenant in Tail dies; this is no Bar to the Elder Son.

So if Lands be given to a Man and the Heirs Female of his Body, and he has a Son and a Daughter, and the Son levies a Fine of the Land; this is no Bar to the Daughter.

So if Tenant in Tail has a Daughter, his Wife being with Child of a Son, and the Daughter levies a Fine, and after the Son is born; this Fine shall not bar the Son, for these (notwithstanding they be Privies and Heirs to the Blood, yet) are not Privies and Heirs to the Estate. Trin. 25 Jac. C. B. Godfrey v. Wade.

Altho' the Estate passed by the Fine be afterwards (before all the Proclamations had) avoided, yet the Issue in Tail is barred by it.

And therefore if Tenant in Tail discontinues in Fee, and after disseises the Discontinuee, and levies a Fine with Proclamations to a Stranger, and takes an Estate back by Render in the same Fine, and the Discontinuee before all the Proclamations pass enters and claims, and so avoids the Fine; yet hereby the Estate-tail is barred.

3 Co. 91.

And if Tenant in Tail enfeoffs the Issue in Tail, and after disseises him and levies a Fine, the Issue enters, and after the Proclamations pass, and after the Issue in Tail enfeoffs the Tenant in Tail which levied the Fine, and dies; it seems this Fine shall bar the Issues in Tail. *Per Popbam and Fenner Just. M. 37 & 40 Eliz. B. R.*

A Fine is a Bar to the Estate-tail and to the Issues only, and is no Bar to him in Remainder or Reversion; and therefore when the Estate-tail is spent, this Bar is at an End.

And therefore if an Estate be limited to *A.* and *B.* his Wife, and the Heirs Male of the Body of *A.* the Remainder to *C.* and *A.* and *B.* have Issue, and *A.* dies, and *B.* and her Issue, or her Issue alone, levies a Fine; this will bar the Issues of the Issues whilst there be any, but if they fail it will not bar *C.* in Remainder, except he suffers five Years to pass, and so be barred by his Non-claim.

So if Tenant for Life and he that is next in the Remainder in Tail join in a Fine; this is a good Bar to the Issues in Tail for ever as long as that Estate-tail shall continue, but not to him that is next in Remainder, nor to any other that shall come in of any Remainder in Tail or in Fee, nor to him in Reversion. 1 Co. 76. Co. Lit. 372.

If Lands be given to *A.* and the Heirs Male of his Body, the Remainder to *B.* and the Heirs Male of his Body, the Remainder to the right Heirs of *A.* and *A.* bargains and sells this Land by Deed indented and inrolled to *J. S.* and his Heirs, and after levies a Fine of it *sur Conusance de droit come ceo, &c.* to him and his Heirs; by this the Remainder to *B.* is not discontinued, but it is a Bar to the Estate-tail by the Statutes, and causes the Estate of the Bargainee to last so long as the Tenant in Tail has Issue of his Body; but if the Fine had been before the Bargain and Sale, it had been a Discontinuance of the Remainder, but in neither Case a Bar to him in Remainder, unless he suffers himself to be barred by his Non-claim within five Years after his Remainder happens to come in Possession. 10 Co. 96. & 9 Jac. B. R.

If there be Tenant in Tail, the Remainder to him in Tail, and the Tenant in Tail levies a Fine of this Land, hereby both his Estates are barred. *Et sic de similibus.* Co. Lit. 372.

But notwithstanding all this, if Lands be conveyed to a Woman in Tail for her Jointure within the Statute of 11 H. 7. c. 20. and she levies a Fine of this Land, this will not bar the Issues in Tail.

Or if Lands be given in Tail to any Subject by the King's own Gift or Provision, and the Tenant in Tail levy a Fine, this Fine shall not bind the Issues in Tail nor the King, but others it will bar, for these Fines are not intended within but excepted out of the Statute of 32 H. 8. but the King himself being Tenant in Tail of the Gift of some of his Ancestors, being Subjects, may levy a Fine of it to bar his Issues in Tail.

And in all Cases where a Recovery will not bar the Issues in Tail, there a Fine will not bar them. *Bro. Fines* 121. 6 Co. 55. *Dyer* 4. Co. Lit. 372. 8 Co. 17, 78.

The Husband being seised in Fee, covenanted to stand seised to the Use of himself for Life, then to the Use of his Wife for Life, Remainder to the Heirs Male which she should beget on her, Remainder over; he had Issue only a Daughter; the Husband and Wife afterwards levied a Fine to the Use of the Daughter with Warranty, and both died, and the Warranty descended upon him in Remainder, who made a Lease to the Plaintiff in the Action; adjudged that the Estate-tail was not executed in the Husband and Wife, for if it had, then this Fine would have been a Discontinuance, which it was not, because there was an intermediate Estate for Life to the Wife, which remained as a separate and distinct Estate from the Inheritance; but if there had been an intermediate Estate for Years, there the Freehold and Inheritance had been united in the Husband *simul & semel.* *Sid.* 83. *Stephens v. Bitteridge.* *Perk.* 336. S. P. in the Case of *King and Edwards*, the Husband and Wife were jointly seised to them and the Heirs of the Body of the Husband, so that the Estate-tail was executed in him.

Tenant in Tail, Remainder to the King, levied a Fine with Proclamations; adjudged that this Fine shall bind his Issue notwithstanding the Saving in the Stat. 32 H. 8. which speaks of a Reversion, and not of a Remainder, and here there was no Reversion in the King; it is true in the Stat. 34 H. 8. c. 20. there is a Proviso, that no Act done by the Tenant in Tail shall prejudice his Issue; but that must be intended where the King is the Donor, as it appears by the Preamble of the Statute. *Moor* 115.

Formedon in Descender by the Issue in Tail for a Moiety of Lands in *N. in Com. D.* in which the Demandant counted upon a Gift in Tail made to one of his Ancestors in the Reign of *Edw. the First*; the Tenant *B.* pleaded in Bar, that the Great Grandfather of the Demandant *Anno* 30 H. levied a Fine of the Lands to the Use of himself for one Month, Remainder to the Use of his Wife for Life, Remainder to the Use of the Cognisor and his Heirs; that the Wife was dead, and that the Cognisor being thus seised in Fee, made a Feoffment of the Lands in Fee, under whom the Tenant now claims, and demands Judgment, if the Plaintiff should claim by the In-tail against the Fine of his Ancestor; the Demandant replied, that at the Time of the Levying the Fine his Ancestor was seised but of a Moiety, and avers that the *B.'s* were seised of the other Moiety, and then sets forth how they became Jointenants at that Time, and always afterwards, and so *Partes finis nihil habuerunt*; and upon Demurrer to this Replication the Question in Law was, whether the Issue in Tail might thus aver against the Fine of his Ancestor, that *Partes finis nihil habuerunt*; and adjudged that he could not; it is plain that the Issue could have no such Averment at Common Law, for being the lineal Heir to the Tail, he is privy to him who levied the Fine, and is barred as the Party himself was until the Stat. of *Westm. 2.* which gave him the *Formedon* to recontinue the Estate-tail, by which Statute he might avoid the Fine, in respect to the Tail, until the Stat. 4 H. 7. was made, by which it is enacted, That both Parties and Privies shall be bound by a Fine and Non-claim; now ever since the making that Statute it hath been held, that the Issue in Tail is bound as privy; and tho' by that Statute there is a Saving of the Averment, that *Partes finis nihil habuerunt*, yet that extends only to Strangers, and not to those who are either Parties or Privies to the Fine; but even between these two Statutes there was another made which explains this Matter, viz. the Stat. 32 H. 8. by which it is enacted, That no Man shall demand any Lands against the Fine of his Ancestor; which Words are peremptory against the Issue in Tail, and bar him from any Plea to avoid the Fine, whether *Partes finis* had any Thing or not. *Moor* 250. 3 Co. 88. 1 And. 165. Godb. 138. 1 Leon. 75.

Husband and Wife Tenants in Tail, Remainder to the Heirs of the Husband; they had Issue two Daughters, which Daughters levied a Fine to *W. R.* then the Husband died, and the Widow, who was the surviving Tenant in Tail, made a Lease of the Lands for 100 Years to *T. S.* and died, under which Lease the Plaintiff in Ejectment claimed; and the Question was, whether this Lease was good against the Cognisee of the Fine, and adjudged that it was so long as any of the Issue in Tail were living; for the Widow might have disposed of the whole Estate if she would, she being Tenant in Tail in Possession. *Sid.* 62.

In Ejectment the Case upon the Evidence was, Tenant in Tail covenanted to stand seised to the Use of himself for ninety-nine Years, if he so long lived, Remainder to his first Son in Tail, Remainder over, then he levied a Fine to *T. S.* and whether this Fine shall corroborate the Remainder, or enure to the Use of the Cognisee, was the Question. *Hale* Ch. Just. held the first, because the Tenant in Tail did not limit to himself an Estate for Life, but for Years; and therefore not like *Blithman's Case*, 3 Cro. 279. nor *Beddingfield's Case* 895. where the first Estate was limited for Life; but here it being for Years, the Remainder may arise to the Son out of the Residue of the Estate the Covenantor had to dispose of in his Life-time; and if so, it is executed in the Son and corroborated by the Fine, like *Wingfield's* and *Duncumb's Case*, 2 Lev. 84.

Tenant in Tail of a Rent issuing out of Lands of which *T. S.* was seised in Fee, levied a Fine of the said Rent *Come ceo, &c.* and the Question was, whether his Issue was bound by the Fine; it was argued that they were not, because the Land was not intailed, but only the Rent; and that if Tenant in Tail of Lands grants a Rent out of them by Fine, this shall not bind the Issue, which is very true: *Sed per Curiam*, the Stat. 4 H. 7. & 32 H. 8. give a Tenant in Tail as large and ample Power to bar their Issues by Fine as Tenant in Fee had; therefore where Tenant in Tail of an

Office levies a Fine of Lands which belong to such Office, this will bind his Issue, and yet it was not the Land but the Office which is intailed. 2 *Roll. Rep.* 500.

Lands were given to the Grandfather and his Wife in special Tail; the Grandfather died, the Father disseised the Grandmother; and levied a Fine in her Life-time with Proclamations, then she died, and the Father afterwards died; adjudged that the Son was barred by this Fine, and yet the Father at the Time when he levied it had only a Possibility to inherit the Estate-tail. 1 *Co.* in *Archer's Case*.

The Cognisor being seised in Fee, levied a Fine of Lands to two, and to the Heirs of one of them, who granted and rendred the same Lands to the Cognisor and his Wife, (who was no Party to the Writ) and to the Heirs of the Body of the Cognisor, who suffered a Recovery, with Vouchers in the Life-time of his Wife, and afterwards died; the Wife died, he in the Remainder brought a *Scire Facias* to have Execution of it; adjudged that the Grant and Render to the Wife was not void, but only voidable, because she was no Party to the Writ, and that this Recovery against the Husband alone did not bar the Remainder. 3 *Co.* 6.

Adjudged that where a Tenant in Tail levies a Fine, and dies before all the Proclamations are made, tho' the Right of the Estate-tail descends upon the Issue *per formam doni* immediately upon the Death of the Ancestor, yet if Proclamations are made afterwards, such Right shall be barred by the Fine by the Statutes 4 *H.* 7. & 32 *H.* 8. which is explanatory of the Stat. 4 *H.* 7. for it is provided by that Act, That every Fine after the ingrossing of it, and Proclamations had and made, shall be a final End, and conclude as well Privies as Strangers, and it cannot be denied but that the Issue in Tail is privy, for he claims as Heir by Descent; and if it should be objected, that by the Equity of the Statutes the Issue in Tail might claim where his Ancestor dies before Proclamations are made, for otherwise that Solemnity would be to little Purpose; the Answer is that by the Statute of the 4th of *H.* 7. every one had Liberty to levy a Fine according to the said Act, either with Proclamations or without, as at Common Law; and therefore the Act 32 *H.* 8. appoints that Proclamations shall be made according to the Statute 4 *H.* 7. not to enable the Issue in Tail to claim where his Ancestor dies before they are made, for that would be against the express Intention of the Act itself; but it was to distinguish such a Fine from a Fine at Common Law, where Proclamations were not requisite; and it would be very inconvenient if when such Fine is levied, either for some valuable Consideration in Money, or for the Advancement of his Family, or for Payment of his Debts, and the Cognisor shall die before all the Proclamations pass, that all should be avoided by the Claim of the Heir. 3 *Co.* 84. 1 *Co.* 97. S. P.

Tenant in Tail bargained and sold his Lands in Fee, the Bargainee levied a Fine with Proclamations, and five Years passed in the Life-time of the Bargainee; adjudged that the Issue in Tail is not barred by this Fine, but that he shall have a new five Years to make his Claim after the Death of the Tenant in Tail, for he is within the Saving of the Statute. *Cro. Eliz.* 897.

The Father being seised in Fee, had Issue two Sons, the Eldest Son had likewise Issue two Sons by several Venters; the Father made a Feoffment in Fee to the Use of himself for Life, Remainder to the Use of his Eldest Grandson in Tail, Remainder to the Use of his Eldest Son in Tail, Remainder to the Use of the right Heirs of the Father, who died, then his Eldest Son died, and the Grandson, who was Tenant in Tail, levied a Fine, and declared the Uses to himself in Tail, Remainder to the Use of his Uncle, who was the Younger Brother of his Father, in Fee, and died without Issue; adjudged that by this Fine he had barred his Half Brother by Virtue of the Statutes 4 *H.* 7. & 32 *H.* 8. 1 *Leon.* 3.

Husband and Wife were Tenants in Tail, and they had Issue two Sons; the Husband died, and his Widow married again, then she and her Husband, in Consideration of Money paid, did bargain and sell the Lands to her Eldest Son, but no Livery was made; afterwards the Eldest Son, in the Life-time of his Mother, who was the surviving Tenant in Tail, by Bargain, Sale and Fine, conveyed the Lands to B. S. and his Heirs for a valuable Consideration in Money paid, and then the said Eldest Son died without Issue, his Mother still living; adjudged upon a Writ of Error brought to reverse this Fine in the Exchequer-Chamber, that it did not bar the second Brother; for tho' the Elder Brother was inheritable to the Estate-tail, and if he had survived his Mother, who was Tenant in Tail, his Fine would have barred his Brother; yet because he was never seised by Force of the Tail, by Reason of his Death in the Life-

Life-time of his Mother, his Younger Brother shall never mention him in a *Formedon* in Descender, and by Consequence his Fine shall be no Bar. *Cro. Eliz.* 314.

Tenant in Tail, Remainder in Tail; the Tenant in Tail in Possession made a Lease for three Lives, warranted by the *Stat.* 32 H. 8. and afterwards died without Issue, he in Remainder in Tail, before he was in Possession of the Land, levied a Fine thereof with Proclamations; adjudged a good Bar to the Estate-tail, because by the Death of the Tenant in Tail without Issue, the Freehold and Inheritance was immediately vested in him in the Remainder. 1 *Leon.* 268.

Tenant in Tail levied a Fine, and five Years passed, and then he died; it was objected that the Issue in Tail shall not be reputed privy, because he pleads *per formam doni*, and then his Right is saved by the second Saving in the Statute; but adjudged that tho' he is the first to whom the Right descends after the Levying the Fine, yet because he suffered five Years to pass without any Claim, he shall be barred. 19 H. 8. *Dyer* 3.

Tenant for Life, Remainder in Tail to B. G. when he should come to the Age of twenty-five Years; the Tenant in Tail levied a Fine in the Life-time of the Tenant for Life, and before he was twenty-five Years old, and this was to the Use of R. W. adjudged that tho' the Tenant in Tail had nothing in the Lands till he was twenty-five Years of Age, yet this Fine had extinguished his Right, and barred the Estate-tail. 2 *Leon.* 36. *Goldf.* 107.

A Woman Tenant in Tail within the *Stat.* 11 H. 7. acknowledged a Fine *sur Cognissance de droit come ceo*, and by the same Fine rendred the Land to the Cognisee for 100 Years; it was adjudged this was a Discontinuance, for by such Practice the Meaning of the Law might be defeated; for if the Render of 100 Years should be good, it might be for 1000 Years, which would be as prejudicial to him in the Reversion as a Discontinuance. 2 *Leon.* 168.

Husband and Wife were Tenants in Tail, Remainder to the Husband in Fee, he died, and after his Death the Wife, who was now the surviving Tenant in Tail, and the Son and Heir of the Husband, levied a Fine, &c. to the Use of him and his Heirs, and afterwards she made a Lease of the Lands for twenty-one Years, and died; the Son devised the said Lands to G. D. and died, and the Question being, whether this Lease shall be good against the Devisee; it was adjudged that the Issue in Tail himself was barred by this Fine to avoid the Lease, and that tho' the Estate-tail was barred, yet it is not quite extinguished, but shall have a Being to support the Lease so long as any of the Issue in Tail are living. *Bridgm.* 28. *Cro. Jac.* 688.

Feoffment in Fee to the Use of himself and his Wife, and to the Heirs Male of their two Bodies, Remainder to the Husband and his Heirs; they had Issue a Son and Daughter, and then the Husband died, the Son levied a Fine to the Use of himself in Fee, and died without Issue; adjudged that this was no Bar to his Sister, because he had only a Possibility to inherit the Tail, which was wholly in his Mother after the Death of his Father, and she surviving both her Husband and Son, the Land so intailed shall descend to her Daughter immediately upon her Death. *Hob.* 332.

Grandfather, Father and Son, the Grandfather being Tenant in Tail made a Feoffment in Fee to W. R. rendring Rent to him and his Heirs, and died; the Father accepted the Rent; then W. R. who was the Feoffee, levied a Fine with Proclamations, and the five Years passed without any claim; then the Father died, and the Son brought a *Formedon*; the Question was, whether the Father had extinguished his Right to the Estate-tail by the Acceptance of the Rent; for if so, then when the Fine was levied he had no Manner of Right; and if he had no Right at that Time, then the Son shall be barred by the Fine, and the five Years incurred in the Life-time of his Father, because if the Father had no Right, then the Son was the first to whom the Right came after the Levying the Fine, and he should have made his Claim within the five Years after it was levied; but adjudged that he was not barred, because by the Acceptance of the Rent the Father had not extinguished his Right and Interest in the Estate-tail, but only by way of Estoppel. *Moor* 301.

The Case upon the Pleadings in Replevin and Avowry was thus: The Husband made a Feoffment to the Use of himself and his Wife for their Lives, and afterwards to the Use of B. their Eldest Son, and after his Decease to the Use of him who should be his Eldest Son at the Time of his Death, in Tail, Remainder to C. in Tail, Remainder over in Fee; the Husband died, the Wife made a Lease for Years to B. who afterwards made a Feoffment to W. R. and then the Wife died, and C. levied a Fine, &c.

3c. to *W. R.* the Feoffee; then *B.* died, having Issue a Son, who entred; adjudged that the Feoffment made by *B.* and the Fine levied by *C.* had prevented the future Use to arise in the Son of *B.* and this upon the Authority of *Dillon* and *Freyne's* Case, *Moor* 545.

Tenant in Tail Male, Reversion to *W. R.* his Brother, made a Lease for three Lives, warranted by the *Stat. 32 H. 8.* and afterwards levied a Fine of the same Lands to one *Taylor*, with Warranty against all Persons, and died, leaving Issue only a Daughter; then the Brother died without Issue, the said Daughter being his Niece and Heir at Law; the Lease for Lives expired, and then *Taylor*, the Cognisee of the Fine, entred; the Question was, whether the Warranty in the Fine should make a Discontinuance in Fee, and be a Bar to the Daughter, or whether it was determined by the Death of her Father; adjudged that it was a Bar to the Daughter, for when her Father made an Estate for Lives, with Warranty likewise against all Persons, he gained a new Fee, and then when by the Fine he granted the Reversion with Warranty, that being annexed to the Fee binds him or her who had any Right; for the Reversion being divested and displaced, the Fine and Warranty enures thereon; and tho' it did not descend upon the Brother who had the Right of Reversion upon the Tenant in Tail's dying without Issue Male, yet upon the Death of his Brother it descended upon his Niece, who was the Daughter of the Tenant in Tail, and she is barred; for when her Uncle who had a Right at the Time of the Death of the Tenant in Tail, and did not prosecute that Right by a *Formedon* in Reverter, but suffered five Yeas to pass after the Fine levied, and without any Entry or Claim, it is a Bar, and he shall not have the Advantage of entering after the Expiration of the Estate for three Lives, because he had no other Title upon their Death than before, for his Title was by the Death of the Tenant in Tail without Issue Male, and then he should have brought his *Formedon*. *Cro. Car.* 156. *Salvin* or *Sawle v. Clerke*.

The Lord Ch. Just. *Vaughan* tells us, this Case is wrong reported; for it was, that the Warranty did bind the Daughter, because the Reversion was discontinued by the Lease for Lives, and a new Fee gained thereby, and so the Reversion was displaced, and the Warranty was annexed to that Fee, and passed away by the Fine and Warranty, which could not be; for the Lease was warranted by the Statute 32 *H. 8.* and then it could be no Discontinuance, nor no new Fee of a Reversion gained; and so is *Cro. Eliz.* 602. *Keen* versus *Cope*. *Vaughan's Rep.* 283.

Tenant in Tail had Issue a Son and Daughter; the Son levied a Fine in the Life-time of his Father, who was Tenant in Tail, and this was to confirm a Lease by him made, &c. and then he died without Issue, living his Father; the Question was, whether his Sister was barred by this Fine; and adjudged that she was not; and this depends upon the Exposition of the Word *privy*, in the *Stat. 4 H. 7.* and the Words *Heirs in Tail*, in the *Stat. 32 H. 8.* Now there are three Sorts of Privies; one is privy in Blood and not in Estate; another is privy in Estate, but not as Heir at Common Law; and the third is privy both in Blood and Estate; so there are three Sorts of Heirs, as there are three Sorts of Privies; but the first of these Privies and Heirs is not within either of these Statutes; as for Instance, If Lands are given to *T. S.* the Son, and his Father levies a Fine, he is neither Heir nor Privy within either of these Statutes; but he who claims as Heir at Common Law, or an Estate *per Formam doni*, to or from that Person who levied the Fine, he is both Privy and Heir within these Statutes: But in this Case the Sister cannot claim as Heir to her Brother who levied the Fine, because he died in the Life-time of his Father, and had no Right, but only a Reversion whilst living; it is true the Sister is Heir, but not Heir to his Estate; and if so, then she must derive a Title from the Father; and if she is not in the Letter, she is not within the Intention of the Statute; for by that it was intended to bar the Issue in Tail, who claimed the Estate-tail as Heir to him who levied the Fine; for if any other Construction should be made, *viz.* if such Heir should be bound who claims the Estate-tail from another Ancestor, then if Tenant in Tail hath Issue two Sons, and the Youngest levies a Fine, this would bar the Eldest, which no Body will maintain. *W. Jones* 31.

(AA) *Of Fines barring Estates in general.*

A Fine at Common Law, or a Fine without Proclamations, was once a perpetual Bar to all Persons that had Right and no Impediment at the Time of the Fine levied, and that did not claim within a Year and a Day after the Execution of the Fine by Possession; but now this Law is changed, and this Kind of Fine will bar none but such as are Parties and Privies thereunto.

But a Fine by the Statute, or a Fine with Proclamations, is now much of the same Vertue and Force as a Fine at the Common Law was; for by the Statute of the 4th of H. 7. it is provided, That every Fine after the ingrossing thereof shall be proclaimed in the Court the same Term, and the three next following Terms, four several Days in every Term, which Proclamations so made, the Fine shall conclude all Parties, Privies and Strangers, except Women Covert, Persons within twenty-one Years of Age, in Prison, out of the Realm, or of *Non sane memorie*, (being no Parties to the Fine) so as they or their Heirs take their Action or lawful Entry within five Years after these Imperfections removed, saving to all Persons and their Heirs (other than Parties) the Right, Claim and Interest which they have at the Time of the Fine, so as they pursue it by Action or Entry within five Years after the Proclamation; and saving to all other Persons such Right, Title, Claim and Interest, as first shall grow or come to them after the Proclamations by Force of any Matter before the Fine, so as they make their Claim or Entry within five Years after the same grow due, or if at that Time there be any Impediment as aforesaid, within five Years after the Impediment removed.

And by Statute of 32 H. 8. (which is an Exposition of this Statute) it is provided that all Fines with Proclamations levied according to 4 H. 7. by any Person of twenty-one Years of Age, of any Land, &c. before the Fine levied intailed to him that doth levy the Fine, or any of his Ancestors, in Possession, Reversion, Remainder or Use, immediately after Proclamations had, shall be a Bar against him and his Heirs claiming only by Force of any such Intail, and against all others claiming only to the Use of him or any Heir of his Body.

By which Statute it doth appear, that all the Parties to the Fine, Conufors and Conusees, whether they be Females Covert, Men *de non sane memorie*, or others, (Infants only excepted who during Minority may avoid it) and whether they have a Natural or Civil Capacity; and Privies, *viz.* Privies in Blood, as Heirs, whether they be lineal or collateral, or Privies in Representation, as Executors, Administrators, and all Strangers also, *viz.* all others besides Parties and Privies that have or pretend any present Right or Title, (except Women Covert, and the Rest that have Impediment that do make their Entry or Claim, or bring their Action within five Years after Proclamations had, and those Persons excepted also if they make not their Claim, &c. within five Years after the Impediment removed) all these are included, for their Right is extinct thereby, that they can have no Pretence to the contrary; saving to all others such as have no present Right at the Time of the Fine levied, and were excepted before such Right, Title, Claim or Interest, as shall accrue to them after the Proclamations upon any Trust, Gift in Tail, or other Cause, before the Fine levied, so as they make their Claim, &c. within five Years after their Right first accrued, if they have then no Impediment, or if they have, within five Years after the Impediment removed.

The Persons to be barred by a Fine are the *Parties* to the Fine, the *Privies* and *Strangers*.

(BB) *How Parties shall be barred.*

THE Parties are really barred altho' they be Ideots or *Non compos mentis*. Co. Lit. 247. 2 Co. Inst. 516.

So the Fines of Men that have the Lethargy, old dotting Persons, drunken Men, &c. (tho' they ought not to be received, yet) being received, are unavoidable and binding. 17 E. 3. 5. 78. 17 Aff. 17. Plow. 368. 4 Co. 124.

The *Parties* themselves to the Fine (if they be of the Age of twenty-one Years) are for ever bound up by the Fine, and have no Time given them by Claim to avoid

avoid it: But an Infant is preferred during his Minority; so that if he pass away his Estate by Fine, it may be reversed at any Time during his Minority, but not afterwards. 17 Ed. 3. 52, 78. 59 E. 3. 5. 2 Bulst. 320.

Such as are blind, deaf or dumb, naturally or accidentally, if they can express their Minds in Writing, may in some Cases be barred by their own, or by the Fines of another Man.

(CC) *How Privies shall be barred.*

PRIVIES, being Heirs and Executors to the Parties, (void of Impediment at the Time of the Fine levied or not) if they claim by the same Title that their Ancestor had that levied the Fine, are barred for ever by the Fine.

And by Privies also are understood Privies in Blood, not only the Heir at the Common Law, but Heirs by Custom, as *Borough-English*, Gavelkind, and the like, who claim as Heirs by Custom.

But by Privies are not intended such Privies in Estate as are Jointenants, Donor and Donee, Lessor and Lessee, or the like. 2 Co. Inst. 516.

That the Son shall never have Remedy upon a Fine levied in the Time of his Father, and the five Years after the Proclamations passed, but in Case where the Right begins first to be a Right in the Son. Popb. 113. Plow. 369.

Privies or Heirs in Estate and Blood, as he that is Heir to him to whom the Land doth or should descend, are within these Statutes, and shall be barred by the Fine of their Ancestor of that Land: And so also shall Privies in Estate, that are not Privies in Blood; as where one hath Land in *Borough-English*, and levies a Fine of it, hereby the Younger Son is barred.

If my Father *disseises* my Grandfather of an Estate in Fee, and thereof levies a Fine with Proclamations, and first my Grandfather, and then my Father dies; I am now barred as privy, for that I cannot otherwise convey myself to the Lands than as Heir to my Father the Conusor. Dyer 3.

But one that makes his Title as Heir by another, and not by him that levied the Fine, may not be barred. Cro. Eliz. 377.

Also he that is privy in Blood only, and not in Estate also, is not within these Statutes, neither shall he be barred by the Fine.

As if Lands be given to a Man and the Heirs Female of his Body, and he has a Son and a Daughter, and the Son levies a Fine and dies without Issue; this is no Bar to the Daughter, for tho' she be Heir to his Blood, yet she is no Heir to the Estate, nor hath she need to make her Conveyance to it by him; but if the Father had levied, it would have been otherwise. Trin. 21 Jac. C. B. Godfrey's Case.

If Husband and Wife, Tenants in special Tail, have Issue, and the Wife dies, and the Husband marries another Wife, and hath Issue, and levies a Fine *sur Cognissance de droit come ceo*, &c. and by the same Fine takes an Estate in special Tail, the Remainder over, &c. and dies; in this Case the Issue by the first Wife is barred, for that he is privy in Blood notwithstanding the Continuance of Possession in the Husband. Dyer 354.

So if Lands be given to Husband and Wife in special Tail, the Remainder to the right Heirs of the Husband in Fee, and he alone levies a Fine with Proclamations of it; by this the Issue in Tail may be barred, for he cannot otherwise convey himself to the Tail and Descent than as Heir of the Body of Father and Mother. Dyer 3, 251. Bro. Fines 109.

(DD) *How Strangers shall be barred.*

THE Strangers that are to be concluded by a Fine are,

First, *All Persons whatsoever that have present Right and no Impediment*, who are barred by five Years after Proclamations, if they make not their Claim within that Time; and so as well Tenant for Years, Tenant by Statute Merchant and Staple, Copyholders and Customaryholders, as Tenant of Freehold and Inheritance, if they be out of Possession or Seisin at the Time of the Fine levied, are barred; for a Fine levied by a Stranger (by the Common Law) cannot Bar him that is in Possession. 2 Co. Inst. 517.

Secondly,

Secondly, Or they are *such as have present Right and have Impediments*, as Infants, Persons in Prison, *Non sane memorie*, &c.

And these are barred if they make not their Claim, &c. within five Years after the Impediment removed.

And if after Proclamation their Impediments be wholly removed, and afterwards they fall into the like again and die, their Heirs shall not have five Years claim anew, but the first Years begun immediately after the first Removal shall run on to five Years. *Plow. 375.*

Thirdly, Or they are *such as have no present but future Right upon Cause precedent*; and then such Strangers to Fines being void of Impediments, whose Right or Title cometh or descendeth to them after the Proclamations, have five Years after the coming of such Right. *1 R. 3. 7. 4 H. 7. 24. Plowd. 378. a. b.*

So he in Remainder or Reversion, depending upon an Estate of Freehold after the Reversion or Remainder accrueth, hath five Years to enter; and if he die before Entry, his Heir hath only five Years to enter after the Death of the particular Tenant. *Plow. 374. a. b.*

But if these have Impediments, they shall have five Years after the Impediment removed. *Plow. 364. a.*

Fourthly, Or they are *such as have neither present nor future Right at the Levying of the Fine by reason of any Matter had before the Fine*, whose Right grows either intirely after the Proclamations, or partly before and partly after.

And these may enter and claim when they please within the Time of Prescription; as if the Father dies seised, his Eldest Son being professed in Religion, and the Younger Son entreth, and is disseised, and a Fine with Proclamations levied, and after the Eldest Son is deraigned, *i. e.* discharged of his Profession or Religion; it seemeth he is bound to no Time, but may claim when he will. *Plow. 3. Stowell's Case.*

Note; If a single Woman, being a Stranger to the Fine, having present Right, takes an Husband who suffereth the five Years to incur, she is for ever barred. *Plow. 366. a.*

They that have Right of a Reversion or Remainder expectant upon an Estate-tail or for Life, shall have five Years after their Title comes unto them to make their Claim. *2 Co. Inst. 518.*

Civil Bodies and Corporations having an absolute Estate so as to maintain a Writ of Right, as Mayor and Commonalty, Dean and Chapter, &c. are barred presently as Privies, and within five Years as Strangers; as if one disseises such a Corporation of Land belonging to it, and after levies a Fine of it with Proclamations, and they claim not, &c. within the five Years, they are barred. *Plow. 537, 538.*

But in such Case of a Fine levied by a Disseisor or other, every Successor or Successors, Head of the Corporation, shall have a new five Years to make their Claim. *Plow. 539.*

So every Officer that hath Land appertaining to his Office, as Parker, Forester, Keeper of a Gaol, &c. will be barred by Non-claim after a Fine levied by a Disseisor, and after five Years past after the Proclamations: But the Successor shall not be bound, if he also shall not suffer five Years to pass in his Time.

So that these and Corporations are by their Laches barred only for their own Time. *Plow. 537.*

Deans, Bishops, Masters of Hospitals, Parsons, Vicars, Prebendaries, &c. which may not have a Right, are not barred by five Years; for they are restrained by divers Statutes to levy a Fine to conclude their Successors of such Land as they hold in Right of their Churches, &c. nor will the Non-claim of such prejudice their Successors. *Plow. 138, 375, 378, 538. a.*

And it is a Rule, that such Persons as may not have a Writ of Right, but either a *Furis utrum*, or *Sine assensu capituli*, are not barred by such Fines if the Patron and Ordinary join not with them. *F. N. B. 118.*

By the antient Common Law, he that had Right was to make his Claim, &c. within the Year and a Day after the Fine levied, and the Execution thereof, or he was barred for ever.

And if such a Fine without Proclamations be now levied, he that hath Right may make his Claim or Entry, &c. at any Time to prevent the Bar. *Co. Lit. 254, 262.*

(EE) *Persons having Natural or Civil Capacities how barred.*

AND Parties, Privies and Strangers to Fines that are barred thereby, are such as have *Natural Capacities* or *Civil*, for both these are barred.

And therefore it is held, that if such a Corporation as has an absolute Estate and Authority of their Possessions, so as they may maintain a Writ of Right thereof, as Mayor and Commonalty, Dean and Chapter, &c. levy a Fine of their Lands, they and their Successors are barred presently; but if a Bishop, Dean or Prebend, with the Assent of the Dean and Chapter; or a Parson and Vicar, without Assent of the Patron and Ordinary, had levied a Fine, this would not have barred the Successor; neither will it bar now with their Assent, for they are restrained by divers Statutes.

So also such Persons are barred by the Fines that are levied by others if they make not their Claim in Time; as if one disseise a Corporation Aggregate of Land belonging to their Corporation, and after levies a Fine of it with Proclamations, and they do not make their Claim, &c. within five Years, thereby they are barred. *Plow.* 538, 337, 375, 378.

(FF) *Heirs when barred.*

WHERE the Ancestor is barred by the Fine, there for the most part the Heir is barred also.

And therefore if Tenant in Tail be disseised, and the Disseisor levies a Fine with Proclamations, and the Tenant in Tail suffers five Years to pass without Claim, &c. hereby he and his Issues are barred for ever, so that the Heir suffers for the Laches of his Ancestor. 9 Co. 105.

(GG) *Where a Disseisee, &c. may be barred by a Fine of the Disseisor, &c.*

IF a Man disseises me of the Land I have in Fee-simple or Fee-tail, and after levies a Fine of this Land with Proclamations, and I do not make my Claim, &c. within five Years after the Proclamations had, hereby I and my Heirs are barred for ever of this Land.

And if I being such a Tenant in Fee make a Lease for Years, or be Lord of any Copyhold Estate, and my Lessee for Years, or Copyholder in Fee, or for Life, be ousted, and I thereby disseised, and the Disseisor levies a Fine, and neither I nor my Lessee for Years, or Copyholder, do make any Claim, &c. within five Years after the Fine levied; hereby we are all barred for ever.

And if one disseises me of Land, and after makes a Lease for Life of it, and then levies a Fine with Proclamations, and I suffer five Years to pass; hereby I am barred both of the Reversion and of the Estate for Life also. 9 Co. 105. 3 Co. 87. Co. Lit. 698.

If Tenant for Life makes a Feoffment in Fee, and the Feoffee levies a Fine with Proclamations, and he in Reversion or Remainder does not make his Claim, &c. within five Years; hereby he is barred for ever. *Plow.* in *Stowel's Case*.

If I pretend Right or Title to Land, and enter upon it, and put him out that is in Possession, and then I levy a Fine with Proclamations with an Intent to bar him, and he does not make his Claim, &c. within five Years; hereby he is barred for ever altho' he had the true Right, and I no Right at all. 3 Co. 79.

If I purchase Land of H. and after perceiving my Title defeasible, and that a Stranger has the Right of the Land, I do levy a Fine to, or take a Fine from another with Proclamations, with Intent and of Purpose to bar him that hath Right, and he suffers five Years to pass, and doth not make his Claim, &c. hereby he is barred of his Right for ever; and in these and such like Cases there is no Relief to be had in Equity. 3 Co. 79. *Doct. & Stud.* 83, 855.

Fines may operate by Disseisin where they can have no other Interpretation.

In the Case of *Piggot* vers. *The Earl of Salisbury*, *Mich.* 28 *Car.* 2. it is said to be agreed, that Fines may work a Disseisin when they can have no other Interpretation; as if Tenant *per auter vie* levies a Fine to a Stranger for his own Life, it is more than such a Tenant could do, because his Estate was only during the Life of another, and no longer.

So a Fine *sur Cognissance de droit*, &c. implies a Fee, which being levied by any one who has but a particular Estate, will make a Disseisin. 2 Mod. 112.

But in the same Case, 2 Mod. 117. it is said, that in Case of a Fine a Lease for Years is an Impediment or displacing of the Reversion.

For if Tenant in Tail expectant upon a Lease for Years levies a Fine, it is a Discontinuance of the Tail; and notwithstanding the Lease, the Fine has such an Operation upon the Freehold, that it displaces the Reversion in Fee. Co. Lit. 32.

Where one is in Possession by Virtue of a particular Estate for Life, &c. and accepts a greater Estate, it shall not divest the Estate of those in Remainder for Life, so as the same may be barred by Fine and Non-claim.

This Rule seems to be cleared *arguendo* in the Case of *Smith and Pierce, Pasch. 4 Jac. 2. B. R.* where a Term for Years was devised for Payment of Debts, with a Remainder over in Tail; he in Remainder entred and levied a Fine, and settled the Land on his Wife for Life, and died; the Wife survived, and the Debts not paid; and it was insisted the said Term was not barred by this Fine and Non-claim; *sed adjournatur*.

But in the Argument of the same Case this further Case seems to be proved, *viz.* where a Lease is for 100 Years in Trust to attend the Inheritance, and *Cestuy que Trust* being in Possession, demises to another for fifty Years, and levies a Fine, and five Years pass, the Term of 100 Years is divested by such Fine and Non-claim, and is turned to a Right, and so barred. *Vide 3 Mod. 195, 196.*

(HH) *Where a Fine shall be a Bar as to one Person and not to another; or as to one Part of the Land and not to another.*

IF there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail bargains and sells the Land by Deed indented and inrolled, and after levies a Fine with Proclamations to the Bargainee *sur Cognissance de droit come ceo*, &c. in this Case as to the Tenant in Tail and his Issue, this is a Bar, but as to all others it is no Bar altho' they never make any claim, &c.

So if Tenant in Tail levies a Fine of his intailed Land; this is a Bar as to him and his Issue, but as to all others it is no Bar at all, and therefore he in Remainder or Reversion in their Times may enter notwithstanding. 10 Co. 95. 9 Co. 106.

So if Lands be intailed to the Husband and Wife, and the Heirs of their two Bodies, and the Husband alone levies a Fine of this Land; this as to the Husband, Tenant in Tail, and his Issue, is a Bar, but not as to the Wife, for she shall be Tenant in Tail still; and yet it seems she may not suffer a Recovery of this Land afterwards.

So if a Man attainted of Felony or Treason levies a Fine of his Land; this as to the King and Lord of whom the Land is held is void, and is no Bar to their Advantage and Title of Forfeiture, but as to all others it is a good Bar. 9 Co. 140, 142.

So if one levies a Fine of Lands in Antient Demesne, and of other Lands together; this as to the Lands in Antient Demesne is not good, nor any Bar at all, but as to the other Lands it is a good Bar. 7 H. 4. 44. F. N. B. 98.

(II) *What Estate may be barred by a Fine.*

THE Estates that shall be barred by Fine are Estates by the Common Law, or by Copyhold, in Fee-simple, Fee-tail, or for Life or for Years; the Estates also of Tenant by Statute, Elegit, and of Guardians in Chivalry, and of Executors that have Land until Debts and Legacies be paid.

And therefore if one enters upon and puts out a Copyholder of Land, and levies a Fine thereof, and the Copyholder suffers five Years to pass, and makes no Claim, &c. the Copyholder and his Lord both are hereby barred for ever.

And if a Lease be made for Years, and the Lessor, or another before Entry of the Lessee, levies a Fine with Proclamations, and the Lessee does not make his Claim, &c. within five Years; hereby the Lessee is barred of his Interest for ever. 9 Co. 104. 5 Co. 124.

The Things whereunto the Statutes relating to Fines do extend, are Lands and Tenements, and not a Rent or other Profit appender out of the Land; and therefore if

I have a Rent, Common or Estovers out of Land, or a Way over Land, or Power to sell the Land, and a Fine is levied of the Land itself, and I do not make my Claim of my Rent, &c. within five Years, yet I am not hereby barred of my Rent, &c. And for this Cause it is, that if a Tenant in Antient Demesne levies a Fine of his Land, and five Years pass, the Lord is not hereby barred to avoid it, for herein he claims not the Land, but his antient Seignory. *Plow. 378. Bro. Fines 123. 5 Co. 124.*

No Fine shall bar any Estate in Possession, Reversion or Remainder, which is not divested and put to a Right at the Time of the Fine levied.

And therefore if one levies a Fine of my Lands whilst I am in Possession of it, this Fine will not hurt me.

So if the Tenant of the Land out of which I have a Rent or Common, &c. levies a Fine of the Land, this shall not bar me of my Rent or Common, for I am still in Possession of this in the Judgment of the Law.

So if there be Tenant for Life, the Remainder for Life; or Tenant in Tail, the Remainder in Tail, and the first Tenant in Tail or for Life bargains and sells the Land by Deed indented and inrolled, and after levies a Fine to the Bargainee; in this Case the Remainders are not barred altho' five Years pass without claim, for the Law in these Cases adjudges them always in Possession.

So if I make a Lease for Years of Land, rendring Rent, and the Stranger levies a Fine of the Land, and the Lessee for Years pays his Rent to me duly; in this Case I am said to be always in Possession, and therefore am not barred by this Fine of my Reversion; so if there be a Tenant by Copy or Lease for Life, the Remainder for Life, and the first Tenant for Life accepts of a Fine of the Land with Proclamations, and five Years pass without Claim, &c. hereby he that is in Remainder is not barred.

So if one has a Lease for Years of Land, to begin *in futuro*, and a Fine levied of the Land, and five Years pass after the Term begins; it seems this is no Bar, because this Estate is not put to a Right. *5 Co. 124. 9 Co. 106.*

A Fine does not bar the Estate, but binds the Right; and where the Fine does not turn the Estate to a Right, there needs no claim. *T. Raym. 149. 9 Co. 106. 2 Inst. 517. Cro. Jac. 60. 5 Co. 124. 1 Vent. 81.*

No Fine bars any Estate which is not divested and put to a Right; and he that at the Time of the Fine levied had not any Title to enter, shall not be barred by the Fine. *T. Raym. 149. 9 Co. 106. b.* This is in the Case of a future Interest, not in Case of Tenant in Tail barring his Issue. *Per Stat. 32 H. 8.*

No Fine bars any Estate *in futuro*: For if a Man has a future Interest, and the Lessor is disseised, and the Disseisor levies a Fine, the future Interest is not touched; and because it is not turned to a Right, he is not bound to claim. *T. Raym. 149.*

A Fine of a *Cestuy que Trust* will bar an Estate, but not a Remainder over to another; and it has been doubted, whether by a Recovery of a *Cestuy que Trust* any Thing be barred. *1 Chan. Caf. 213.*

But it has been held, that the Fine or Recovery of a *Cestuy que Trust* shall bar and transfer the Trust, as it should an Estate at Law, if it be upon a valuable Consideration. *Ibid. 49.*

And *Cestuy que Trust* in Tail, where the Remainder in Tail was devised over, levied a Fine, and died without Issue: On a Question, whether this Fine by *Cestuy que Trust* in Tail and Non-claim should bar the Remainder-Man, the Lord Keeper was of Opinion that it should. *1 Vern. Rep. 226. vide Mod. Ca. in Law and Equity 144.*

But if there be an Entry and Claim, *quare* whether the Remainder is barred. *Vide 2 Chan. Caf. 64. 1 Williams 91.*

It has been resolved, that a Fine with Proclamations and Non-claim has all Trusts and Equity, (*or else no Man would know when he was sure of Inheritance*); but this is on two Differences: First, where the Equity chargeth the Lands, there the Fine bars; but when it charges the Person in respect of the Land, it does not bar; and if the Equity or Trust be created by the Fine, that Fine shall never bar the Equity which it created.

An Entry on the Land by *Cestuy que Trust* is not sufficient Claim to avoid the Fine; for the Claim of an Equity can be made no other way but by *Subpœna*. *1 Chan. Caf. 268, 278.*

If J. S. devises Land to B. in Tail, Remainder to C. in Tail, subject to the Payment of Legacies, and C. levies a Fine, and five Years and Non-claim pass, and C. grants a Rent-charge to A. and mortgages to B. yet the Legacies are not barred by the Fine and Non-claim; for C. having no Title but under the Will, the Purchasers

chafors must be presumed to take Notice of the Legacies and the Contents thereof. 2 Vern. 662.

A. having prevailed with a Woman to levy a Fine of some Houses, and to execute a Deed leading the Uses thereof to him and his Heirs; and it being proved, that she at the Time of levying the Fine declared, that she must make use of some Friend's Name in Trust; and afterwards by Will declaring, that she only levied such Fine in Trust, the better to dispose of her Estate, and having devised it to J. S. subject to the Payment of her Debts; the Court decreed not only the Estate liable to the Debts, but also a Conveyance to J. S. the Devisee. 2 Vern. 307.

Lands are devised to Trustees till Debts paid, and then to an Infant and his Heirs, and J. S. a Stranger, enters on the Lands, and levies a Fine, and five Years and Non-claim pass, and the Infant, when of Age, brings an Ejectment, but is barred, because the Trustees ought to have entred; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of his Trustees, nor to be barred of a Trust-Estate during his Infancy; and the Infant in this Case shall recover the mesne Profits. 2 Vern. 368.

A Trustee sold the Land to a Stranger, who had no Notice of the Trust, and a Fine and five Years past; and afterwards the Trustee, for a valuable Consideration really paid, purchased these Lands again: And it was decreed, that the Trustee, notwithstanding the Fine and Non-claim for five Years, should stand seised in Trust as before the Sale. Bovey's Case, 1 Vern. 60. 2 Chan. Rep. 124.

A. seised in Fee in Trust for B. for full Consideration conveys to C. the Purchaser having Notice of the Trust; afterwards C. to strengthen his own Estate, levies a Fine: Whether B. the *Cestuy que Trust*, be not in that Case bound to enter within five Years. 1 Vern. 149. B. is not bound, because here C. purchased with Notice, and altho' any Consideration be paid by him, yet he is but a Trustee for B. and so the Estate not being displaced, the Fine cannot bar. *Per Serjeant Meynard & al.*

Fine levied by a Mortgagee, and five Years Non-claim, will not bar the Mortgagor of his Equity of Redemption, who may notwithstanding bring his Bill to redeem. 1 Vern. 252. See 2 Vern. 189.

(KK) *Where a Fine is a Corroboration only and no Bar.*

WHERE there is a precedent Agreement amongst the Parties, as a Feoffment, or the like, there the Fine shall not pass any Thing, nor work by way of Estoppel, but only by way of Corroboration, and shall be guided by the precedent Agreement.

And therefore if a Feoffment be made to two and their Heirs, and after a Fine is levied to them two and the Heirs of one of them; this shall enure as a Release, and shall not alter the Estate. 10 Co. 96, 2.

If A. enfeoffs B. of certain Land in Fee, rendring Rent with Condition of Reentry for Non-payment of Rent, and by Indenture at the same Time covenants to levy a Fine of the same Land to the Feoffee, to the Uses and Conditions in the Deed of Feoffment, and after a Fine is levied *sur Conusance de droit come ceo*, &c. accordingly; in this Case the Fine shall enure as a Fine *sur Release*, because the Conusee hath the Fee before, and it shall not enure by way of Estoppel, altho' it be a Fine *sur Conusance de droit come ceo*, &c. and therefore the Rent and Condition shall remain in this Case, and not be extinct. Dyer 157. Fitz. Estoppel 211. 2 Co. in *Cromwell's Case*.

(L.L) *How a Fine is a Bar by Estoppel.*

A Fine is sometimes a Bar by way of Estoppel only.

It is called an Estoppel where one is concluded and forbidden in Law to speak against his own Act, (altho' it be the Truth he would speak) whereby his Mouth is stopt, and his Hands are bound, that now he cannot say or do that which otherwise he might have said or done; and this may be done by Matter of Record, or by Matter in a Deed, or by Fact in the Country. Vide 2 Co. 4, 55. Plow. 397, 431, 434. F. N. B. 97. 3 Co. 3, 19. 4 Co. *Hind's Case*. 4 Co. 53, 71. 21 H. 7. 24 Moor 896. *Case* 869.

Where a Feoffment will work an Estoppel, there a Fine (which is a Feoffment upon Record) will much more work an Estoppel.

Estoppels do always descend upon the Heir general, and upon the Heir at Common Law, and none others; and the Daughter which comes in by a *Posseffio fratris* shall escape an Estoppel of the Father. *Hob. 31. Co. Lit. 352.*

In every Estoppel Privy is required, for it ought to be reciprocal, *viz.* to bind both Parties; and therefore regularly a Stranger shall never take an Advantage of nor be bound by an Estoppel; but Privies in Blood, as the Heir; Privies in Estate, as the Feoffee, Lessee, &c. Privies in Law, as the Lord by Escheat, Tenant by the Curtesy, in Dower, the Incumbent of a Benefice, and others that come under by Act of Law, or in the Post, shall be bound and take Advantage of Estoppels. *Co. Lit. 353.*

A Fine levied by a Remainder-Man in Tail binds by Estoppel.

This Rule seems to have been admitted *arguendo* in the Case of *Hollis* *vers.* *Carr*, *Pasch. 28 Car. 2. in Cancellaria*, where it is said, that it would be very hard to decree the Execution of the Fine in that Case; for that the Father of the Defendant was alive when the Defendant executed the Deed; and the Father who never sealed it being Tenant in Tail, the Son who sealed could have no present Right: And how could a Court of Equity decree a Fine in that Case, whereby a Right may indeed be extinguished, but can never be transferred, and by which no Use can be declared? For tho' such Fine be good by Estoppel before the Estate-tail descends to the Issue, yet no Use can be declared thereupon. *2 Mod. 90.*

(MM) *Where a Fine works a Discontinuance.*

A Fine sometimes works a Discontinuance of Land, and the Possession of it.

A Discontinuance is where one that is present Owner of the Land grants some larger or greater Estate than he has, (and thereby devests and interrupts the Inheritance or Estate which should or ought to have come to another) and then dies, and another has Right to have them, but he cannot enter by reason of such Alienation.

And there is a Discontinuance in *Fact*, which is where there is a Transmutation of Possession, and in *Law*, as by Cognisance of Right by Fine; by which, notwithstanding that the Cognisor continues the Possession, yet the other is Tenant in Law, and the Right of the Estate or of the Tail is discontinued or dissolved. *Lit. §. 192. Co. Lit. 325.*

All Fines and Recoveries suffered by Tenant in Tail to bar the Estate-tail are Discontinuances, in which there is no Remedy but in Case where the Reversion is in the King. *10 Co. 97.*

Where a Feoffment will make a Discontinuance, there a Fine will much more make a Discontinuance.

Where an Estate is not discontinued, there regularly it is not barred by a Fine. *Co. Eliz. 827. Moor 170.*

A Fine of Lands in *Antient Demesne* works a Discontinuance, but is no Bar; this appears by the third Resolution in the Case of *Hunt and Brown*, *Hil. 1 Ann.* where the Court held, that a Fine levied in the Court of Antient Demesne may work a Discontinuance tho' that Court is not a Court of Record; for the Discontinuance is because the Freehold is recovered in the Action; for every Recoverer recovers a Fee-simple, and a Recovery of a Fee-simple must work a Discontinuance. But tho' such Fine be a Discontinuance, yet it is not a Bar to an Intail. For it is by the *Stat. 4 H. 7. c. 24.* that a Fine with Proclamations shall bar an Estate-tail, and no Fine but a Fine with Proclamations is within the Statute, nor can bar an Estate-tail. *Salk. 240.*

(NN) *Where a Fine works by way of Remitter.*

A Fine sometimes works by way of Remitter.

A Remitter is a Man's Restitution to his former Right; or where a Man is come to two Titles of Land, and his latter is defective, and not so good as the former, he is remitted to the former and better Title, &c.

No Remitter shall be where there is a Fine or Recovery to hinder it. *Vide Co. Lit.* 349.

But if Tenant in Tail levies a Fine with Proclamations, and after the same is reversed by Writ of Deceit; the Issue in Tail is remitted, and shall avoid all the Estates made, because the Fine is void between the Parties. *Cro. Car.* 471.

(OO) *Where a Fine is an Extinguishment of an Estate.*

Extinguishment.

A Fine levied by the Issue in Tail is an *Extinguishment* of that Estate. This Rule has been often held, as appears by the Case of *Symonds and Cudmore*, *Hil. 2 W. & M.* in *B. R.* 4 *Mod.* 4, 5. And the Reasons and Authorities there cited, see also *Shou.* 370. that upon the *Stat. 32 H. 8. c. 36.* (that a Fine levied of Lands intailed on the Cognitor, or any of his Ancestors, shall be a Bar against the Person and his Ancestors claiming by Force of such Intail). It has been often held, that a Fine levied by a Remainder-Man in Tail during the Estate of a Tenant for Life, was an Extinguishment of the Intail.

Yet a Lease made by Tenant in Tail dying before the Commencement, shall be good against a Fine levied by such Issue or Remainder-Man in Tail; as was agreed in the same Case of *Symonds and Cudmore*, which as it is reported in 1 *Salk.* 338. is thus, *viz.* in Ejectment a special Verdict found *A. Tenant in Tail in Reversion after a Lease for Years, Remainder to Issue in Tail in Fee: A. made a Lease to commence at a Day to come, and died before the Day, having Issue, who afterwards and before the said Day levied a Fine; and agreed per tot' Cur'*,

First, That the Remainder in Fee stood chargeable with this Lease, and it should have been served out of the Remainder in Fee, had the Tenant in Tail died without Issue.

Secondly, That the Estate-tail was extinct by the Fine, as much as if Tenant in Tail were dead without Issue; for these Reasons, *viz.* 1. Because two Fees immediately expectant one upon another cannot subsist in the same Person. 2. Because by 32 *H. 8. c. 36.* the Fine is declared to be a Bar and a Discharge of the Estate-tail. 3. Because the Statute of *Westm. 2.* having made Estates-tail a Kind of particular Estates, they are (the Protection of the Statute being gone by the Fine) like all other particular Estates, subject to Merger and Extinguishment when united with the absolute Fee; and several Cases are there to prove it.

And by that Book three Judges denied *Co. Lit.* 46. *b.* and held the Issue in Tail had Election either to avoid or affirm the Lease, and that by *Westm. 2.* but that the Conussee had not; for that the Power and Privilege is Personal, and cannot be transferred. But note, *Holt* Chief Justice differed, and held the Lease actually void *quoad* the Issue, as if Tenant in Tail make a Lease; and that as by Law no Act is necessary to be done to avoid the Lease, so the Fine in this Case does not prevent its being void.

Where a Husband is intitled to be Tenant by Curtesy, and levies a Fine with his Wife, his Right is extinguished.

This Rule is laid down *obiter* in the Case of *Winchurst and Masely*, *Mich. 7 W. 3.* On Motion to quash the Party's own Writ of Error brought to reverse a Fine, for that one of the Parties to the Fine was omitted in the Writ of Error. The Court refused it, saying, they could take Notice of nothing but what was on the Record, and not of a foreign Suggestion; and cited a Case where a Fine being levied by three, two of them brought Error, and reversed it, for perhaps the other has nothing in the Land.

Fine by Tenant by Curtesy extinguishes his Right.

But if one intitled to be Tenant by the Curtesy joins with his Wife in a Fine of those Lands to which he is so intitled; *Quare*, whether his Title to be Tenant by Curtesy be not extinguished if the Fine be reversed after her Death? Indeed if it be reversed in her Life-time, he may have a new Title.

But if he makes a Feoffment on Condition of her Lands, and she dies, and then the Condition is broken, shall he be Tenant by Curtesy? *Quasi diceret non.* 5 *Mod.* 67.

(PP) *How a Fine levied by Decree in Chancery works.*

BY Decree in Chancery a Fine was levied to a particular End and Purpose, which would operate further in Point of Law than the Decree ordered it; and it was resolved, that such Fine should not be suffered in Equity to work any further than the Decree intended. 1 Chan. Ca. 49.

(QQ) *Where a Fine enures as a Release.*

IF A. enfeoffs B. of Land, rendring Rent with Condition of Re-entry for Non-payment, and by Indenture at the same Time covenants to levy a Fine of the same Land to the Feoffee, to the Uses and Conditions in the Deed of Feoffment; and after a Fine is levied *sur Conuſance de droit come ceo, &c.* accordingly: In this Case the Fine shall enure as a Release, because the Conufee has the Fee before, and it shall not enure by way of *Eſtoppel*; and therefore the Rent and Condition shall remain in this Case, and not be extinct. 2 Co. 72. b. 73. a.

(RR) *Where levying a Fine makes a Forfeiture, and where not; and where the Entry for such Forfeiture is good.*

TENANT for Life, Remainder in Tail; the Tenant for Life levied a Fine *Come ceo, &c.* to the Use of himself and his Heirs; adjudged this was a Forfeiture; afterwards the Tenant for Life, and he in Remainder, joined in a Feoffment, and made a Letter of Attorney to make Livery: Adjudged this was a Discontinuance, for it is first an Entry for the Forfeiture, then it is a Feoffment of him in Remainder; and lastly, the Confirmation of the Tenant for Life. Dyer 214.

Tenant for Life, Remainder in Fee, the Tenant for Life made a Lease for four Years in March 20 Eliz. and afterwards granted the Lands to B. G. *Habendum* from Midsummer next ensuing for Life, the Lessee for four Years attorned, and after the Expiration thereof B. G. entered and made a Lease at Will, and the Tenant for Life levied a Fine *Come ceo* to the Lessee at Will; adjudged that when B. G. entred by Colour of the Grant made to him by the Tenant for Life, he was a Disseisor, because an Estate of Freehold was granted to him to commence *in futuro*; and if the Fine had been levied to him, the Remainder-Man might have entered for a Forfeiture, and so he may as it is levied to the Lessee at Will. 2 Co. 55. Moor 423. Cro. Eliz. 450. 2 And. 29.

Tenant for Life, Remainder in Tail, Remainder in Fee; the Tenant for Life bargained and sold the Lands to one, who before the Stat. 14 Eliz. c. 8. suffered a common Recovery, in which the Tenant for Life was vouched, and he vouched over the common Vouchee, &c. thereupon he in Remainder entered for a Forfeiture; and adjudged he might, because the Recovery suffered by the Tenant for Life made a Forfeiture of his Estate, for he did as much as he could do to disinherit him in the Remainder in Tail. 1 Co. Sir William Pelham's Case.

Tenant for Life made a Lease of Part of the Lands, to hold the same at Will, and being in Possession of the Residue, he levied a Fine of the Whole with Proclamations; the Lessor entered for the Forfeiture on the Land, which was leased at Will, and this he did in the Name of the Whole, and adjudged good for the Whole; but where a Disseisor makes a Lease of Part, and continues in the Possession of the Rest, and the Disseeisee enters on that which is in his Possession in the Name of the Whole, that Entry is not good for that Part which was in Lease, because the Lessee was in it by Title; but in the other Case, where the Tenant for Life leases Part at Will, and afterwards levies a Fine, that is a Determination, and by Consequence the Lessee has no Title to that Part, and then the Entry is good for the Whole. 1 Leon. 51.

Husband and Wife, Tenants in Tail, had Issue two Sons, and they made a Feoffment in Fee to the Use of the Wife for Life, and after her Decease to the Use of the Heirs of the Body of the Husband begotten, Remainder in Fee to W. R. afterwards the Mother and her Youngest Son levied a Fine with Warranty against her and

and her Heirs, and the Conusees in that Fine rendered to the Son an Estate for sixty Years, rendring Rent, and then granted the Reversion to the Mother and the Heirs of her Body of the Body of her Husband begotten, Remainder in Fee to W. R. The Eldest Son entred, the Mother died, and then the Youngest Son claimed this Lease; adjudged that he had no Title to it, because by the Entry of his Elder Brother, as for a Forfeiture at least, all the other Estates are avoided. *Dyer 111.*

Where Tenant for Life is of full Age, and he in Remainder, being an Infant, levies a Fine, which is afterwards reversed by reason of the Infancy; in such Case the Infant shall not enter for the Forfeiture, because he assented to it by joining in the Fine. *2 Leon. 108.*

The Father having two Sons, made a Feoffment in Fee to the Use of himself for Life, afterwards to the Use of his Youngest Son for Life, Remainder to the first Son of his Youngest Son who should have Issue Male of his Body, and to his Heirs for ever; Remainder in like Manner to the Daughter, Remainder for want of such Issue to the right Heirs of the Younger Son for ever: The Father died, the Eldest Son had Issue a Son and died, the Youngest Son had likewise Issue a Son who died without Issue, and then his Father levied a Fine of the Lands, and the Son of his Elder Brother entered on the Conusees for a Forfeiture; adjudged that this Remainder to the first Son of the Youngest Son, should have Issue Male, is a contingent Remainder, and the Remainder to the right Heirs of the Youngest Son vested in him; therefore his levying the Fine was no Cause of Forfeiture. *Cro. Car. 265.*

In a special Verdict in Ejectment the Case was, Tenant for Life, Remainder for Life; the Tenant for Life levied a Fine to him in Remainder for Life, and to his Heirs, and this was *sur Cognissance de droit, &c.* adjudged that both their Estates are forfeited, the Tenant for Life levying the Fine, and the Remainder for Life by accepting it. *2 Lev. 202. T. Jones 65.*

Tenant for Life, Remainder for Life, he in Remainder for Life levied a Fine *sur Cognissance de droit come ceo, &c.* as if he had a Fee-simple; the Conusee brought a *Quid juris clamat* against the Tenant for Life, who not appearing, he was adjudged to attorn to the Conusee; adjudged that by this Attornment the Tenant for Life had not forfeited his Estate, because it was by Compulsion of the Court, and that the Remainder for Life had not forfeited his Estate by levying the Fine, for nothing passed but what he might lawfully pass; but the Chief Justice and another Judge were of a contrary Opinion as to this Point, for that the Forfeiture is not only where there is a Discontinuance, but where the Party does any Act upon Record, in order to disinherit him in Reversion. *Cro. Eliz. 751.*

Agreeable to the Opinion of the Chief Justice, &c. was this Case: *ff.* Tenant for Life, Remainder for Life, Remainder in Fee to one B. B. he in Remainder for Life coming into Possession by the Death of the Tenant for Life, levied a Fine *sur Cognissance de droit, &c.* adjudging that by this Fine of the Remainder-Man for Life, the Remainder in Fee was not touched or discontinued; yet because he had done as much as he could in order to dispose the Fee-simple by the Fine, he did thereby take that upon him, which amounts to a Forfeiture. *1 Leon. 46.*

Tenant in Tail, upon Condition that if he or any of his Heirs shall alien or discontinue the Lands, &c. that then the Donor may re-enter; he had Issue two Daughters, and died, one of the Daughters levied a Fine *Come ceo*; adjudged this is a Forfeiture of their Estate, and that the Donor might enter, because both of them are but one Heir. *1 Leon. 292.*

(SS) *Where Equity will relieve against a Forfeiture by levying a Fine.*

A. Devised to B. the Father for Life, Remainder to his Son C. an Infant, and devised 400 *l.* to the Son, to be paid at twenty-one, and made the Father Executor, and left 2000 *l.* Personal Affets; and B. having spent the Personal Affets, mortgaged the Lands to J. S. and made Affidavit that they were free from Incumbrances, and that he was seised in Fee, and levied a Fine for corroborating the Mortgage, and also declared the Use thereof to him and his Heirs. The Son having entered for a Forfeiture, the Mortgagee brought his Bill to be relieved, and the Court decreed, That the Mortgagee, notwithstanding the Forfeiture, should hold and enjoy the Lands against the Son during the Father's Life. *Abr. Ca. Eq. 257.*

(TT) *Claim what, and the different Kinds of Claim.*

CLAIM is a Challenge of the Ownership or Property that a Man has not in Possession, but is detained from him by Wrong.

Mr. Brown in his *Introd. to Fines*, p. 67. says, There are four Sorts of Claims provided by the Law for defeating of Fines, viz.

1. By Action Real.
2. By Entry of the Claim in the Chirographer's Office at the Foot of the Fine.
3. By actual Entry.
4. By Claim.

Of these, the two first are by Record, and the other two by Acts in the Country.

But as to the second Sort observe, that in *Michaelmas Term*, 29 *Eliz.* it was adjudged, that where a Disseisor levieth a Fine, and the Disseisee, to preserve his Right, entereth his Claim in the Record of the Foot of the Fine, this is not such a Claim as will avoid the *Stat. 4 H. 7. of Fines.* 2 *Leon. 53.*

(UU) *Of Non-claim.*

TENANT in Tail levied a Fine after the *Stat. 4 H. 7.* with Proclamations, and five Years incurred in his Life-time, and then he died; adjudged that it shall bar the Issue in Tail. *Dyer 3.*

Husband and Wife levied a Fine with Proclamations of the Lands of the Wife, the Husband died, and five Years passed after his Death without Action or Entry; adjudged that the Wife and her Heirs are barred. *Dyer 72.*

Where a Man has a Right to a Writ of Error to reverse a Fine for an apparent Error, and he suffereth five Years to pass without bringing it, he shall be barred by such Fine and Non-claim, by the *Stat. 4 H. 7.* by the Word *Actions* in the Statute; and so it was adjudged in the Exchequer-Chamber, 27 *Eliz. Mandeville's Case, Cro. Jac. 332.—1 Roll. Rep. 36. 2 Bulst. 244.*

Error in B. R. to reverse a Judgment in Ejectment in C. B. in a special Verdict, wherein the Case was, That Tenant in Fee-simple made a Lease to A. M. for 100 Years, in Trust to attend the Inheritance; afterwards the Tenant in Fee entred and took the Profits, and made two Leases to other Persons for short Terms of Years, which were expired; then he made a Lease to one *Germin* for fifty-four Years, and levied a Fine with Proclamations to corroborate the Term to *Germin*, who entred, and the five Years passed; adjudged that this Fine and Non-claim was a Bar to the Term of 100 Years. 1 *Vent. 55, 80. 1 Sid. 349, 458. 1 Lev. 246, 270. Hardres 448.*

A Copyholder of a Dean and Chapter levied a Fine *Come ceo*, and five Years passed without any Claim by the Dean, &c. adjudged in a special Verdict in Ejectment, that the succeeding Dean was not bound by this Fine and Non-claim; for if he should, the Statutes 1 & 13 *Eliz.* which restrain the Alienation of Church Revenues, would be to little Purpose. 1 *Vent. 311.*

(VV) *Of Entry.*

IN *Ejectione firmæ* it was held, that where a Fine was levied with Proclamations, and a Friend of him who had a Right to the Land entered to his Use, but without his Appointment, in order to avoid the Fine before the five Years passed, and the Conusee re-entered, and then the five Years passed; that this Entry should not avoid the Fine, unless he who had the Right agreed to the Entry, but his Agreement to it afterwards will not do. *Cro. Eliz. 561. Popb. 108. Moor 450, 457.*

Where a Lessee for Life in Possession levies a Fine *Come ceo*, &c. if the Lessor does not enter within five Years afterwards, he shall be barred, by the Opinion of the Ch. Just. and another Judge, but *Windham* was of a contrary Opinion; for he hath Liberty to enter within five Years, or may stay till the Death of the Lessee for Life. 1 *Leon. 46.*

There was a Lease made to commence after the Determination of another Lease then in Being; the first Lease ended, the second Lessee did not enter, but he in Re-

version entered and made a Feoffment, and levied a Fine, and the five Years passed without Entry or Claim; adjudged that the second Lessee was barred of his Term by the Stat. 4 H. 7. of Fines, because the Words of the Statute are general, and extend to all Estates, and the Saving is of Claim and Interest, &c. and he who hath a Term for Years, hath an Interest, and such an Interest which may be barred by a Fine, and so are the Interest of Tenants by Statute Merchant, *Elegit*, Guardians and Executors; and tho' he who hath only a Right to an Inheritance cannot levy a Fine, yet if the Tenant of the Land levies a Fine, he shall be bound by it. 5 Co. 123.

A Lease was made Anno 20 H. 6. for eighty Years; the Lessee died Intestate, and Anno 4 Mar. a Fine was levied of the Lands with Proclamations, and the Cognisee enjoyed the same till the 37th of Eliz. and then W. R. took out Administration to the Goods, &c. of the Lessee; two Judges held, that the Right of a Term for Years is not within the Statute of 4 H. 7. of Fines, but a Right of Freehold, and therefore this Lease shall not be bound by that Statute, and by Consequence that the Entry of the Administrator was lawful; but *Anderson* Ch. Just. was of a contrary Opinion, viz. that the Statute did extend to a Right of a Term, and shall bind it, if the Lessee ever was or might have been in Possession before the Fine levied. *Goldf.* 171.

In a special Verdict in Ejectment the Case was, T. S. being seised in Fee, did for the Continuance of his Lands in his Name, and for the Maintenance of his Brother, make a Lease to G. D. and M. G. for 500 Years, in Trust for himself for Life, and afterwards for his Brother, and upon some other Trusts, &c. afterwards being still in Possession according to the Trust, he covenanted with W. W. and T. P. to stand seised of these Lands, upon the same Consideration and to the same Uses as mentioned in the Lease, and covenanted to levy a Fine accordingly, and afterwards levied a Fine, and enjoyed the Profits during his Life, and the five Years being long since passed, he died, then G. D. one of the Lessees in Trust, entered; and the Question was, whether the Lease for 500 Years was barred by this Fine and Non-claim; it was insisted that it was according to the Distinction made in *Saffin's* Case, viz. where a Lease commences immediately in Point of Time, tho' the Lessee doth not enter, a Fine and Non-claim is a Bar; but it is not so where it is to commence *in futuro*, which is this Case; but adjudged that this Fine was no Bar to the Estate for 500 Years, because it was levied in Affirmance of it; and it shall be intended that the Conusor continued in Possession, by the Leave and Permission of the Lessees; if so, then he was but Tenant at Will; and being in Possession upon such a Privy between them, that will protect the Interest of the Lessees; it is like the Mortgagor's levying a Fine and five Years pass; this will not bar the Mortgagee, he being out of Possession; besides this Fine doth not displace the Estate and turn it to a Right, as where there is Lessee for Years, Remainder for Life to another, and the Lessee for Years levies a Fine, and the five Years pass, the Lessor is not barred by Non-claim, because the Fine operates nothing, for *Partes finis nihil habuerunt* may be pleaded; but it is otherwise where Tenant for Life levies a Fine, because he hath a Freehold, and his Fine displaces the Remainders, and therefore an Entry is requisite within five Years after his Death; but in the principal Case the Lease was precedent to the Estate of the Lessor who levied the Fine, and he had a Freehold expectant upon the Lease; and his Fine is so far from working a Wrong, that he intended it should fortify the Lease, therefore he shall not be made a Wrong-doer against his Will; and so it has been adjudged in *Blunden* and *Baugh's* Case; nor will the Court presume it to be a Tort, if it may be intended otherwise. *Hardres* 400. *Vide Cro. Jac.* 60. *Moor* 220, 298. *Noy* 23.

In Ejectment it appeared upon the Evidence that the Title of the Lessor of the Plaintiff was by Virtue of a Remainder limited to him for Life, &c. but that there was a Fine levied, and that within five Years after his Title accrued, he sent two Persons to deliver Declarations on the Lands; adjudged that this was no Entry or Claim to avoid the Fine, because this was no express Authority given to them for that Purpose. 1 Vent. 42.

Adjudged upon a Trial at Bar in Ejectment, that where a Fine *Come ceo* was levied by Tenant for Life, and the Plaintiff in Ejectment, who had the Reversion for Life after the Death of the Cognisor of the Fine, directed one to deliver a Declaration to the Tenant in Possession within five Years after the Death of the Cognisor, which was done accordingly; that this did not amount to an Entry to avoid the Fine, altho' in this very Declaration the Lease was contained, upon which the Ejectment was brought. 1 Saund. 319.

See more before Chap. 2. concerning Entry.

(WW) The

(WW) *The Time of Entry or Claim.*

THE Time in which they must make their Claim or bring their Action that have present Right and no Impediment, is within five Years after Proclamation had, and the Time for them which have Impediments is within five Years after the Impediment removed. *Plow. 370.*

And the Time within which they must make their Claim or bring their Action whose Right doth happen afterwards, if they have no Impediment, is within five Years after the Time that their Right accrues; and if there be Impediment, within five Years after the Impediment removed.

And the Persons whose Right is saved and preserved are mentioned in the first and second Saving of the Statute of 4 H. 7. and they are Strangers and not Parties nor Privies; and they that have Benefit by the first Saving of the Statute shall have none by the second Saving, for he that will be within the second Saving to have Benefit by it must be,

1. Another Person.

2. The Right must come and accrue to him first.

3. It must come to him after the Fine and Proclamations.

4. His Right must be some Cause or Matter before the Fine.

A Lessee for Years shall have five Years from the Commencement of his Lease to claim. *Cro. Jac. 60.*

He that hath two Titles shall have two five Years to make his Claim. *Jenk. Cent.*

6. Case 45.

Five Years are given after a Remainder doth fail, and five Years after the Forfeiture of Tenant for Life, and five Years for a Woman to claim her Dower after her Husband's Death. *Plow. 374. Dyer 3. 19 H. 8. 7.*

An Infant shall have five Years after he comes to his full Age, altho' he was in his Mother's Womb at the Time of the Fine levied. *Plowd. 539.*

Madmen, &c. have five Years after Cure of their Maladies, altho' the Infirmary happens after the Fine levied and before the last Proclamation. *Plow. 339, 367, 375, 377. Dyer 3.*

Strangers out of the Realm at the Time of the Fine levied shall have five Years after their Return; so also if they were in England at the Time of the Fine levied, and within the five Years be sent in the King's Service and by his Commandment. *Plow. 366.*

If the Party be beyond the Sea at the Time of the Fine levied, and never returns, but dies there, the Heir shall not be barred at all. *Sir Thomas Cotton's Case, 20 Eliz.*

If he be in Ireland or Scotland, he shall be said to be out of the Realm. *4 H. 7. Plow. 367.*

They who have divers Defects, have five Years after the last Infirmary removed; but if there be divers Impediments, and once wholly removed, and afterwards they fall into the like again, and die; the first five Years begun in the Ancestor's Time shall proceed and reckon to the Heir, and he shall at the End be bound, as the Ancestor should, if he had remained free all the five Years. *Plow. 375. Dyer 133.*

If he that has Right be beyond Sea at the Time, and never returns, the Heir is not limited to Time.

And so it is if an Infant being Party to the Fine having present Right, if he dies in his Infancy, his Heir is not limited.

And so it is of a Person *Non compos mentis* by the Act of God, or a Man in Prison by the Act of the Law, or a Feme Covert by her own Act, if she dies so, being no Parties to the Fine. *2 Inst. 319, 320. Plow. 366.*

The Husband made a Conveyance of his Land by Fine, and afterwards died; if the Widow make her Claim within five Years after his Death, she shall have her Dower tho' five Years had incurred in the Life-time of her Husband after he levied the Fine; but if she doth not within five Years after his Death, being Sole, and of full Age, &c. and not under any Incapacity, as mentioned in the Stat. 4 H. 7. she shall lose her Dower. *Goldesb. 148. Moor 53.*

The Husband being seised in Fee levied a Fine, and was afterwards outlawed for High Treason, and the Conusee conveyed the Lands to the Crown; afterwards the Daughters and Heirs of the Cognisor reversed the Outlawry; and upon a Petition of

Droit

Droit de Dower to the Queen, it was adjudged, that tho' the five Years were passed long since, and after the Fine levied, and the Death of the Husband, yet this Petition being within five Years after the Reversal of the Outlawry, the Widow shall not be barred of her Dower, because so long as the Outlawry was in Force, that was a Bar to her Claim; but that being reversed, she shall have another five Years after the Reversal to make her Claim, which she had now done by Petition. *Moor* 639.

The Testator devised the Lands to an Infant in Fee, and died; *B. G.* entered and levied a Fine of it in the Life-time of the Infant, who afterwards died within Age, the Wife of *E. B.* being his Sister and Heir; the Husband suffered the five Years to pass without Entry or Claim; adjudged that the Fine shall be a good Bar to him and her, and all claiming under them during the Coverture, but that the Wife, if she survives, shall have five Years more after the Death of her Husband. *Cro. Car.* 91.

Writ of Error to reverse a Fine under which the Plaintiff in the Action claimed; and the Defendant pleaded, that he was beyond Sea at the Time of the Fine levied; the Plaintiff replied, that the Defendant came into *England* in *August* within five Years after the Fine levied, upon which they were at Issue, and the Jury found that he came in *July*; adjudged that tho' the Verdict differs from the Issue in Point of Time, viz. in the Month, the one being in *July* and the other being in *August*, yet the Substance of the Issue is found, viz. that the Defendant was in *England* within five Years after the Fine levied, and might have made his Claim; and it is not material in what Month he came, so as he was here, and therefore the Fine and Non-claim shall bar him. *March* 3.

In Dower against the Tenant of the Land, he pleaded that her Husband *Anno* 14 *Jac.* levied a Fine of the Lands with Proclamations, and that he died in the same Year, and that the Widow made no Claim within five Years afterwards, so that she was barred by the *Stat. 4 H. 7.* of Fines; the Demandant replied, that *Anno* 15 *Jac.* she brought a Writ of Dower against the now Tenant and two others, and that the Writ abated by the Death of those two, and that she now brought this Writ by Journeys Accompts; the Defendant rejoined, that those two were not Tenants, but that one *W. R.* was Tenant; and upon Demurrer to this Rejoinder it was objected that it was ill, because it amounted to a Negative pregnant, and to a Confession that the Defendant was Tenant; for if those two were not Tenants, then he was, and so the Writ is well brought against him; now admitting that he was not Tenant then, it is true that the Writ being brought against him is not any Claim within the Statute; but if he was Tenant then where she brought her Writ against him and two others, then it abated by their Death; and now she brings a second Writ by Journeys Accompts, tho' after the Time limited by the Statute, yet it is a good Claim. *Winch* 66.

In a special Verdict in Ejectment the Case was, A Settlement was made by Covenant to stand seised, &c. to the Use of *C. M.* for ninety-nine Years, if he should so long live, Remainder to Trustees to preserve contingent Remainders, (which being two Strangers, and not of the Blood of the Covenantor, was void as to that) Remainder to the first, and so to the tenth Son of *C.* in Tail, Remainder to *E. M.* the Father of the Lessor of the now Plaintiff in Tail, Remainder to the right Heirs of the Covenantor; in *October* 1656. *C.* made a Feoffment to the Defendant, and in *Hilary* Term following levied a Fine to him; *E. M.* the Father of the Lessor of the Plaintiff, being then living, who died in *March* 1661. leaving the Lessor of the Plaintiff then and still under Age; *C.* died in 1664. without Issue Male, but had a Daughter now living; the Question was, whether the Lessor of the Plaintiff shall have five Years after the Death of *C.* to enter to avoid this Fine, or if the Entry should not be within five Years after the Fine levied; but if the first, then he is right in Point of Time, being at the Death of *C.* and still an Infant; but if the last, then the Right of Entry being attached in his Father, and he not entering within five Years after the Fine levied, the Sons are barred. It was insisted for the Defendant, that if *C.* had been Tenant for Life, he in Remainder would have five Years to enter after his Death tho' he might have entered in the Life-time of the Tenant for Life, and this by the Saving in the *Stat. 4 H. 7.* viz. the second Saving, by which future Rights are saved; now the Title comes by the Determination of the Estate for Life, is a new Right which accrues to him in Remainder, and therefore he shall have five Years to enter and claim after the Death of the Tenant for Life; but my Lord Coke, in *Podger's Case*, tells us, it is otherwise where a Fine is levied by Tenant for Years, for then the Entry and Claim must be within five Years after the Fine levied, because in such Case he in Remainder hath a present Right, being disseised by levying the Fine; but

but adjudged for the Lessor of the Plaintiff that he shall have five Years to enter after the Death of C. that there are no Words either in the first or second Saving of the Statute to warrant this Difference of a Fine levied by Tenant for Life, and a Fine levied by Tenant for Years, for by the first Saving all present Rights are saved, and by the second all future Rights; and there is nothing mentioned of Freehold or Chattels: Now when Tenant for Life levies a Fine, he in Remainder hath a new Right of Entry upon the Determination of that Estate, as well as he in Remainder hath upon the Determination of the Estate for Life, for in both Cases the Levying a Fine is a Forfeiture; and the Reason why it doth not bar, is because of the Trust and Privy which is between the Lessee and him in Remainder, that no Prejudice be done to him by their Acts; now in the principal Case the Lessee was trusted with the Possession, and if he in Remainder should not have five Years to enter after the Determination of the Estate for Years, then there would be an apparent Injury and Fraud done by his Means and Privy. 2 Lev. *Whaley v. Tancred*. T. Raym. 209. 1 Vent. 241, 334.

In Ejectment the Case upon a special Verdict was, That T. L. acknowledged two Statutes to K. and G. and another to B. which K. and G. extended by *Liberate*, and afterwards they two granted their several extended Interests to one E. L. but that T. L. the Conusor, still continued in Possession, and levied a Fine *Come ceo* to L. and his Heirs; that J. L. deviseth the Lands to the said E. L. in Tail Male, and for want of such Issue, to his Daughters; that afterwards E. L. being in Possession, levied a Fine to F. to the Use of the said E. and his Heirs; the Question was, that when E. L. had the extended Interest upon K. and G.'s Statutes, and soon afterwards the Estate of Inheritance likewise in himself, and then levied a Fine to F. to the Use of himself and his Heirs, whether that Fine did destroy the extended Interests which were in him; and adjudged that it did; for when a Fine is levied by him who hath the Freehold, whatever Interest he hath besides passes inclusively, not by way of transferring of it, but Consolidation with the Fee; if so, then B. might have entered immediately, which he did not, but five Years passing afterwards without Claim, the Extent upon his Statute is barred, for he shall not have a new five Years after G.'s Statute shall be satisfied by Perception of Profits, or Satisfaction acknowledged upon Record, by Virtue of the Saving in the Stat. 4 H. 7. viz. saving such Right as shall first remain after the Fine levied by reason of any Matter before, so that he pursue the Right within five Years next after it shall accrue; for whether the Extents upon K. and G.'s Statutes were barred by the Non-claim in the first Fine levied by T. L. or destroyed by the last Fine levied by E. L. there was no Pretence that B. claimed within five Years after either of those Fines, so that the Right was not pursued within five Years after it did first accrue; and this had been necessary to be done where there was only a Right of Action; as for Instance, Tenant in Tail levied a Fine, by which the Remainder was destroyed, he having before the Fine levied made an Estate for Life warranted by the Statute, and then died without Issue; adjudged that he in Remainder was barred of a *Formedon* in the Life of the Tenant for Life within five Years after the Fine levied, and could not have a new five Years after the Death of the Tenant for Life, (altho' he could not enter whilst the Tenant was living) because of the Death of the Tenant for Life, the Remainder-Man had no new Right, for it was the very same he had before: In *Whaley* and *Tancred's* Case it is held, that he in Reversion shall have a new five Years, after a Term in Being when the Fine was levied, shall be ended by Effluxion of Time; but that was upon an apparent Fraud, where a Fine was levied by a Lessee for Years continuing still in Possession; but even in that Case the Resolution was carried beyond the Words of the Statute, for the Right was not pursued within five Years after it first came; and it was a Construction by Equity to weaken the Force of a Statute contrary to the very Reason of the Common Law, which takes no Care for a Reversionary Interest; besides to let him who has a Reversion by Extent have five Years to claim after a precedent Extent is satisfied by Perception of Profits, or Satisfaction acknowledged, is to let in a Claim after an Estate that no Man can see an End to, whereas other particular Estates have an End either by express Limitation of the Parties, or by Operation of Law. 2 Vent. 21. 4 Mod. 247.

By Stat. 4 & 5 Ann. No Claim or Entry to be made into any Lands, &c. shall be of any Force to avoid a Fine levied with Proclamations, according to the Form of the Statute in the Court of Common Pleas at *Westminster*, or in the Courts of Sessions in any of the Counties Palatine, or Grand Sessions in *Wales*, of any Lands, Tenements or Hereditaments; or shall be a sufficient Claim within the Statute of Limitation of

Actions, and avoiding Suits in Law, unless upon such Entry or Claim an Action be commenced within one Year after making of the Entry or Claim.

(XX) *Where there is no need of Claim.*

A Fine does not bar the Estate, but binds the Right; and where the Fine does not turn the Estate to a Right, there needs no Claim. *T. Raym.* 149. 9 Co. 106. 2 Inst. 517. *Cro. Jac.* 60. 5 Co. 124. 1 Vent. 81.

(YY) *How Fines Executory are to be executed.*

THE Execution of a Fine is the obtaining of actual Possession of the Things contained in the same by Virtue thereof; and it is either,

1. By Entry into the Lands; or,
2. By Writ.

Entry.

First, By Entry into the Lands; as where the Fine is *sur Cognissance de droit come ceo que il ad de son done*, the Cognisee may obtain the actual Possession of the Land contained in the Fine by an Entry: For in this Case of a Fine executed, if the Cognisor be still in Possession of the Land whereof the Fine is levied, the Cognisee may without any Writ of *Habere facias seisinam* enter upon him, and so get the Seisin and Possession of the Land.

And note, That if a Fine be levied to Husband and Wife in special Tail, the Remainder to the Heirs of the Body of the Husband, and the Wife dies without Issue, the Remainder is executed in Possession in the Husband; for the Estate-tail meets with the Fee-simple, and it is drowned. 41 Ed. 3. 14. 14 Ed. 3. 5. 7 H. 4. 23. 2 West's Symb. p. 57.

Secondly, The Execution of Fines by Writ is either,

1. By *Habere facias seisinam*; or,
2. By *Scire Facias*.

1. A Writ of *Habere facias seisinam* in this Case is a judicial Writ issuing out of the Record of a Fine executory, directed to the Sheriff of the County where the Land lies, commanding him to give the Cognisee or his Heirs Seisin of the Land whereof the Fine is levied.

This Writ lies within the Year after the Fine or Judgment upon a *Scire Facias*. 2 West's Symb. 57.

2. And a Writ of *Scire Facias* upon a Fine lies in the same Case as a Writ of *Habere facias seisinam* does, excepting that it is to be sued a Year and a Day after the Fine is levied, whereby the Sheriff is commanded to warn the Tertenants to appear and shew Cause, if he can, why the Cognisee or his Heirs should not have Execution.

At the Return whereof if the Tenant appears and shews no Cause to the contrary, the Plaintiff shall have an *Habere facias seisinam*, *ut supra*. 2 West. Symb. 58.

Surplusage.

A *Scire Facias* to execute a Fine must agree with the Fine, and then it is not material if one Thing be twice demanded thereby, as a Manor, and a Hundred, Parcel of the same Manor. 27 H. 8. 2.

Upon the Note.

A *Scire Facias* may be sued out upon the Note of a Fine before it be ingrossed by the Chirographer. 22 H. 6. 13.

A Fine before Memory.

But if a Fine be levied before Time of Memory, a Man shall not have Execution by *Scire Facias*. 1 E. 4. 6. contr. 16 H. 7. 9.

Of Land in Lieu of the Services.

Where a Fine executory is levied of a Seignior, if the Land escheats, or the Tenant be forejudged, &c. the Cognisee shall have a *Scire Facias* of the Land in Lieu of the Services. 48 E. 3. 11.

Mittimus.

A *Mittimus* makes no Mention whether the Fine be ingrossed or not, but *Cum quidam finis levasset*, &c. 22 H. 6. 13.

If a Fine be levied to A. in Tail, the Remainder to B. in Tail, the Remainder to C. in Fee, and the Record is sent into the Chancery, and the first Tenant in Tail dies without Issue, and the Record comes back into the Bench by *Mittimus*, at the Suit of him in the first Remainder, and thereupon he had a *Scire Facias* to execute the Fine, and died without Issue before Execution had; he in the Remainder in Fee shall not hereupon have a *Scire Facias* without a new Commandment, because the Record was once out of Court, and came again at the Suit of him in the first Remainder.

mainder, unto whom he in Remainder in Fee is a Stranger, yet the Issue of him which removed the Record in this Case might have a *Scire Facias* without any new Commandment, because he is privy. 14 H. 7. 16. 9 E. 4. 15. 11 E. 4. 13.

If two sue a *Scire Facias* to execute a Fine, and the one dieth, the Survivor shall have a *Scire Facias* without any new Commandment. 1 E. 4. 13.

But if divers Persons, as Heirs to *A. B.* pray a *Scire Facias*, it is not grantable until they have sued several Writs to the Justices of the Bench, commanding them to make Execution. 11 E. 4. 13. 7. 21 E. 4.

In a *Scire Facias* to execute a Fine as Cousin and Heir to him in Remainder or Reversion after the Death of the particular Tenant, the Plaintiff needs not shew how Cousin and Heir, so long as the Plea has Continuance, by *Idem dies, &c.* given to the Tenant, nor at his Appearance, nor until the Plaintiff prays Execution; and then the Count *Cousin & Heir* is to be entered thus in the Roll only: *And the aforesaid J. says that he is Cousin and Heir of J. W. to wit, the Son and Heir of T. W. the Brother and Heir of J. W.* 33 H. 6. 54. 41 E. 3. 13. & 24 H. 8. 4. 31.

In a *Scire Facias* by him in Remainder upon an Estate-tail against *A. B.* supposing the Donee to be dead without Issue, if *A. B.* pleads that he is Issue to the Donee, and the Plaintiff replies that he is a Bastard, it is a good Replication. 40 E. 3. 16.

Scire Facias upon a Fine levied to *T. R.* and *W.* and to the Heirs of the Body of *R.* the Remainder to the right Heirs of the said *W.* *T.* died, and *R.* died without Issue, and *W.* survived and died; his Heirs need no *Scire Facias* to execute this Fine, because it is executed in his Life by the Union of the Fee and Freehold in *W.* 40 E. 3. 20.

And so if a Fine be levied to a Baron and Feme, and to *W.* and his Heirs, and he dies, and then the Baron and Feme die, the Fine is executed for one Moiety in the Life of *W.* Fitz. *Scire Facias* 19. 43 E. 3. 9. 24 E. 3. 57.

Tenant for Life in *Scire Facias* had Aid of him in Remainder. 41 E. 3. fo. 16. & Aid. 20. 22 E. 3. 12.

In *Formedon* in Reverter or Remainder, the Demandant must mention the Death of every one which had Estate and survived his Ancestor, but not so in a *Scire Facias* for Fine. 42 E. 3. 19.

If the Plaintiff has several Estates created by one Fine, he needs but one Writ of *Scire Facias*, 43 Ed. 3. 11. tho' it be of several Things against several Tenants. 11 H. 4. 15. 21 E. 3. 14. 24 E. 3. 25.

If in a *Scire Facias* the Sheriff returns the Party summoned, and he appears not, Default. Execution shall be awarded. 43 E. 3. 13.

If a Fine *sur Cognissance de droit come, &c.* be levied of a Reversion by the Name of the Land, it is not executory. 43 E. 3. 15.

If the Services escheat after a Fine levied of the Seignior, the Cognissee shall have Execution of the Land escheated. 48 H. 3. 11.

A *Scire Facias* lies sometimes of Things not comprised in the Writ; as if in a Fine for Release the Cognissee renders Rent in Tail. 48 E. 3. 8.

Of Things out of the Writ.

If Land be given by Fine for Life, the Remainder to Baron and Feme in Tail, and the Baron dies, and then the Tenant for Life dies, and the Feme enters, the Fine is executed so as their Issue needs no *Scire Facias*. 49 Ed. 3. 12.

Execution by Entry of him in Remainder.

Scire Facias lies for the Donor in Tail against any that abates after the Death of the Donee in Tail by Fine without Issue. 22 E. 3. 12.

Upon general Non-tenure pleaded, the Plaintiff may take Execution at his Peril: But special Non-tenure seems a good Plea. 7 H. 6. 25.

A Man shall not have Execution upon *Nihil* returned, because the Tenant may be summoned in the Land demanded. 24 E. 3. 25.

If a Fine be levied to Husband and Wife in Tail, the Remainder to his right Heirs, and they having Issue, the Husband dies, the Wife has Issue by another Husband and dies, the Issue by the first Husband enters and dies without Issue, and his next Heir enters, as into the Remainder in Fee; against whom the Issue by the second Husband brings a *Scire Facias* and recovers, by reason that the Fee could never execute in Possession in the Elder Brother during the Estate-tail. 24 E. 3. 30 & 62.

A Feoffment with Warranty from the Plaintiff's Ancestor, is a good Plea in a *Scire Facias* upon a Fine. 22 H. 6. 39.

The Heir shall have his Age in *Scire Facias*. Cont. Westm. 2. cap. 45. — 24 E. 3. 28 & 60.

(22) Of

(ZZ) Of Attornment upon a Fine.

A Fine of a Reversion ought not to be ingrossed until the Tenant for Term of Life attorns, for until Attornment he is punishable of Waste; neither can the Cognisee avow upon him for the Rent behind before Attornment. 22 H. 6. fol. 13. Plow. 431.

And the Cognisee may compel such Tenant for Life to attorn by *Quid juris clamat*, a judicial Writ issuing out of the Record of the Fine which lies in the *Custos Bre-vium's* Hand, and lies for the Grantee of a Reversion or Remainder to force the particular Tenant to attorn.

Or a *Quem redditum reddit*, a judicial Writ issuing out of the Note of a Fine against the Tenant of the Land, to compel him to attorn upon the Grant of Rent-Seck or Rent-charge out of the Land.

Or a *Per quæ servitia*, a judicial Writ issuing from the Note of a Fine, and lies for the Cognisor of a Manor, Seignior, chief Rent or other Services, to compel him that is Tenant of the Land at the Time of the Note of the Fine levied to attorn unto him.

And this must always be sued forth upon the Note of the Fine made by the Chirographer, and before it be ingrossed by him, for after the Ingrossing it cannot be had. F. N. B. 47. a. b.

For more concerning these Writs and the Forms thereof, see 2 West's Symb. from p. 47 to 54.

Note, That by Stat. 11 G. 2. c. 19. §. 11. The Attornment of Tenants to others is void, except in Consequence of Judgments or Decrees, or with the Consent of the Landlord, or in Case of Mortgages forfeited.

See more concerning Attornment before, p. 494.

(AAA) Of avoiding Fines in general.

A Fine may be avoided for good Cause in many Cases; as,

1. By the Death of all or some of the Parties before it is finished.
2. By some Error escaped in the suing of it out and Prosecution of it.
3. By Fraud, Deceit or Covin that hath been used in it.
4. By Claim, Entry, &c.
5. By Sentence of a Court.

And so it is sometimes avoidable by a Writ of Deceit, sometimes by a Writ of Error, and sometimes by Pleading only.

The avoiding of a Fine by one defeats it against all, altho' their Right were bound before by their Non-claim, which sets at large all other Rights above them. Plow. 358.

If the Husband and Wife levy a Fine, and both of them be within Age, whilst either of them be within Age they may avoid the Fine as against them both. 1 Co. 76. 2 Co. 77.

But if there be Tenant for Life, and he in Remainder in Tail being an Infant, and they two levy a Fine, and he in Remainder reverse it for Infancy; this shall not avoid the Fine as to the Tenant for Life also. Ibid.

Lands that are bought of divers Persons may pass by one Fine, and then the Writ of Covenant must be brought by all the Vendees against all the Vendors, and they must every one of them warrant for himself and his Heirs, and such a Fine is good.

If Lands lie in divers Shires, it may be contained in one Concord, and good enough; but there must be several Writs of Covenant in every County, else the Fine will not be good. 15 Ed. 4. 33. Dyer 227.

First, By Death of some of the Parties.

If either of the Parties Cognisors die after the Cognisance or Concord, and before the King's Silver be entered, this will avoid the Fine, and it cannot be made good: But if the King's Silver be entered in Paper, or upon the Back of the Writ of Covenant (as the Use is) and the Party dies after this, the Fine by this shall not be

be avoided, but may be finished. *Vide Cro. Eliz.* 469. *Dyer* 89, 320, 220, 246. 5 Co. 39. Co. Lit. 9. 2 Inst. 511. *Hob.* 330, 403, 404.

Where the Cognisor dies after the Cognisance made, the Writ of Covenant and *Dedimus Potestatem* being antedated, and the King's Silver paid, the Fine will be a good Fine. *Jenk. Cent.* 4. c. 28. 7. c. 3.

It is held also, that if a Judge take the Cognisance of a Fine, and before it be certified the King demises, and the Judge has Notice of this; that now the Fine cannot be certified, for his Patent is at an End: And there seems to be the same Reason for Commissioners to take a Cognisance by *Dedimus Potestatem*. *Jenk. Cent.* 4. c. 28.

Note, That where any Fine is levied, it shall be said to be all that Term wherein it is levied *in pectore judicis* to amend it for Error, as the Judges see Cause. *Latch* 180.

If any one of the Conusors dies before the Conusance be certified after it is acknowledged and taken, the Fine cannot now be made a good Fine; and yet if the Commissioners shall certify this Conusance with an Antedate, and the Fine be finished, this may be a good Fine at the Common Law: But if the Conusance be certified, and the King's Silver paid to the King before the Death of the Conusor, the Fine may be ingrossed and finished after his Death well enough, and it will be a good Fine.

And if a Feme Sole makes a Conusance of a Fine, and before it be certified and ingrossed she takes a Husband; this will not hinder the Fine from being finished; and altho' it be recorded and issued out in her Name as Sole, whereas in Truth she is Covert and of another Name, yet the Fine is good; however in this Case it is not amiss to get a Release of Errors from her Husband. *Dyer* 220, 246, 254. *Crom. Jur.* 92.

Secondly, By Error.

The Fine must be levied and sued out in that Manner and Order as before is set forth; for if it be not so, but that there wants an original Writ, or if there be one, it bears *Teste* after the *Dedimus Potestatem*, or the like; it will be a defective Fine, and either *ipso facto*, or at least voidable by Writ of Error.

No Error but such as is *notorious* shall avoid a Fine; for in this the Rule is, *Conventus tollit errorem*.

If there wants an Original, or if there be a Writ, and that bears *Teste* after the *Dedimus Potestatem*, or the *Dedimus Potestatem* be to two, and one alone takes it; this, it is said, is Error, for which the Fine may be reversed; but for the *Teste* of the Writ of Covenant after the *Dedimus Potestatem*, this is amendable. *Latch* 186.

A Writ of Error *De recordo quod coram vobis, &c.* lies in B. R. on Affirmance there of a Fine levied in C. B. 1 *Salk.* 337, 338.

And yet the Writ of Error in B. R. to reverse a Fine in C. B. removes the Transcript only, and not the Record itself. 1 *Salk.* 337, 338, 341.

But if the Court of B. R. adjudge the Fine erroneous, then a *Certiorari* goes to the Chirographer to certify the very Fine, and when it comes up it is actually cancelled. 1 *Salk.* 341.

No Error may be alledged to reverse a Fine where the Error is contrary to the Record or Certificate of the Justices; as to say, the Commissioner was not a Knight, when the *Dedimus Potestatem* saith he was. *Jenk. Cent.* 6. c. 53. *Dyer* 89. *Cro. Jac.* 11. *Telv.* 33.

If a *Dedimus Potestatem* be awarded against two, and one of them takes the Caption of the Fine, which is afterwards drawn up in the Common Pleas, yet the Party may have a Writ of Error, because the Caption was without Warrant, being contrary to the Record, for the *Dedimus* is Parcel of the Record; but if such an erroneous Caption be taken on a *Dedimus*, and the Fine is drawn up not as upon a *Dedimus*, but as a Fine acknowledged in Court; in such Case it shall not be avoided for Error in the Caption. *Telv.* 33. *Cro. Jac.* 11.

The Writ of Covenant was returnable *Octab' Pur'*, and dated 23d January, the *Dedimus Potestatem* bore Date the same Day, and the Judge certified the Caption on the 14th of February, which was two Days after the Term, and the Fine was *hæc est finalis concordia facta, &c.* in *Octab' Pur'*, and afterwards it was recorded in *Easter Term*; and yet this was adjudged a good Fine. *Hutt.* 135.

Four Proclamations were made on a Fine every Term, according to the Statute 4 H. 7. but the 13th was made on the 7th of June, which was not *dies juridicus*, being Sunday,

Sunday, and that was assigned for Error to reverse the Fine; but adjudged that the Fine should stand, and the Proclamations only should be reversed; for the Statute doth not appoint any new Form of Fines, but they remain in Substance and Form as they were before; it is true it gives Proclamations upon the Fine, to the Intent that Strangers may have Notice of it; but the Fine itself is perfect without Proclamations, and being Matter of Record, shall bind the Parties. *Plow. Com. 265. Dyer 182.*

Scire Facias.

On Error to reverse a Fine a *Scire Facias* must go against the Ter-tenants, for the Conusees are (often) but nominal Persons. *1 Salk. 339. 2 Salk. 598.*

The same Rule is affirmed and said to be for fear of Purchasors and in Favour of them; and tho' in Strictness of Law a *Scire Facias* being returned against the Conusees is sufficient, yet the Course of the Court is to have it also against the Ter-tenants. *1 Salk. 339.*

Error to reverse a Fine levied in the *County Palatine of Chester*, and several Errors assigned; but because there was no *Scire Facias* against the Ter-tenant, who might have something to plead as a Release or other Matter, there was no Answer made to the Errors, but a *Mandamus* was awarded to the Chamberlain of *Chester*, to warn the Ter-tenant *ad audiend' errores*. *Dyer 321.*

Error to reverse a Fine levied by *Charles Earl of Devonshire*; the Writ was brought by the Plaintiff as Cousin and Heir of the Earl, and a *Scire Facias ad audiend' errores*, and did not shew in either of those Writs how he was Cousin to the Earl; adjudged good, for the first Writ is only a Commission to hear Errors, and needs not such Certainty; and the *Scire Facias* is founded upon it, in which it is not requisite to shew any Title, unless it is in some special Case varying from the common Form; and tho' in some Writs and Cases it is shewed how Cousin, as in *Vernon's Case*, yet it is not necessary so to do. *Mich. 14 Jac. Sir Richard Champenoon ver. Sir William Godolphin.*

Bar.

One may bar himself of this Writ of Error by a Feoffment of the Land, or a Release of his Right to the Land, or by a Recovery, or by a Fine and five Years past. *Cro. Eliz. 69. 1 Co. 77. 2 Co. 77. 2 Inst. 518. Cro. Jac. 332. 2 Leon. 263.*

And by making of a Lease for Years, he may suspend it.

A Writ of Error was brought to reverse a Fine levied in *Lancaster* by Tenant in Tail; the Defendant in the Writ of Error pleaded in Bar, that the Tenant in Tail had suffered a Recovery, in which he was vouched, and thereupon he appeared, and vouched the common Vouchee; and upon Demurrer the Question was, whether the Issue in Tail was not barred by the coming in of the Tenant in Tail as Vouchee, to bring this Writ of Error to reverse an erroneous Fine which he had levied; and adjudged that he was barred. *Moor 367.*

Lands in divers Counties.

If the Lands lie in divers Counties, and there be not several Writs of Covenant for every County, this will be Error. *Dyer 225. 15 Ed. 4. 13.*

Where Error is in the Proceed of the Proclamations only, there they only shall be reversed, and the Rest of the Fine shall stand good at Common Law. *Hughes's Akr. 938. Case 2, 3, 4.*

Infancy.

Husband and Wife levied a Fine of the Lands of the Wife, she being then under Age, and afterwards they suffered a Recovery, wherein they being vouched over the common Vouchee, &c. there were two Writs of Error brought, one to reverse the Fine, and the other the Recovery; adjudged that it was clear the Fine ought to be reversed for the Infancy of the Wife; but it was doubted concerning the Reversal of the Recovery, because she appeared in Person, and vouched; yet afterwards it was reversed. *Goldf. 181.*

Husband and Wife levied a Fine of the Lands of the Wife, she being an Infant; both of them brought a Writ of Error to reverse the Fine; adjudged that it shall be reversed as to both for the Infancy of the Wife, and not stand good as to the Husband, and be reversed as to her, because it is an intire Thing, and cannot be affirmed in Part and reversed in Part. *1 Leon. 115. Owen 21.*

Tenant for Life, Remainder to an Infant in Fee, join in a Writ of Error to reverse a Fine, it shall be reversed as to the Infant only. *1 Leon. 155.*

An Infant may avoid a Fine by a Writ of Error during his Minority, but not afterwards. *2 Co. 230. Dyer 201.*

Marriage.

After the *Teste* of the Writ of Covenant, and the *Dedimus Potestatem* to take a Fine of a Feme Sole, and before the Day in Bank to record and ingross it, she married; adjudged that this Fine shall be ingrossed as her Fine, for she had done all she could do, and the Fine shall bind her and her Heirs; but if she had died, in such

a Case the Writ of Covenant should abate, that being by the Act of God, but Marriage was her own Act. *Dyer* 246.

Error to reverse a Fine, that it was levied of a Reversion, &c. and the Conusee brought a *Quid juris clamat*, in order to compel the Tenant to attorn, and pending the Writ he died; then his Heir brought a new *Quid juris clamat*, and the Tenant pleaded, that as to one Part he claimed the Fee, and as to the other Part he was ready to attorn, and the Plaintiff accepted thereof, and as to Remainder *Quod defendens eat inde sine die*; and the Fine was ingrossed, and Proclamations made; the Error assigned was, that the Conusee alone was to have Election, whether he would have the Fine with Proclamations or not, and that he being now dead, his Heir cannot have it with Proclamations; besides, the Judgment in the *Quid juris clamat* is, that the Fine be ingrossed for Part, and here it was ingrossed for the Whole; but adjudged that the Heir hath Election to have the Fine with Proclamations, as well as his Ancestor had, for it is for his Benefit; as for the *Quid juris clamat* it is not material, for the Conusee might have the Fine ingrossed without that Writ; it is true he might not compel the Tenant to attorn without it, therefore he brought the Writ for that Purpose; and tho' the Judgment is, that the Fine be ingrossed in Part, yet if he will he may have all the Fine ingrossed. *Cro. Eliz.* 692.

The Husband made a Feoffment in Fee to the Use of himself and his Wife and the Heirs of their two Bodies, Remainder to the right Heirs of the Husband; they had Issue a Daughter, then the Husband died, and the Daughter married, and she and her Husband joined in a Fine to confirm her Estate, and then she died without Issue; her Cousin and Heir brought a Writ of Error to reverse the Fine, and assigned for Error, that after the Writ of Covenant and before the Caption certified, viz. 25th of March, which was before the *Teste* of the *Dedimus*, the Daughter died; but this being contrary to the Record certified by the Judge who took the Caption, was not suffered to be assigned for Error. *Dyer* 89.

So where fifteen Proclamations were made, and one of them out of Term; it was adjudged that the Fine should stand, and the Proclamations be reversed. *Dyer* 216.

Writ of Error to reverse a Fine; and the Error assigned was, that the Ancestor of the now Plaintiff in Error who levied this Fine, died between the *Teste* and Return of the Writ of Covenant; the Defendant pleaded, that after the Death of him who levied the Fine, the Father of the now Plaintiff entered on Parcel of the Lands, and made a Feoffment in Fee to B.G. and upon Demurrer to this Plea it was adjudged for the Defendant, and that the Plaintiff was barred of this Writ of Error by the Entry of his Father, and his Feoffment of Parcel; for where a Man hath a Right of Action to recover the Land, and it is suspended or extinguished as to Parcel, it is extinguished as to the Whole; but if he hath an actual Right to the Land itself, he may release or suspend it as to Part, and it shall remain good for the Residue. *Moor* 413.

Tenant in Tail, Remainder to H. in Tail, Remainder to W. M. in Tail, the Remainder over in Fee, &c. The Tenant in Tail and his Wife and H. who was the next in Remainder, join in a Fine, and on the last Day of January 3 Car. the Writ of Covenant was brought, and the Caption was 2d of February following, and so the Fine went on, and five Years and more passed; then a Writ of Error was brought to reverse it, and the Error assigned was, for that the Tenant in Tail having Issue, died before the Return of the Writ, or the King's Silver was entered, so that the Estate-tail descended on his Issue, and by Consequence H. the next in Remainder, had nothing at the Time of the Perfecting the Fine; and thereupon he alledged Diminution in the Record, before the Chief Justice of Chester, (this Fine being levied there) and afterwards before the Prothonotary, who returned no Diminution on the Record, for that the King's Silver was entered on a Paper-Book in the Office, &c. without shewing for what; and thereupon the Defendant demurred, and that the Plaintiff joined in Demurrer. It was insisted, that this was no Entry of the King's Silver, it being in Paper, and all Records ought to be in Parchment; it is true, if a Feme Sole brings a Writ of Covenant which is taken by *Dedimus*, (as in this Case) and before the Return of the Writ she marries, the Fine shall go on and bind her, because the Marriage was her own Act; but in the principal Case, the Death of the Tenant in Tail was by the Act of God, and as to the five Years passing, that shall not hinder where the Fine itself was erroneous; and of this Opinion were two Judges, and so was the Chief Justice; but he held, that the Entry of the King's Silver could not come in Question; for to proceed on a Fine after the Death of the Cognisor, and before

before the Return of the Writ, is building without a Foundation; that in all Fines the Writ of Covenant is the Foundation; that where the King's Silver is entered, and the Fine ingrossed, the Fine is good tho' one of the Parties die; that even in the principal Case, if the Tenant in Tail had not died, the King's Silver might be paid; and if not, yet there was a Composition for it; and in Favour of common Assurances it shall be presumed to be paid; so Judgment was, that the Fine shall be reversed in the Whole. 2 Sid. 54, 92. Dyer 246.

Misnomer.

Tenant in Tail of a Messuage and Lands called *Escons*, lying in *L.* levied a Fine thereof by the Name of a Messuage, and 200 Acres, &c. lying in *Eslington*, *Escon* and *Chilford*; and the Jury found that there was not any Vill, Hamlet, or *Lieu Conus*, by the Name of the Messuage or Tenement called *Escons*, out of the Vill or Hamlets, and that none of the said Tenements were in *Eslington* or *Chilford*; it was objected, that a Fine cannot be of Lands in a Vill or Hamlet, by the Name of a *Lieu Conus*, for the Vill being the Principal, ought to be named; but adjudged that the Fine being an amicable Assurance, ought to be taken favourably; and since it is recorded, it shall be good. Cro. Car. 196 & 201.

In a special Verdict in Ejectment the Case was, A Fine was levied of Lands in the Parish of *St. Inderion*; the Cognisor had Lands in *Portgwyn*, and the Jury found that *Portgwyn* had a Tithingman, but that the Constables of *St. Inderion* did exercise their Authority in *Portgwyn*; the Question was, whether the Lands in *Portgwyn* passed by this Fine; and this depended upon another Question, whether *Portgwyn* was of itself a Parish, because it had a Tithingman, or whether it was a Vill or Hamlet in the Parish of *St. Inderion*; adjudged that if it had been found that they had distinct Constables, and could not interfere in their Authority, that then they might be distinct Parishes; but here it is found that the Constables of *St. Inderion* did exercise their Authority in *Portgwyn*, therefore it must be a Vill in *Inderion*, and a Parish may contain many Villages; and if a Fine is levied of Lands in the Parish, it passeth whatsoever is in the Villages. 1 Vent. 170. 2 Mod. 234. 2 Vent. 31.

Misprision amended.

The Conusor levied a Fine of a Manor, and of several Acres of Land, naming them, to the Value of 20 Marks per Annum, so that the King's Silver was 40s. for the Whole, and the Clerk to whom it was paid entered it thus, (*viz.*) B.G. Dat Domini Regi 40 s. pro licentia concordandi in placito conventionis of so many Acres, leaving out the Manor; upon which a Writ of Error was brought, and the Transcript of the Record being removed into the King's Bench; it appearing to the Judges of the Common Pleas, upon Examination, that the King's Silver was paid for the Whole, they amended the Record, it being but the Misprision of the Clerk. 5 Co. 43.

Variance.

Error to reverse a Fine, because the Caption was by Roger Manwood Chief Baron, on the 27 Martii 27 Eliz. and the *Dedimus Potestatem* was dated 9 Aprilis, so as the Caption was taken without Warrant; but this was held not to be Error; then it was objected, that the Caption was upon the *Dedimus*, in which the Land was mentioned to be to the Husband and Wife, and to the Heirs of his Body on her Body to be begotten; and the Fine ingrossed was, to the Heirs of the Body of the Husband on her to be begotten; so the Word Body was left out; but adjudged this Variance was not material, because in both Cases the Words are of the same Import, and the Wife hath but an Estate for Life, and the Husband an Estate-tail in both Limitations. Cro. Eliz. 275.

The Writ of Covenant and the *Dedimus Potestatem* were, that a Fine should be of the Manor of *R.* and of 20 Acres of Land, and 40 s. Rent in *R.* and the Concord was, *Quod cognovit Manerium & Tenementa præd cum pertinentiis esse jus*, &c. leaving out the Rent, and so it varies from the Writ of Covenant and *Dedimus*; and this upon Error brought was assigned for Error; but adjudged it was not Error, because the usual Course of the Fine-Office is, that where a Fine is levied of a Manor and a Rent, &c. if the Rent is under 5 l. yearly, they never mention it in the Fine; but if it is 5 l. or more, then they mention it in the Concord; another Error assigned was, that the *Dedimus* was directed to Roger Manwood, who was then a Knight, and the Caption was taken by Roger Manwood, Knight, and so certified by him; but this was not allowed, because it was expressly against the Judge's Certificate. Cro. Jac. 11.

That Variance in the Persons in the Render, or of the Estates of Lands, except it be very gross, will not make it void. Hugbes's Abr. 239. Case 9. 946. Case 10.

Discontinuance.

Writ of Error to reverse a Fine, and one of the Parties to the Fine was omitted in the Writ, whereupon the Plaintiff in Error moved for Leave to quash it; but it was denied.

denied, because the Court cannot take Notice of any Thing but what is of Record; however they made a Rule that the other Side should shew Cause why the Plaintiff might not discontinue, tho' Writs of Error are seldom discontinued. 5 Mod. 67.

Thirdly, *By Fraud, Deceit or Covin.*

If a Fine be gotten or obtained by any *notorious Fraud* or Practice, it may in some *Vacat.* Cases be avoided by a *Vacat.* Vide Cro. Eliz. 518, 531, 471. Moor, Case 21. Plow. 370.

If a *Lessee* for Life or Years, or a *Copyholder*, levies a Fine of *Covin* on Purpose to bar him in Reversion, or the Lord of his Inheritance; this may be avoided for Fraud, and therefore Non-claim within five Years shall not hurt in this Case. 9 Co. 105. 3 Co. 78.

And as a *fraudulent Deed* or Conveyance may be avoided for Fraud, so a *Fine* may be avoided.

So also it seems the Law is of a Fine suffered in Pursuit of an *usurious Contract.* 3 Co. 18, 80, 45. 16 H. 7. 5. Jenk. Cent. 6. Case 45. Stat. 13 Eliz. & 76 Eliz. Style 288.

A Fine levied to *deceive a Purchaser* or Creditor may be void, or be voidable. Vide 3 Co. 79.

But if one *pretends Title* to Land, and enters and *disseises* the Tenant, and after levies a Fine with Intent to bar the Disseisee; this is good.

And if the Disseisee shall not enter or claim within the five Years, he is barred. 3 Co. 79.

Note, That it is Felony without Benefit of Clergy, without Corruption of Blood or Loss of Dower, to acknowledge, or procure to be acknowledged, any Fine, Recovery, &c. in the Name of any Person not privy or consenting thereunto: But this does not extend to a Judgment acknowledged by Attorney of Record for another. Stat. 21 Jac. 1. c. 6.

The Conusor being possessed of several Lands under several Titles, viz. some for Years, of others by Copy of Court-Roll, and of some in Fee, made a Lease of the Whole to B. G. for Life, and then levied a Fine of so many Acres to him as amounted to the whole Land, and continued in Possession, and paid the Rent to the Lord till the five Years passed; adjudged that the Lord should not be barred of the Copyhold by this Fine, because he could not possibly have Notice of the Covin. 3 Co. 77.

If a Fine be levied of Covin by a Lessee for Years or Life, or a Copyholder on Purpose and with an Intent to bar him in Reversion, or the Lord of his Inheritance; this is of no Force, and therefore Non-claim within five Years will not hurt in this Case.

So that it seems a Fine or Recovery may be covinous and avoidable for Covin as well as a Deed, and therefore a Fine or Recovery levied or suffered of Fraud to deceive Purchasers or Creditors will be void as to them as well as any other Conveyance.

So also a Fine or Recovery levied or suffered in Execution, or Pursuit of an *Usury.* *usurious Contract*, may be avoided by the Statutes of Usury as well as a Feoffment or other Conveyance by Deed.

But a Fine or Recovery shall not be said to be levied or suffered *per duress*, and Duress. avoided for that Cause.

One A. G. being seised in Fee of Lands, &c. B. G. procured another Man to take upon him the Name of the said A. who was then beyond Sea, and to acknowledge a Fine of the Lands to the said B. G. which was accordingly done; for which Offence each of the said Persons were fined in a very great Sum in the Star-Chamber, but no Sentence to take the Fine from the Roll, or Damages to the Party grieved. 12 Co. 23. Moor 630. S. C. that a *Vacat* was made of the Fine.

Altho' the Court of Chancery has a Power to relieve as much against a Fine obtained by Fraud or Practice as any other Kind of Conveyance, yet such Relief was not by decreeing a *Vacat* of the Fine, but by ordering a Re-conveyance; but that for any Error in the Fine, or Irregularity, or ill Practice in the Commissioners, it was a Matter cognisable in that Court where the Fine was levied, and for which that Court may vacate the Fine. Abr. Ca. Eq. 259.

Relief in Equity against Fines obtained by Fraud, &c.

Fourthly, *By Claim, Entry, &c.*

A Fine also is and may be sometimes avoided, or at least lose much of its Force by the Claim, Entry or Action of him that hath Right to the Land; for if the Estate contained in a Fine be once within five Years after Proclamation lawfully defeated, the Party hath thereby left his whole Estate both against him which did reverse the same, and against all others which had Right or Title paramount, and made no Claim within the five Years, altho' he which brings the Action has no Judgment and Execution within seven Years after the Proclamations.

In like Manner if there be a Tenant for Life, the Remainder for Life, the Remainder in Fee, and the first Tenant for Life aliens, and the Alienee levies a Fine with Proclamations, and the second Tenant for Life claims or enters, &c. this makes void the Fine both against him and against him in Remainder also; for it is a Rule, that any one that hath an Estate in Possession or Reversion which will be barred by the Fine when it is levied, may make a Claim or Entry to prevent the Bar of the Fine.

As Tenant for his own or for another's Life, Tenant for Years, he in Reversion or Remainder after an Estate for Life or Years, a Copyholder, or the Lord, a Guardian in Nature or Nurture, may avoid a Fine; and this they may do for themselves and others, and for others without Authority precedent, or Assent subsequent, and the Claim of one of them in this Case shall avail the other. And by Authority also, any other Man may make a Claim, Entry, &c. in this Case for him that hath Right; and so he may do also without any Authority precedent, if the Party for whom he doth it do afterwards agree and assent unto it; but a Stranger of his own Head (unless perhaps it be for an Infant) cannot make such a Claim or Entry to prevent the Bar of a Fine, except he that hath the Right do give him Authority before it be done, so to do, or do agree to it after it be done.

And therefore if a Stranger of his own Head will make an Entry or Claim into Land whereof a Fine is levied whereunto I have Right, and he does it to my Use, and I do not agree to it within the five Years, this Entry or Claim will not avoid the Fine.

And yet it was held by Just. *Doderidge*, *M. 2 Car. B. R.* that if a Stranger enters in my Name and to my Use that has the Right, this doth vest the Estate in me before Agreement, and I shall be said to agree until I do disagree. *Plow. 358, 359. 9 Co. 106.*

Lands were devised to Trustees till Debts paid, and then to an Infant and his Heirs; and *J. S.* a Stranger entered into the Lands and levied a Fine, and five Years and Non-claim pass, and the Infant when of Age brought an Ejectment, but was barred, because the Trustees ought to have entered; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of his Trustees, nor to be barred of a Trust-Estate during his Infancy; and the Infant in this Case shall recover the mesne Profits. *2 Vern. 368.*

Fifthly, *By Plea.*

A Fine also is and sometimes may be avoided by Plea, as by Averment of the Continuance of Seisin of the Land in another at and before the Time of the Fine levied, and that *Partes finis nihil habuerunt tempore levationis finis*, and then he must shew in whom the Estate was.

As if Lessee for Years, or a Disseisee, levies a Fine to a Stranger that has nothing in the Land, or *A.* be disseised by *B.* and *B.* be disseised by *C.* and *B.* levies a Fine to *D.* or one that has a Right of Remainder only, or a Disseisor makes a Gift in Tail, and the Donee makes a Feoffment to *A.* and after levies a Fine to a Stranger that has nothing in the Land.

But this Plea, it seems, neither Parties nor Privies, altho' they be Issues in Tail may have at this Day, but Strangers only; and therefore in the last Case the Disseisor and not the Issue in Tail may avoid this Fine by this Plea.

But if a Collateral Ancestor of whom the Issue in Tail does not claim the Land levies such a Fine, the Issue may by this Plea avoid it.

It seems also the Issue in Tail may have this Plea to a Fine *sur Release* only. *Stat. 4 H. 7. c. 24. 3 Co. 141, 88. Dyer 334.*

Also there is a Plea by which (as it seems) a Fine hath been avoidable, which in Effect is nothing else by an Averment of Seisin still in the Demandant or Plaintiff, or his Heirs, before, at and after the Time of the Fine levied.

And this Plea (as it seems) no Man may have at this Day but the Issue in Tail only to avoid a Fine levied *sur Grant & Render* by the Ancestor in Tail, and not to avoid a Fine levied *sur Cognissance de droit come ceo que il ad de son done, &c.* and a Feme Covert to avoid a Fine levied by her Husband alone.

If there be two of one Name, and one of them levies a Fine of the Land of the other, or a Stranger levies a Fine of him that is Owner of the Land; in both these Cases the Fine may be avoided by Pleading the special Matter: And yet some hold in this Case the Party hath no Remedy but by Action of Deceit.

Fine levied by one of the same Name of the other's Lands, may be avoided by Deceit or Pleading.

The Plea of *per Duress*, or Imprisonment, will not, it is said, be admitted. 17 E. 3. 32. 17 Aff. 17.

Issue in Tail may aver Continuance of Possession against a Fine *sur Cognissance de droit tantum*, or Surrender. See 12 Ed. 4. 12, 15. 11 H. 4. 85.

But not against *sur Cognissance de droit come ceo que il ad de son done*.

For Pleas to avoid a Fine, see Owen's Rep. 21. & Stat. 27 Ed. 1. c. 1.

How a Fine is to be pleaded, see 1 Leon. 386, 986. 2 West's Symb. Cro. Car. 903, 917. 2 Lev. 31.

Error to reverse a Fine brought by one as Cousin and Heir of the Conusor, and a *Scire Facias ad audiend' errores*, and did not shew in either of the said Writs how he was Cousin and Heir; and this was pleaded in Abatement of the Writ; but adjudged well enough without shewing it, for the *Scire Facias* is only a Commission to hear Errors, and needs no such Certainty; and the Writ of Error is founded upon it, and therefore it is not necessary to shew the Title in that Writ. Cro. Jac. 160.

Writ of Error to reverse a Fine levied by his Ancestor of twenty Acres of Land; the Defendant pleaded, that the Plaintiff after the Death of his Ancestor did disseise him of the Land, and being in Possession by Disseisin made a Feoffment thereof to B. G. The Plaintiff replied, that he did enter upon the Defendant, *absque hoc*, that he made a Feoffment to B. G. and upon this they were at Issue; and the Jury found that the Fine was levied of twenty Acres, and that the Plaintiff was in Possession of the Whole by Disseisin, and being so possessed made a Feoffment of six Acres, Part thereof to B. G. Adjudged that this Feoffment was only a Bar to the Reversal of the Fine as to the six Acres; and that it might be reversed as to the Residue for Error. Owen 21. Moor 413.

Formedon in Descender was brought by the Issue in Tail; the Tenant pleaded in Bar and confessed the Estate-tail, but said, that before the Death of the Tenant in Tail B. G. was seised of the Lands in Fee, and levied a Fine to him with Proclamations, and the five Years were passed without Entry or Claim; it was adjudged, that upon this Plea it shall be intended that B. G. was in by Disseisin, and being so in Possession, levied the Fine, which shall be a good Bar to the Issue. March's Rep. Taylor's Case.

The Issue in Tail being privy, as Heir to his Ancestor who levied a Fine, is stopped by the Stat. 27 Ed. 1. which took away Exceptions against Fines levied to plead that *Partes finis nihil habuerunt*; and by the Stat. 4 H. 7. he cannot make any such Averment. 3 Co. 88.

By the Stat. 1 R. 3. it is enacted, That all Conveyances made by *Cestuy que Use* shall be good against him and his Heirs; now since this Statute, Fines levied by *Cestuy que Use* are as good and effectual as if levied of immediate Possessions and Seisins; and by the Stat. 32 H. 8. c. 36. Fines levied by Tenants in Tail of a Possession, Reversion or Use, shall be a good Bar to the Intail; now by the Stat. 4 H. 7. c. 24. which tells us who shall be concluded by a Fine levied, there is a Saving to that Person who is not Party or Privy to the Fine, and that he may plead to avoid it, that none of the Parties, nor any to their Use, had any Thing in the Land at the Time of the Fine levied; and this proves that the antient Form in Pleading a Fine was *Quidam finis se levavit*, without alledging a Seisin in Fee in the Cognisor. See Lutw. 1608.

Sixthly, *By Sentence of a Court.*

A Fine also is and sometimes may be avoided by the Sentence of a Court, when it appears to be gotten and obtained by some notorious Fraud or Practice.

Vacat.

In some Cases a Fine may be reversed without Writ of Error, as was done in *Hutchinson's Case*, *M. 33 Car. 2.* in *C. B.* where *H.* and his Wife (she being an Infant of sixteen Years) levied a Fine of her Lands, and paid the King's Silver, and got the Fine perfected and exemplified; but on the Complaint of him in the Remainder in Fee depending on the Estate-tail of the Wife, the Husband and Wife were brought into Court by Rule and examined; and thereupon the Levying the Fine and the Infancy appeared, and the Infant's Father and Mother came also into Court, and prayed that the Fine might stand; and tho' *Maynard* for them insisted, that it ought not to be vacated, the King's Silver being paid; yet on View of the Roll in *Pierpoint's Case*, *Hil. 4 Jac. 1. Rot. 70.* and other Precedents cited, the Court vacated this Fine, and caused the Exemplification thereof to be brought into Court and delivered up, and ordered him in Reversion to prosecute an Information against the Commissioners who took the Cognisance of the Fine.

But note, the *Vacate* was entered *quoad* the *Feme tantum*.

And in *Trin. 34 Car. 2.* a Fine levied by Sir *Robert Massam* and his Wife an Infant, was vacated for the same Cause. *Vide 3 Lev. 31.*

(BBB) *Where Equity will not make good a Fine, nor supply any Defect in the Levying it.*

IF a Tenant in Tail covenants to levy a Fine, and dies before it is executed, tho' the Fine has proceeded to a Caption, yet Equity will not make it good, altho' it be for a valuable Consideration. *Abr. Ca. Eq. 358. 2 Vern. 5.*

A. has two Sons *B.* and *C.* *A.* on the Marriage of *B.* covenanted before the End of *Easter Term* then following, to levy a Fine to the Use of *B.* and the Heirs of his Body, Remainder to the Use of *C.* and the Heirs of his Body, Remainder to *A.* in Tail, Remainder to him in Fee. The Fine was levied as of *Easter Term*, but the Marriage being put off till after *Easter Term*, the Deed was not dated till after, so that the Fine was levied before the Date of the Deed, and consequently the Deed was no Declaration of the Uses of that Fine. The Father died, and then *B.* died, leaving Issue *W.* who having borrowed some Money of *J. S.* mortgaged the Land to him and died without Issue. *C.* claiming under the Settlement brought his Bill to have it established, and that the Defect before mentioned might be supplied; but in Regard the Consideration of *B.*'s Marriage did not extend to him, the Court refused him any Relief. *Abr. Ca. Eq. 258.*

S E C T. V.

Of Common Recoveries.

(A) *Recovery what, and how a Common Recovery differs from other Recoveries.*

A Recovery in general is the obtaining of any Thing unjustly taken or detained, by Judgment or Trial of Law.

And it is either a *Common Recovery*, which is such a Recovery as is used for a Common Assurance of Land, or a *true Recovery* which is not used as an Assurance of Land.

A *true Recovery* is an actual or real Recovery of any Thing, or the Value thereof, by Judgment; as if a Man buys Land of another with Warranty, and this Land is afterwards recovered by a third Person; the Buyer has Remedy against the Seller to recover it in Value, that is, to recover so much Money as the Land is worth. *F. N. B. 124.*

But the Common Recovery (which is here proposed to be treated of) is *Fictio Juris*, a feigned formal Thing by Consent, and is used where a Man is desirous to cut off an Estate-tail, &c. in Lands or Tenements, to the End to sell, give or bequeath, as he thinketh meet, for the Assurance of them that shall after have the Land.

And this is somewhat after the Example of the Recovery upon Title, which is without Consent and contrary to the Will of him against whom the same is had: For there is in this a colourable Suit, wherein there is a *Demandant* which is called the *Recoveror*, and a *Tenant* which is called the *Recoveree*, and one that is called to *warrant* upon a supposed Warranty, which is called the *Vouchee*. *Co. Lit.* 154. *Vide* the Preamble of the *Stat.* 23 H. 8. c. 10. 23 Eliz. c. 3. *Doct. & Stud.* 41.

(B) *Of the Origin of Common Recoveries.*

Common Recoveries and Fines are said to be first invented when Intails fell out to be inconvenient; for before the *Stat. de donis conditionalibus*, *Westm.* 2. cap. 1. Feoffees after they had Issue had Power to alien and disinherit the Issue contrary to the Mind of the Donors.

And by this Statute in *Edward* the First's Time, the Inheritance was made so strong, as that the Tenants in Tail could not put away the Land from the Heir by any Act of Conveyance or Attainder, nor let it, or any way charge or incumber it longer than for his own Life.

But from this Statute there arose many Inconveniencies; for by this Means the Lands were made so sure to the Heir, as that the Father could not put it from him; and hereupon the Son oftentimes proved disobedient, negligent, wasteful, &c. knowing he could not be disinherited; and many Times the Owners themselves of such intailed Lands were less fearful to commit Felonies, Murders, Manslaughters and Treasons, for that they knew that none of these Acts could hurt the Inheritance of their Heir.

Again, such as had intailed Lands could make little or no Profit of them; for none would give a Fine of any Value upon such an uncertain Estate as that of the Owner's Life only, neither would they much improve the Lands for the same Reason, with many other Inconveniencies.

For the Remedy whereof several later Statutes were made, as 4 H. 7. c. 24. 2 H. 8. c. 36. whereby a Tenant in Tail may disinherit his Son by Fine and Proclamations.

By 26 H. 8. c. 13. Tenant in Tail forfeits his Land for Treason.

By 32 H. 8. he may make Leases for twenty-one Years or three Lives, &c.

By 33 H. 8. intailed Lands are liable by Extent for the King's Debt.

And by 13 Eliz. c. 4. they are saleable for his Arrearages upon his Account for his Office.

Also for the Remedy of those Inconveniencies of intailed Lands these Common Recoveries were first invented, and Men began to cut off Intails by such Means as they could find Law for it; and now by Use these Recoveries are become Common Assurances against Intails, and against Remainders and Reversions, and are the greatest Assurances that Purchasers have for their Money, being grounded upon the strictest Principles of the Law, tho' by Consent; for a Fine will bar the Heirs in Tail, but not the Remainders or Reversions; but these Recoveries will bar them all. *Co.* 22, 62.

Mr. *West*, in his *Symbol.* Part 2. §. 1. saith, That the End and Effect of a Common Recovery is to discontinue and destroy Estates, Remainders and Reversions, and to bar the former Owners thereof.

(C) *The Nature and fictitious Formality in suffering Common Recoveries.*

THE Common Recovery is sometimes with a *single Voucher*, which is when the Writ is brought against him that is to pass the Land immediately, and he does vouch over the Common Vouchee.

And sometimes it is with a *double Voucher*, which is when the Writ is brought against another to whom he that is to pass the Land has aliened it, and he does

vouch him that is to make the Assurance, and he does vouch over the Common Vouchee; and this is the surest Way, and the safest Kind of Recovery.

The Formality of a Common Recovery is, that by Agreement of the Parties a real Action is begun by a *Writ of Entry* brought by him that is to have the Land assured against him that is to make the same Assurance, if it be with a *single Voucher*; or if it be with a *double Voucher*, against him to whom he that is to make the Assurance has aliened the Land.

See concerning Vouches, post.

And in this Suit the Recoveror that brings the Action surmises that the Tenant against whom the Writ is brought has no Right to the Land, but that the Recoveror has Right thereto, and that the Tenant came to it from such a Stranger whom the Demandant does name.

And to this the Tenant does *appear in Person* or by *Attorney*, and then enters into Defence of the Land, but in Pleading vouches to warrant, alledges that he bought the Land of *J. S.* a Stranger, who in the Conveyance thereof bound himself and his Heirs to warrant and make good the Title to him or them to whom it is conveyed, and thereupon he prays that *J. S.* may be called in to defend the Title, and then he is allowed by the Court to call in *J. S.* to say what he can for the justifying of his Right to the Land before he so conveyed it.

And hereupon *J. S.* appears and makes shew as if he would defend the Title, but prays further Day may be assigned him to make his Defence, which being granted by the Court, at the Day appointed he by *Agreement, Covin and Assent of the Parties*, does not come in, but makes Default.

And thereupon the Land is to be recovered by him that brought the Writ against the Tenant, and he is left for his Remedy to *J. S.* upon this Warranty, and accordingly Judgment is given by the Court that the Demandant or Recoveror shall recover the Land demanded against the Tenant, and that the Tenant shall recover so much Land of *J. S.* of his own Land in Recompence for the Land recovered from him, which he ought to have warranted and defended, but suffered to be lost. See 1 Co. 94. 10 Co. 43, 45.

Recovery in
Value or *pro*
rata what.

And this Recovery over is called a Recovery in Value or *pro rata*.

But if the Recovery be with a *double Voucher* or a *treble Voucher*, *J. S.* is upon his Appearance to call or vouch to warrant *J. D.* and to alledge in the same Manner as the Tenant does, and to pray that *J. D.* may come in, and thereupon *J. D.* appears and makes Default: And so if there be more Vouchers, and then there must be several Recoveries over in Value against every one of them; but he that is the last Vouchee is always the Common Voucher, who is one of the Criers of the Court of Common Pleas, a Man not worth any Thing, and one that has no Land to render in Value upon the supposed Warranty.

And by his Devise grounded upon the strict Principles of Law the first Tenant does willingly let go the Land for the Assurance of the Purchasor, and yet in Truth has no Recompence over, because the Vouchee has no Land to render in Value.

And by this Means, if one has an Estate-tail in Lands which he is desirous to sell or to convert into an Estate in Fee-simple, the same is commonly done, for the Tenant in Tail causes the Purchasor, or some Friend of his, to bring a *Writ of Entry* against him for this Land, and he appears to the Writ, and in Pleading says, that the Land came to him or his Ancestors from such a Man or his Ancestors, who in the Conveyance bound themselves to warrant it.

And thereupon that Man is called in, who appears and makes Default, and thereupon Judgment is had against him in Manner as aforesaid.

Or if he would have the Recovery with a *double Voucher*, then he by Fine, Feoffment, or Deed of Bargain and Sale inrolled discontinues the Land, and then causes the Recoveror that is to have the Land to bring this Writ of Entry against the *Discontinuee*, and he vouches the Tenant in Tail, who vouches over the Common Vouchee, and so it is done.

And by this the Estate-tail that the Tenant in Tail has or had is barred and bound, for that it appears now he had no Power to intail the Land whereunto he had no just Title, and besides he shall recover Recompence over in Value; and this is adjudged in Law to go in Succession of Estate as the Land should have done, which is the Reason why the Recovery is a Bar to all that are in Remainder and Reversion as well as to the Issues in Tail. F. N. B. 134. 9 Co. 6.

And

And in the suffering of these Recoveries the Tenants and Vouchees do appear most commonly in Person in Court, and so the Recovery is finished in the Court presently without more ado; but sometimes they will not or cannot appear in Person, and then they appear and suffer the Recovery by Attorney, and in that Case there must be a *Conufance* for a Warranty of Attorney taken to authorize the Attornies in the Manner mentioned in the Second Part of this Work. Warrant of Attorney.

There must be two Attornies at the least, with Authority jointly and severally, that if one of them dies before the Recovery be suffered, the other may have Power to do and dispatch it.

And these Warrants of Attorney for the suffering of Recoveries are to be acknowledged and certified in the same Manner as the Conufances of Fines acknowledged in the Country are, except that Recognifances for Warrants of Attorney for Recoveries may be taken by any Judge of the Court of Common Pleas, or any Serjeant at Law, without a *Dedimus Potestatem*. Dedimus Potestatem.

But if any others take it, they use to do it by a *special Dedimus Potestatem*, which is to command the Commissioners therein named to come to such Persons and to take the Names of their Attorney or Attornies in the Suit, and to certify the same in the Chancery under their Seals such a Day.

And if a Feme Covert be to make the Conufance, it seems she is to be examined as in the Case of the Conufance of a Fine. Examination.

And when this is done the Recoveries may be suffered by the Attornies without the Personal Appearance of the Parties.

And this is as good a Recovery as the other which is suffered by the Persons themselves appearing in Court; but it will require longer Time for the Perfection of it, for in this Case there must go forth a *Summoneas ad warrant*, which must have nine Returns before the Recovery can be perfected, and by that Time one of the Parties may be dead. Summoneas.

And when the Recovery is thus suffered by the Parties in Person, or by their Attornies, the same is to be entered, by some one of the Clerks of the Court of Common Pleas upon the Rolls of the same Court, there to remain upon Record.

And herein there must go forth a Writ of Execution called an *Habere facias seisinam*, which is sent to the Sheriff of the County where the Land lies to put the Recoveror in Possession of the Land, except a Recovery be of a Reversion of Land after a Lease for Years of it, in which Case the Reversion shall be in the Recoverors by a Claim, without any Writ. Habere facias seisinam.

And this Writ the Sheriff returns as executed according to the Contents thereof, altho' in Truth he never does any Thing upon it. Return.

And after all this the same Proceeding is to be exemplified by the Clerk of the same Court. 1 Co. 94. 10 Co. 43.

(D) The Use and Operation of Common Recoveries.

A Recovery being Matter of Record is much of the Nature of a Fine, and such a Thing as whereof the Land takes Notice; for it is now become a formal and orderly Manner of Assurance of Lands, and one of the Common Assurances of the Kingdom, or a Common Way and Means to pass Lands from one to another.

And therefore if a Tenant for Life suffers such a Recovery of his Land, it is a Forfeiture of his Estate; an *Use* may be averred upon it as well as upon a Fine, and it may be avoided for *Covin* as well as any other Kind of Conveyance.

But it is of special Use, and has a special Virtue to bar and bind Estates in Tail, and all the Remainders and Reversions thereupon.

And because many of the Inheritances of the Kingdom depend upon this Assurance, and it is oftentimes the greatest Security Purchasers have for their Money, therefore it has much Favour from the Law at this Day.

And therefore the Law will not endure it shall be disputed against, for *Communis error facit jus*; and hence it is that it shall not be avoided for small Errors, for it is another Rule of Law, *Consensus tollit errorem*. 5 Co. 41. 10 Co. 37, 39. 3 Co. 5, 6, 41, 42. Dr. & Stud. 41, 49, 50. Stat. 13 El. c. 5, 23. c. 3. 7 H. 8. c. 4.

And if a Recovery be suffered by a Tenant in Tail, hereby he has not only discontinued, barred and destroyed the Estate-tail, and so defeated himself and his Issues, the former Owner of the Land, and all the Remainders and Reversions thereupon that

that should take Place after the Estate-tail, whether they be *in esse* or contingent only, but also all former Estates, Leases and Charges made by him in Remainder or Reversion.

For when the Estate-tail in Possession is not barred by a Recovery, the Estates in Reversion or Remainder are not barred, for *Quod non in magis propinquo non in magis remoto valebit*; so it is *converso*; where the Estate-tail in Possession is barred by the Recovery, all the Remainders and the Reversions, Conditions, Charges, Incumbrances and Estates dependant upon it are barred also, except it be in some special Cases where the Remainder or Reversion is in the King. And therefore,

If *A.* be Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Fee, or *B.* or *C.* makes a Lease for Years of the Land, or grants a Rent-charge out of the Land, or enters into a Statute, or the like, or grants the Remainder or Reversion upon Condition, and after *A.* suffers a Common Recovery of the Land, and after dies without Issue; in this Case the Recoveror shall hold the Land discharged of all these Estates and Charges in Remainder.

But it is otherwise if *A.* himself makes a Lease, or enters into a Statute, and then suffers a Common Recovery of the Land; in this Case this Recovery does not avoid but affirm the Lease or Charge; for whereas it was before avoidable by the Issue in Tail, or him in Remainder or Reversion, now it is good against them all, and the Recoveror also shall hold it charged and subject to the Lease and Charge of the Tenant in Tail.

This Kind of Assurance therefore is in some Respects *better than a Fine*, for a Fine will bar the *Heir in Tail*, but not him that is in *Remainder* or *Reversion*, but a Recovery will bar them all. 1 Co. 62, 25. Doct. & Stud. 49. 44 Ed. 3. 22.

(E) *What is the Reason that Common Recoveries are a Bar.*

THE Recompence in Value is the Reason of the Bar by Common Recovery against the *Issue in Tail*, but it is not the Reason of the Bar *quoad* him in *Reversion*, or him in *Remainder*; but the Reason of this is, that the Recoveror by Supposition of Law is in of the Estate-tail, and he had in Judgment of Law a Continuance still; as at Common Law the Donee *post prolem suscitatur* might have aliened and barred the Donor; and a Common Recovery is as a Conveyance excepted out of the *Stat. de donis conditionalibus*, and the Recoveror is in of the Estate that the Vouchee had; but the Issue in Tail is barred of his Claimer in Respect of the intended Recompence by the Recovery, and the Estate-tail having in Judgment of Law Continuance, nothing upon the Reversion or Remainder may take Place; and this is the Reason that a Charge made by him in Remainder cannot take Place after the Recovery suffered by the Tenant in Tail. 2 Lev. 27.

(F) *Who is bound and barred by a Common Recovery.*

Cases not prohibited by Statutes.

King.

Subjects.

Common Recoveries should be in such a Case as is not prohibited by some Statute Law; for,

If the King gives any of his own Lands whereof he is seised, or cause or procure another in Consideration of Money or other Land to give the Lands whereof he is seised in Tail to any of his *Subjects* or *Servants* in Recompence of their Service, or the like, the Remainder to the King in Fee-simple or Fee-tail; such Estates in Tail cannot be barred by a Common Recovery: And therefore if such a Tenant in Tail shall suffer a Recovery of such Land, it is void, and it will neither bar the Issues in Tail, nor any of them in Remainder, nor the King.

But if the King makes such a Gift in Tail, keeping the Reversion to himself, and after grants the Reversion to another; in this Case the Tenant in Tail may suffer a Recovery, and bar the Estate-tail and the Reversion also.

And where a *Subject* by the King's Provision makes such a Gift in Tail, and then grants the Remainder to the King for Life or Years only; in this Case the Estate-tail, Remainder and Reversion also may be barred by a Common Recovery.

So in other Cases where a *Subject* makes a Gift in Tail, the Remainder to the King in Fee; this Estate-tail may be barred by a Common Recovery.

And therefore if the Tenant be in Tail, the Remainder or Reversion in Fee to another, and he in Remainder or Reversion by Deed indented and inrolled bargains and sells his Remainder or Reversion in Fee to the *King*; or if one covenants to stand seised to divers Uses in Tail, the Remainder to the *King* in Fee; in these Cases the Estates and the Reversion and Remainders depending thereupon may be barred by a Recovery.

So if a Man makes a Gift in Tail, the Remainder in Fee, and he in the Remainder grants his Remainder to another for Life, the Remainder to the *King* in Fee on Condition, the Estate shall be void upon the Tender of 20 *l.* in this Case the Estate-tail, and the Reversion also and Condition thereupon may be barred.

So if the *Duke of Lancaster* had made a Gift in Tail, and the Reversion had descended to the *King*; this Estate-tail might have been barred by a Recovery.

So if Prince *H.* Son of *H. 7.* had made a Gift in Tail, the Remainder to *H. 7.* in Fee, which Remainder by the Death of *H. 7.* had descended to *H. 8.* in this Case the Tenant in Tail might have barred the Estate-tail by a Recovery.

And yet if the *King* makes a Gift in Tail, the Remainder in Tail, or grants the Reversion in Tail; in these Cases a Common Recovery may not be suffered to bar the Intail, Remainder or Reversion. *Stat. 34 H. 8. c. 20. Co. Lit. 371. 2 Co. 5, 16. 8 Co. 77, 78.*

And if the *Husband* for the Advancement of his Wife in *Jointure*, and the Preference of the Heirs of their two Bodies, makes an Estate in Tail to him and his Wife and the Heirs of their two Bodies, and the Wife after her Husband's Death alone by herself, or with any other Husband, suffers a Common Recovery of the Land whereof this Estate is made; this Recovery will not bar the Estate-tail. Husband and Wife's Jointure.

But if in this Case the Recovery be suffered by the *Heir in Tail*, or by the *Heir and his Mother* together, it is a good Recovery.

And therefore if *A.* be seised of Land in Fee, and he makes a Feoffment in Fee, to the Intent that the Feoffee shall re-convey it to him and his Wife and the Heirs Male of his Body; and this is done accordingly, and they have Issue a Son, and the Feoffor surrenders or makes a Forfeiture, and he enters and suffers a Recovery; this is a good Recovery and Bar to the Estate-tail: Or if the Writ be brought against the Mother, and she vouches the Heir in Tail, and so a Recovery is had, this Recovery will bar the Estate-tail. *Stat. 11 H. 7. c. 20. 3 Co. 58, 59, 61.*

And howsoever at the Common Law a Recovery against a Tenant for Life with a Voucher upon a lawful Warranty and a Recovery in Value was a Bar to him in Remainder or Reversion; and there was no Remedy in this Case, yet at this Day it is otherwise.

And therefore if Tenant in Tail after Possibility of Issue extinct, Tenant by the Curtesy, or any other Tenant for Life, suffer their Lands to be recovered from them by Covin and Agreement, either as immediate Tenants or as Vouches upon feigned Titles, without the Assent and to the Prejudice of him in Remainder or Reversion; such Recoveries are void, and will not bar the Remainders or Reversions, but are Forfeitures of the Estates of such Tenants for Life. Forfeiture.

Infomuch that if Tenant for Life be made Tenant *in fait* to the Writ, or Tenant in Law upon the Voucher, and so a Recovery be had; as if Tenant for Life makes a Lease for Years, and the Lessee for Years makes a Feoffment in Fee, and the Feoffee suffers a Common Recovery in which the Tenant for Life is vouched, and he vouches the Common Vouchee; these Recoveries will not bind the Reversions or Remainders.

But there is no Provision made at this Day to preserve the Reversion or Remainder expectant upon an Estate-tail, nor to avoid a Recovery of the Tenant for Life where the next Remainder is agreeing and assenting to it.

And therefore if there be Tenant for Life, the Remainder to *A.* in Tail, the Remainder to *B.* in Tail, &c. with divers Remainders over, and the Tenant for Life suffers a Common Recovery, in which he vouches *A.* who vouches the Common Vouchee; in this Case this is a good Recovery and bars the Estate-tail, the Remainders and Reversions also.

And if one be seised of Land in Fee, and have two Sons, *A.* by his first Wife, and *B.* and a Daughter by his second Wife, and he devises the Land to his Wife for Life, the Remainder to *B.* his Son in Tail, and the Reversion of the Fee descends to *A.* and the Writ of Entry is brought against the Tenant for Life, and she vouches *B.* and he vouches the Common Vouchee, and so a Recovery is had without the Assent of

of the Heir in Reversion; this is a good Recovery, and a Bar to all the Estates in Possession, Remainder and Reversion.

And if a Writ of Entry be brought against the Tenant for Life, and he makes Default after Default, and then the next in Remainder in Tail is received, or he prays in Aid of him in Reversion or Remainder, and then they vouch over, and so a Recovery is had; this is a good Recovery, and a Bar to all the Estates in Remainder and Reversion.

But if the Writ of Entry be brought against the Tenant for Life and him in the Remainder in Tail together, and they vouch the Common Vouchee, and so a Recovery is had; this will be no good Recovery to bar the Estate-tail. *Stat. 14 Eliz. c. 8. 10 Co. 43, 45. 3 Co. 6.*

And if *Spiritual Persons, as Bishops, Deans, Parsons, and such like*, suffer a Recovery of their Ecclesiastical Lands; such a Recovery is void, and will not bind the Successor. *Co. Lit. 44.*

But if it be not in some such prohibited Case as before, and the Recovery be had and suffered by and between such Persons, and of such Things, and in such a Manner as aforesaid; in such Cases, altho' there be in Truth no Warranty made upon which the Voucher is had, and altho' there be nothing to be recovered in Value, for that the Vouchee has no Land to recover over in Recompence, and altho' no Execution be done in the Life-time of the Party against whom the Recovery is had, yet is the same regularly a perpetual Bar to the Parties against whom the same is had and their Heirs, of all the Estates they have in Fee-simple, Fee-tail or for Life in them, and against all them in Remainder or Reversion, and their Remainders and Reversions that are depending upon the Estates; with this Difference, the Recovery with the single Voucher does not bar any Estate but such as the Tenant in Tail has in Possession at the Time of the Recovery had, so that if the Tenant in Tail be in any other Estate, as by Disseisin, or the Conveyance of the Disseisor, or the like; this Estate is not barred.

But the Recovery with the double Voucher does bind and bar all Interests, Estates and Titles that the Vouchee has at the Time of the Entry into the Warranty. *10 Co. 373. 1 Co. 94. Plow. 357. 3 Co. 59. 12 Ed. 4. 13. 13 Ed. 4. 1.*

If the Writ of Entry be brought against the Tenant in Tail, and he vouches the Common Vouchee, and so a Recovery is had; this Recovery with a single Voucher is a good Recovery, and a Bar to the Estate-tail if it be then in Possession and not put to a Right, and to all the Remainders and Reversions depending thereupon. *3 Co. 5. 10 Co. 37.*

So if Lands be given to *A.* in Tail, the Remainder to the right Heirs of *B.* (*B.* being then living) and the Writ of Entry is brought against the Tenant in Tail, and he does vouch over the Common Vouchee; this is a good Recovery, and a Bar to the Estate-tail and the Remainder also.

But if the Tenant in Tail be disseised, and then suffers a Recovery with a single Voucher; or if the Disseisor makes a new Estate in Tail to the Tenant in Tail, and then the Tenant in Tail suffers a Recovery with a single Voucher; or if the Tenant in Tail makes a Feoffment in Fee of Land, and then takes back a new Estate to himself from the Discontinuee in Tail or in Fee, and then suffers a Common Recovery with a single Voucher, by this Recovery the Intail is not barred.

But by a Recovery with a double Voucher, in these Cases the Estate-tail is barred.

And therefore where the Tenant in Tail levies a Fine, makes a Feoffment, or bargains and sells the Land by Deed indented and inrolled, and the Writ is brought against the Conusee, Feoffee or Bargainee, and he vouches the Tenant in Tail, and he vouches the Common Vouchee; this bars the Estate-tail, and the Remainders and Reversion depending thereupon.

So if in these Cases the Conusee, Feoffee or Bargainee makes a new Estate in Tail to the Conusor, Feoffor or Bargainor, or he disseises the Conusee, Feoffee or Bargainee, and then levies a Fine, makes a Feoffment, or bargains and sells to another against whom the Writ of Entry was brought, and he vouches the Tenant in Tail, and he vouches the Common Vouchee; but by this Recovery the first and second Estate-tail, and all the Remainders and Reversions depending thereupon are barred. *1 Co. 135, 136. 3 Co. 59. 10 Co. 45. 12 Ed. 4. 19. 13 Ed. 4.*

So if Lands be given to *J. S.* and the Heirs Male of the Body of his Wife engendred, and he has Issue a Son, and after his Wife dies, and he discontinues and takes

takes an Estate to him and the Heirs Female of the Body of his second Wife, and after discontinues again and takes an Estate to him and the Heirs Female of his own Body, and after discontinues again, and the Writ of Entry is brought against the last Discontinuee, and he vouches the Tenant in Tail, who enters into the Warranty generally, and voucheth the Common Vouchee; this is a good Recovery and a Bar to all the Estates in Tail, and the Remainders and Reversions also.

And if *A.* before the Statute of Uses had been Tenant in Tail, and had made a Feoffment in Fee to *B.* and he and *B.* had after made a Feoffment to *C.* to the Use of *A.* and his Wife and the Heir of their two Bodies, and then she had died, and after *A.* had entered upon *C.* the Feoffee, and made a Feoffment to *W.* in Fee, against whom *J. S.* had brought a Writ of Entry, and he had vouched *A.* the Tenant in Tail; this had been a good Recovery and a Bar to all the Estates. 3 Co. 5. *Plow.* in *Manxel's Case.*

And if Lands be given to Husband and Wife and the Heirs of the Body of the Husband, with Remainders over to Strangers, and the Husband alone discontinues the whole Land by Fine, Feoffment, or Bargain and Sale by Deed indented and enrolled, and the Writ of Entry is brought against the Discontinuee, and he vouches the Husband alone without the Wife, and the Husband vouches the Common Vouchee, and so a Recovery is had; this is a good Recovery for the whole Land, and a Bar to all the Estates in Tail and Remainder and Reversion, but not to the Estate of the Wife for her Life after the Husband's Death.

But if Lands be given to the Husband and Wife and the Heirs of their two Bodies, with Remainders over to Strangers, and the Husband alone discontinues, and the Recovery is suffered, as in the last Case; it seems this is no Bar to the Estate in Tail, or Remainder or Reversion, for any Part of the Land.

And yet if Lands be given to *J. S.* and *J. D.* in Tail, and *J. S.* discontinues the Whole, and the Writ of Entry is brought against the Discontinuee, and he vouches *J. S.* alone; this is a good Recovery for the one Half of the Land, and a Bar to all the Estates.

And if Lands be given as before to Husband and Wife and the Heirs of their two Bodies, and the Writ of Entry is brought against them both, and they vouch the Common Vouchee, or the Husband alone does continue, and the Writ is brought against the Discontinuee, and he vouches the Husband and Wife both, and they enter into the Warranty and vouch the Common Vouchee, and so the Recovery is had; these are good Recoveries for the Whole, and a Bar to all the Estates in Tail, and to the Estate of the Woman, and to all other Estates. 3 Co. 5, 6, 32.

And where Lands are given to a Man and his Wife and the Heirs of the Body of the Wife, or to the Wife and the Heirs of her Body, and the Writ of Entry is brought against the Husband and Wife, and they vouch the Common Vouchee; these are good Recoveries, and will Bar the Husbands and Wives, and the Estates in Tail, Remainder and Reversion.

And where a Man has Land in which his Wife has a Jointure, or to which she will have the Title of Dower after his Death, if the Writ of Entry in this Case be brought against them both, and they vouch the Common Vouchee, and so a Recovery is had, this Recovery will bar them both: But the Husband alone without her cannot bar her of any such Estate by a Recovery, for she may falsify and avoid it after his Death. *Plow.* 514.

And if Lands be given to Husband and Wife and the Heirs of the Body of the Husband, and the Writ of Entry is brought against the Husband alone, and he vouches the Common Vouchee, and so a Recovery is had with a single Voucher; this is no good Recovery of any Part of the Land, nor bar to any of the Estates altho' the Husband survives the Wife. 3 Co. 5. 1. 12 Ed. 4. 14.

And yet if Lands be given to two others, and the Heirs of the Body of one of them, the Remainder over to a Stranger, and the Writ of Entry is brought against one of them, and he vouches the Common Vouchee, and so a Recovery is had; this is a good Recovery, and a Bar to all the Estates for the one Half of the Land.

If Lands be given to *A.* in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, and *A.* makes a Feoffment in Fee, and the Writ of Entry is brought against the Feoffee, and he vouches *B.* (being him in the second Remainder in Tail) to Warranty, and he vouches the Common Vouchee; this is a good Recovery, and a Bar to the second Estate-tail, and all the Remainders and

and Reversions depending thereupon; and yet it is no Bar of the first Estate-tail which *A.* has. 3 Co. 6.

If the Writ of Entry be brought against a Mortgagee, and he vouches the Common Vouchee, and so a Recovery is had; this is no good Recovery to bar or bind the Mortgagor, but that he may enter upon the Condition broken.

So if one gives Lands to *B.* and his Heirs so long as *C.* shall have Heirs of his Body, and *B.* suffers a Common Recovery, and vouches the Common Vouchee; this is no good Recovery to bar the Donor of the Possibility, for in both these Cases he that is to be barred has no Remainder or Reversion, but an Interest or Possibility, which cannot receive a Recompence in Value.

But if in these Cases the Mortgagee vouches to Warranty the Mortgagor, or *B.* the Donee vouches the Donor, and so they vouch over the Common Vouchee, and so the Recovery is had; these will be good Recoveries to bar both them and their Heirs for ever.

And if one has an Estate in Fee-simple determinable on a Limitation or a Condition, or if Lands be given to *A.* and his Heirs until *B.* pays to him 100*l.* and then that it shall remain to *B.* and his Heirs, and *A.* in this Case suffers a Common Recovery, and vouches the Common Vouchee; it seems this is no Bar to *B.* and his Heirs, but that upon Payment of the 100*l.* he shall have the Land.

So if one by his Will devises his Land thus: I give unto *A.* my Son and his Heirs for ever my Land in *W.* paying 20*l.* to *B.* when *A.* shall come to twenty-one Years of Age, and then that *A.* and his Heirs shall have it for ever; and if *A.* shall die without Heirs of his Body, *C.* being then living, that then *C.* shall have it to him and his Heirs for ever, and *A.* pays the 20*l.* to *B.* at his full Age, and then suffers a Recovery of the Land; this is no Bar to *C.* of his Estate. *Cur' Mic.* 18 *Jac.* B. R. & vide the Case of *Pell* and *Brown*.

But note in the Cases before, where it is said that a Recovery is void, it is meant as to the Heirs and them in Reversion and Remainder; for as to the Parties themselves that suffer the Recovery, the same is for the most part good, and binds them by way of Estoppel and Conclusion.

And note also, that a Stranger that has Right to the Land at the Time of the Recovery suffered is not barred at all by the Recovery, or by his want of Non-claim, &c. as in the Case of a Fine. 3 Co. 5.

Stranger.

A Stranger that has Right to the Land at the Time of the Recovery suffered is not barred at all by the Recovery, or by his Laches of Non-claim, &c. as in the Case of a Fine. 3 Co. 5.

He that is in an Estate in Possession by Title above the Recovery, shall not be bound by the Recovery. 1 Co. 96. a.

Where Lands were devised to *A.* for Life, and if *A.* should die leaving Issue Male, then to such Issue Male and his Heirs for ever; but if *A.* should leave no Issue Male, then to *B.* in Fee; and *A.* suffered a Common Recovery of these Lands, and five Years passed: The right Heirs of the Testator were barred, in Regard they ought to have entered upon such Forfeiture, and had no new Title of Entry upon the Death of the Tenant for Life. 1 *Wil.* 520.

On a Recovery it was objected, that the Recovery was a wilful Forfeiture in Point of Law, and was voluntary, and upon no Condition; and that it ought not to be supplied or maintained in Equity; but the Court decreed it. 1 *Chan. Ca.* 49.

(G) Of the Parties in Common Recoveries in general.

IN every good and binding Common Recovery it is requisite that there be a Demandant, a Tenant, and a Vouchee, as the efficient Causes thereof; for if either of these be wanting, it is not a compleat Recovery.

And therefore if a Common Recovery be had against the Tenant in Tail without a Voucher, this is void.

And for this it is to be known that such Persons and by such Names may be Demandants, Tenants and Vouchees in Recoveries, as may be Cognisors and Cognisees in Fines. 2 *West*, Tit. Recoveries. Co. Lit. 372.

And therefore a Recovery suffered by an Infant appearing by his Guardian is good, and will bind him and all others. *Hob.* 275.

So also a Recovery had against a Woman that has a Husband being joined with her Husband will bind her and all others. 10 Co. 43. Plow. 515.

(H) Of the Demandant.

THE Demandant is he who brings the Writ of Entry, and may be termed the Recoveror.

(I) Of the Tenant.

THE Tenant is he against whom the Writ of Entry is brought, and may be termed the Recoveree.

It is necessary in a Recovery that there be a lawful Tenant to the *Præcipe*, i. e. Tenant to the that the Writ of Entry be brought against one that at the Time of the Writ brought is Tenant of the Freehold, either by Right, i. e. that has an Estate for Life at least in the Land, or by Wrong, i. e. that is a Disseisor of the Land demanded, and whereof the Recovery is had. Dyer 252. Co. Lit. 46. 3 Co. 6. *Præcipe.*

And therefore in this Case the Course is where the Land to be recovered is in Possession, and a Fine and Recovery is had of it together, the Fine is sued out first, for this makes the Conusee Tenant of the Freehold of the Land, and then the Recovery is had against him.

And when the Recovery is to be had of a Reversion, and that there is an Estate for Life in Being of the Land whereof the Recovery is to be had, (for an Estate for Years, or any such like Estate, will not hinder the suffering of a Recovery) there the Course is to get a conditional Surrender for the Tenant for Life of his Estate to him in Reversion or Remainder, to the End that he may be perfect Tenant of the Inheritance, and then the Writ of Entry may be brought and the Recovery had against him; for if a Writ of Entry be brought against a Stranger, and he vouches the Tenant in Tail in Possession of the Land, and so a Recovery is had; or if there be Tenant for Life of Land, the Remainder or Reversion to another in Tail, or in Fee, and a Stranger brings a Writ of Entry against him in the Remainder or Reversion, or against a Stranger who vouches him, and so a Recovery is had; these Recoveries are not good.

And yet if the Writ be brought against the Tenant of the Land and a Stranger that had nothing in the Land together, and so a Recovery be had; this Recovery is good enough.

And if a Disseisor makes a Gift in Tail of the Land to another, and the Writ is brought against him, and he vouches the Disseisee, and he vouches the Common Vouchee; this is a good Recovery. 3 Co. 6. Co. Lit. 46. Lit. §. 519. Plow. 514. Dr. & Stud. 49.

I bargain and sell Lands to you and your Heirs, the Bargainee has an Estate before Entry, and he is a good Tenant to the *Præcipe* in a Common Recovery, yet he cannot bring Trespass. Carter 78.

In a Case, Mic. 29 Car. 2. amongst the Serjeants, it was held by Ellis, Newdigate and Dolbin, that if a Bargainee suffers a Recovery by Writ of Entry returnable *Craft Mart*, and after the Deed is inrolled; in such Case the Bargainee was sufficient Tenant to the *Præcipe* before Inrolment by this Relation subsequent, and that this Bargain and Sale may lead the Use of this Recovery. But Raymond doubted that the Inrolment coming after the Return of the Writ of Entry, came too late to make a Tenant to the *Præcipe*; and it was said 4000 l. was lent upon this Title. And Lord Hobart in Duncomb and Wingfield's Case, is of Opinion, that if the Defendant be Tenant to the *Præcipe*, either at the Time of the Writ purchased, or at the Return of it, it is sufficient.

Tenant in Tail, Remainder in Tail, the Remainder in Fee. The Tenant in Tail was attainted of Treason, Office was found. The King by Letters Patent granted the Land to A. who bargained and sold it by Deed to B. and B. suffered a Common Recovery, by which the Tenant in Tail is vouched, and afterwards this Deed was inrolled. Per Holt Ch. Just. this is no Bar of the Remainder, because before Inrolment nothing passed but by way of Conclusion, and the Bargainee was not lawful Tenant to the *Præcipe*. Godb. 218. 2 Inst. 675.

A Common Recovery cannot be suffered where the *Estate-tail* is expectant on an Estate for Life, *Tenant for Life* not being made Tenant to the *Præcipe*. 1 Vent. 360. This is true in a Writ of Entry in *le post*, (which is commonly used; and the Reason is, that such Writ supposes a Disseisin) which cannot be when there is a Tenant for Life in Possession.

A Lessee for Life, Remainder to B. in Tail, and a *Præcipe* is brought against B. if B. happens to have a Surrender of the Lessee for Life at any Time before the Recovery, it is a good Recovery, and the *Præcipe* is made good. Noy's Rep 126.

If a Tenant to the *Præcipe* is made by Lease and Release, it is good tho' there be no Consideration. 1 Mod. Rep. 262. 2.

The Conusee of a Fine, *Ostab. Pur.* is a good Tenant to the *Præcipe* of a Recovery the same Day; and the Court will suppose a Privy the same Day to support a Conveyance. H. 22 Car. 2. B. R. Fettiplace's Case.

Tenant for Life, and he in Remainder in Tail suffer a Common Recovery, in which they both vouch the Common Vouchee; this shall not bind the Estate-tail, for he in the Remainder in Tail is not Tenant to the *Præcipe*, but the Tenant *pur vie*; and in Truth the Land is recovered against Tenant *pur vie* only, and the Recompence cannot vest in him in Remainder only, because the Land is in Truth recovered against Tenant for Life. 3 Co. cited in Cupledike's Case.

Plowden's Opinion in Manxell's Case, that if there be *Tenant for Life*, the Remainder or Reversion over in Tail, and a Common Recovery is had against him in Remainder or Reversion, it shall bar the Estate-tail, was denied for Law by all the Judges; for there is no Tenant to the *Præcipe*, but only by Admittance and Collusion, which shall not bind the Issue in Tail. *Præcipe* against Tenant for Life, who vouched him in Remainder in Tail, who vouched the Common Vouchee, he in Remainder is barred. 1 And. 275.

If there be a Bargain and Sale, and a Fine to a Lessee for Years or in Reversion to make them Tenants to a *Præcipe*, this does not destroy the Reversion for Years. 2 Rol. Rep. 249.

If Lessee for Years be made Tenant to the *Præcipe*, it does not extinguish his Term, because it was in him for another Purpose. 1 Mod. 107.

In Error of a Judgment in Ejectment in C. B. where a special Verdict was found, that a Writ of Entry was brought against M. C. returnable *Quind' Martini*; that on the Return he appeared, and the Demandant counted against him; that he vouched L. the Tenant in Tail, and a *Summoneas ad warrantizand'* issued, returnable *Ostab' Pur'*; after the *Teste* and before the Return of the Summons, viz. 1 January, L. the Tenant in Tail conveyed to M. C. by Lease and Release for Life, and at the Return thereof L. appeared and entered into Warranty, and vouched over the Common Vouchee, and so a Recovery was had. And this being held good in C. B. the Plaintiff in Error's Counsel insisted in B. R. that M. C. was not Tenant to the *Præcipe* at the Return of the Writ of Entry: He agreed, if he had purchased before the Return thereof, the Recovery had been good (*aliter* if after, as here) to bind Strangers, or the Issue in Tail, tho' it might be good between the Parties by way of Estoppel, because the Tenant could not render the Lands at the Return of the Writ of Entry, and a Voucher always supposes a Seisin: For it is always a good Counterplea, that the Vouchee had nothing at the Time of the Voucher, and the *Nec unquam possea* is not material; and if the Tenant does not plead Non-tenure, as he might and ought, that only binds himself and those that are Parties and claim under him by Estoppel. *Econtra* argued, That the Issue shall be bound where he may have Execution for the Value; and it is not a sufficient Counterplea of Voucher, to say the Voucher had nothing *Tempore*, &c. without adding *Nec unquam possea*. And so it is of Non-tenure. Where the Tenant appears on the Return of the Writ of Entry, and a Recovery is then had, there the Tenant must have the Freehold in him at the Return of the Writ, because it is a Recovery then suffered; but otherwise where there is a Voucher over, or interpleaded, as in this Case, for there it is sufficient if he becomes Tenant before Judgment. And of this last Opinion, both as to the Counterplea of Voucher, Non-tenure, &c. was Holt Ch. Just. And he also held, that if the Tenant to the *Præcipe* gains a Freehold before Judgment, it is sufficient, for it cannot be said to be a Recovery against him that had nothing; and therefore a Writ may be made good by a subsequent Purchase, and so may a Voucher; and it is the more reasonable, because the Demandant may have a good Cause of Action tho' the Tenant have not the Land; for it is not his being Tenant to the *Præcipe*, but the Demandant's having a Right

Right to the Land, that is the Foundation and Cause of the Action; and therefore it is sufficient in Law if the Tenant has the Land to render at any Time before Judgment; and the Judgment in *C. B.* was affirmed *nisi causa*. Cause was afterwards endeavoured to be shewed, *sed non allocatur*: And then *Holt Ch. Just.* further observed, that the Recompence in the Case of Common Recoveries was *ratio una*, but *non unica* why they barred; for a Reversion expectant is thereby barred, and yet the Recompence cannot extend to that; which (he said) was a bold Advance in Favour of Common Recoveries. The Rule was made absolute. 2 *Salk. Lacy v. Williams*.

A Recovery is good tho' a Stranger that has nothing in the Land be made Tenant to the *Præcipe with the Tenant in Tail*; for the Recompence in Value shall go to him that lost the Estate; and being a Common Assurance, it shall be favourably expounded. 1 *Vent. 358*.

In a *Quare Impedit*, the Plaintiff intitled himself to an Advowson by a Recovery suffered by Tenant in Tail; and in Pleading the Recovery, he alledged *two to be Tenants to the Præcipe*, but did not shew how they became so, or what Conveyance was made to them by which it may appear they were Tenants, the Court thought it was not well pleaded, but gave no Judgment. 2 *Mod. 7*. 1 *Mod. 219*.

If he in *Reversion* suffers a Common Recovery to divers Uses, his Heir cannot plead that his Father *had nothing in the Land* at the Time of the Recovery, for he is estopped to say, that he was not Tenant to the *Præcipe*; and it was a good Recovery against him by Estoppel. *Godb. 141*. 4 *Leon. 238*. *Cro. Eliz. 21*.

On producing a Common Recovery at a Trial, the Counsel on the other Side press'd them to prove who was Tenant to the *Præcipe* at the Time of the Recovery; but the Court would not allow it, for it shall be intended a good Recovery; and if it were otherwise, the Proof ought to be made by the other Party. *Cro. Jac. 455*.

By Stat. 14 G. 2. intitled, *An Act to amend the Law concerning Common Recoveries*, Tenant to the &c. reciting, That whereas several Leases have been heretofore, and are hereafter *Præcipe*.

likely to be made, of Honors, Castles, Manors, Lands, Tenements and Hereditaments, for one or more Life or Lives, under particular Rents thereby reserved, and to be reserved: And whereas procuring Surrenders of such Freehold Leases, or the Tenants thereof to join, in order to make Tenants to the Writs of Entry, or other Writs for suffering Common Recoveries, frequently occasions great Trouble, Difficulty and Expence to Tenants in Tail, and the same cannot in many Cases be obtained, by reason of the Uncertainty in whom the legal Estate of Freehold under such Leases is vested, and also by reason of the Disabilities and Incapacities of such Lessees, or Persons claiming under them, by Means whereof Purchases and Family Settlements are often delayed, and may be in great Danger of being defeated, if some proper Remedy be not provided: For Remedy whereof it is enacted, That all Common Recoveries suffered, or to be suffered in his Majesty's Court of Common Pleas at *Westminster*, or in any other Court of Record in the Principality of *Wales*, or in any of the Counties Palatine, or in any other Court having Jurisdiction of the same, of any Honors, Castles, Manors, Lands, Tenements or Hereditaments, without any Surrender or Surrenders of such Lease or Leases, or without the Concurrence of, or any Conveyance or Assurance from such Lessee or Lessees, or other Person or Persons claiming under such Lessee or Lessees, in order to make good Tenants to the Writs of Entry, or other Writs, whereupon such Recoveries have been or shall be had or suffered, shall be as valid and effectual in Law, to all Intents and Purposes whatsoever, as if such Lessee or Lessees, or any other Person or Persons claiming under him, her or them, had conveyed, or joined in conveying, or shall convey, or join in conveying a good Estate of Freehold to such Person or Persons as has or have been, or shall become Tenant or Tenants to such Writs of Entry, or other Writs, whereupon such Common Recoveries have been or shall be suffered.

Common Recoveries to be valid without conveying the Freehold.

Provided always that nothing in this Act contained shall extend, or be construed to extend, to make any Common Recoveries valid and effectual in Law, unless the Person or Persons intitled to the first Estate for Life, or other greater Estate (in Case there be no such Estate for Life in Being, in Reversion or Remainder next after the Expiration of such Leases) has or have, by some lawful Act or Means conveyed or assured, or joined in conveying or assuring, or shall, by some lawful Act or Means, convey or assure, or join in conveying or assuring an Estate for Life at the least, to such Person or Persons as has or have been, or shall become Tenant or Tenants to the Writs of Entry, or other Writs, whereupon such Common Recoveries have been or shall be suffered.

Provido.

Provided

Provided also that nothing in this Act contained shall be construed to extend to prejudice the Estate of such Lessee or Lessees, or any Person or Persons claiming any Interest under such Lessee or Lessees.

If *A.* be *Cestuy que Trust* for Life, Remainder in Trust for *B.* in Tail, Remainder in Fee to *C.* *B.* cannot bar the Remainder by suffering a Recovery if there be a good Tenant to the *Præcipe*. 1 Chan. Ca. 64.

But if there be no legal Tenant to the *Præcipe* in order to the suffering a Recovery, yet after a Length of Time it shall be presumed that there was. Mod. Ca. in Law and Eq. 143.

And tho' there be no Tenant to the *Præcipe*, yet a Recovery is good by way of Estoppel against the Party that suffered it, but not against Remainder-Men, Strangers, &c. Lucas 45.

A Common Recovery, tho' defective as to a Tenant to the *Præcipe*, will bar an equitable Estate-tail in Trust only. 2 Vern. 132. 2 Ch. Ca. 63.

(K) Of the Vouchee.

Who.

THE Vouchee is he whom the Tenant vouches or calls to Warranty for the Land in Demand.

Child in ventre sa mere.

A Child in ventre sa mere it is said may be vouched in a Common Recovery, a Bill may be brought in its Behalf, and an Injunction to stay Waste, &c. 2 Vern. 711.

(L) Of the Use of Vouchers, and the Intent of Recoveries with single, double, treble, &c. Vouchers.

THE Effect of a Recovery, as is said before, is to bar Intails, and all Remainders and Reversions that should take Place after Intails; and they are most usually suffered either with a single Voucher, double Voucher, or treble Voucher, and sometimes with a quadruple Voucher.

Intent of Recoveries with single Voucher.

The Intent of a Common Recovery with a single Voucher, is to bar the Tenant and his Heirs of such Estate-tail only which then is in him, to destroy the Estates which others have of any Reversion expectant, or Remainder dependant upon the same; and of all Leases and Incumbrances derived out of such Reversions or Remainders.

But where the King is the Giver of an Estate-tail, and keeps the Reversion in himself, it is said that such a Recovery against the Tenant in Tail will not bar the Issue in Tail of his Entry, nor discontinue his Estate, nor pluck such Reversion or Remainder out of his Majesty. 28 H. 8. b. 34 H. 8. c. 20. Dyer 132.

A Recovery with single Voucher bars only such Estate as the Tenant has in Possession at the Recovery, and the Dependences thereon; as if Lands be given to *A.* in Tail, the Remainder to the right Heirs of *B.* (*B.* being then living) and the Writ of Entry is brought against the Tenant in Tail, and he vouches over the Common Vouchee; this is a good Recovery and Bar to the Estate-tail and Remainder also. 1 Co. 135. 3 Co. 59.

But if the Tenant in Tail be not in Possession, or be in of another Estate by Disseisin or Conveyance, &c. as if Tenant in Tail be disseised, and then suffers a Recovery with single Voucher; or the Disseisor makes a new Estate to the Tenant in Tail, and then the Tenant in Tail suffers a Recovery with single Voucher; or if the Tenant in Tail makes a Feoffment in Fee of Land, and then takes back a new Estate to himself from the Discontinuee in Tail or in Fee, and then suffers a Common Recovery with single Voucher; by this the Estate in these last Cases is not barred. Ibid. But by double Voucher they may.

With double Voucher.

A Recovery with double Voucher, is intended to bar the first Voucher and his Heirs of every such Estate as at any Time was in him, or any of his Ancestors, whose Heir he is, of such Estate; and all other Persons of such Right to a Reversion or Remainder as was thereupon at any Time expectant or dependant, and of all Leases, Charges and Incumbrances derived out of any such Reversion or Remainder, and will be also a perpetual Bar of such Estate whereof the Tenant was then seised in Reversion or Remainder expectant or dependant upon the same.

But by a Recovery with *double Voucher*, in the Cases before where a single Voucher is no Bar, the Estate-tail is barred, and all Interests, Estates and Titles that the Vouchee has at the Time of the Entry into the Warranty.

And therefore where the Tenant in Tail levies a Fine, makes a Feoffment, or bargains and sells the Land by Deed indented and inrolled, the Writ is brought against the Cognisee, Feoffee or Bargainee, and he vouches the Tenant in Tail, who vouches the Common Vouchee; this bars the Estate-tail, and the Remainders and Reversions thereupon.

So if in these Cases the Conusee, Feoffee or Bargainee, makes a new Estate to the Conusor, Feoffor or Bargainor, or he disseises the Conusee, Feoffee or Bargainee, and then levies a Fine, makes a Feoffment, and bargains and sells to another against whom the Writ of Entry is brought, and he vouches the Tenant in Tail, and he vouches the Common Vouchee; by this Recovery the first and second Estate-tail, and all the Remainders and Reversions depending thereupon are barred. 1 Co. 135. 3 Co. 59. 12 Ed. 4. 19. 10 Co. 45.

The Intent of a Recovery with a treble Voucher is to make a perpetual Bar of the Estates of the Tenant, and of every such Estate of Inheritance as at any Time had been in the first or second Vouchee, or any of them, or either of their Ancestors, whose Heirs he or they are of such Estate, and as well of every Reversion thereupon dependant; as also of all Leases, Charges and Incumbrances derived out of such Reversion or Remainder.

Note; In that called a single Recovery, you will find two Recoveries included: The first by the Demandant against the Tenant, and the second by Tenant against the Common Vouchee.

2. In that with a double Voucher you will find three Recoveries included, one for the Demandant against the Tenant, the second for the Tenant against the Voucher, the last for that Voucher against the second or common Vouchee.

3. And also in a Recovery with a treble Voucher are included four Recoveries: First by the Demandant against the Tenant, the second by the Tenant against the first Voucher, (otherwise called Vouchee) the third by the first against the second, and the fourth by the second against the Common Vouchee.

(M) Of the due Order and Form required in Recoveries.

It is necessary that every good Common Recovery be had and suffered in that Order and Form as Law requires, viz. that there be a Writ of Entry brought, and Appearance of the Tenant *in fait*, a Voucher, and an Appearance of the Tenant in Law the Vouchee, Judgment and Execution; for if there be any substantial Defect in these Things, the Recovery may be thereby avoided by Writ of Error; but if it be only in Form, it will not hurt. 3 Co. 3. Stat. 23 Eliz. c. 3.

If a Recovery be intended with *single Voucher*, the *Præcipe* must be brought against the Tenant in Tail in Possession, and he must vouch the Common Vouchee.

But if your Recovery be intended with a *double Voucher*, you must either by Fine, Feoffment, Bargain and Sale inrolled, or Lease and Release, make him (you intend to be) Tenant at the Time of the Writ of Entry brought; for every Writ of Entry must always be brought against him that must be a perfect Tenant of the Freehold of the Land demanded at the Return of the Writ, 18 R. 2. and Dyer, fol. 252. pl. 98. Because the Estate of the Tenant in Tail (who is the first Vouchee) is barred in respect of the supposed Recompence adjudged over against the Common Vouchee; for in strict Law the Recompence adjudged over is to go in Succession of the Estate, the Land lost should have done; and then it were not Reason to allow the Heir liberty to keep the Land, and also to have a Recompence in Value, therefore he loath the Land, and is to trust to the Recompence. Dyer 252. 3 Co. 6. 1 Co. 42.

But in a feigned Recovery the Recompence is but imaginary, and no such Thing really in the Case.

If there be a Fine as well as a Recovery, you must make him Cognisee to the Fine who is to be Tenant in the Recovery, and he must vouch the Tenant in Tail, and in such Case the Writ of Covenant for the Fine must bear *Teste*, and be returnable before the Writ of Entry.

And if a Tenant has but an Estate for Life, or be Tenant in Dower, or by the courtesy of England, it is requisite for the Strengthening of a Recovery, and saving his

How the Writ of Entry must be brought.

his Estate, that he makes a conditional Surrender of his Estate to him in the Reversion or Remainder, to the End he may be a present Tenant of the Inheritance, and then to bring the Writ of Entry against him; and after the Recovery is executed, the particular Tenant, for Breach of the Condition, may enter and enjoy his Term notwithstanding such Surrender. See the Form of the Surrender in the Second Part, but see the *Stat. 14 Geo. 2. c. 20.* before at p. 655.

The Form of
Recovery
with single
Voucher.

Recoveries are mostly used for Assurances of Land in the Form whereof the Parties do agree, that one who is called the Demandant shall bring an Action real (as if he had good Right) against the Tenant of the Freehold of the Lands, as tho' he had no Right of Entry to the same; but after a Disseisin, which *Hugh Hunt* (the common Name of the supposed Disseisor) had unjustly made to the Demandant, &c. and hereupon the Tenant calls to warrant to him the Lands — (or the Common Vouchee, one of the Criers of the Court) which Vouchee is supposed to appear in Court, and warrant the Lands to the Tenant, (or Defendant) whereupon the Plaintiff or Demandant claims the Lands against the Common Vouchee, who is supposed to appear and defend his Right, and pleads, that *Hugh* did not disseise the Plaintiff or Demandant, as by his Declaration he supposes, and puts himself upon the Country to try it; whereupon the Demandant prays a Day to imparl, or speak to the Plea, and a Day being given, the Demandant is supposed to come again into Court in proper Person, and the Common Vouchee then is supposed to make Default, and withdraw in Contempt of the Court; and thereupon Judgment is given, that the Demandant shall recover in Value against the Common Vouchee, &c. and so by this Device, grounded upon the strict Principles of the Law, the Tenant loseth the Land, and has nothing for it; but it is by his own Agreement, and for the Assurance of him that buys the Land, &c.

Double or
treble Vouch-
er.

And so it is if it be with double or treble Vouchers; as in a double Voucher the Tenant calleth to Warranty the first Vouchee, who warranteth and calleth the Second or Common Vouchee, who pleads to the Country, and after Imparlance and Return of the Demandant makes Default, and then Judgment for the Demandant against the Tenant, for the Tenant to recover in Value of the first Vouchee, and the first to recover in Value of the Second or Common Vouchee; and it is in the like Manner with treble Voucher, &c.

(N) Who may suffer a Common Recovery.

ANY Person who is not disabled by Law may suffer a Common Recovery. Such Disabilities are either by the Common or Statute Law.

By the Common Law Infants, Feme Coverts, Persons attainted, and Aliens, are disabled. But as to Ideots and Madmen, a Recovery suffered by them is unavoidable.

Those disabled by Statute are for some particular Reasons therein given, on Account of the Abuse of Common Recoveries.

Tenant in
Fee simple.

A Tenant in Fee-simple may suffer a Common Recovery of Land, and it will bind him that suffers it, his Heirs, and all others.

Donee in Tail
on Condition.

A Condition that a Donee in Tail shall not alien, is void; and therefore such a Donee in Tail may, notwithstanding such Condition, by Recovery bar it. *9 Co. 127.*

Tenant in
Tail contrary
to his Cove-
nant.

By a Settlement *A.* was made Tenant for Life, Remainder to the Heirs of his Body by his Wife, and in the same Deed *A.* covenanted not to suffer a Common Recovery, but that the Lands shall be enjoyed according to these Limitations. *A.* suffered a Recovery, and then devised the Lands; this Recovery was held good to bind the Assets, but *A.* being Tenant in Tail, and as such having a Power to suffer a Recovery, the Lands devised shall not be affected. *1 Wil. 104. 2 Vern. 635.*

Tenant in
Tail, Mort-
gagor or
Cognisor, &c.

If Tenant in Tail makes a Mortgage, or confesses a Judgment, &c. and afterwards suffers a Common Recovery, the Recovery shall enure to make good all his preceding Acts and Incumbrances. *1 Chan. Ca. 120.*

Mortgagee.

If a Mortgagee suffers a Recovery, it will not bar the Mortgagor; but if the Mortgagor be a Party to the Recovery, it will be good. *Cro. Jac. 592, 593.*

Cestuy que
Trust.

A Common Recovery, suffered by *Cestuy que Trust* of an Estate-tail, has the same Effect in Equity to bar the Intail and Remainders, as it would have at Law in Case he had the legal Estate in him. *1 Vern. 13, 440. 2 Vern. 132. 2 Chan. Ca. 71. 2 Vent. 350. 1 Wil. 91.*

If *A.* be *Cestuy que Trust* for Life, Remainder in Trust for *B.* in Tail, Remainder in Fee to *C.* *B.* cannot bar the Remainder by suffering a Recovery if there be a good Tenant to the *Præcipe*. 2 Chan. Ca. 64.

Where a *Cestuy que Trust* in Tail brings a Bill against the Trustees to the Intent they should join in a Recovery, this is not proper; but it is proper to pray that the Trustees may convey the Premises to *Cestuy que Trust* in Tail, who may then suffer a Recovery; tho' if the Trustees are also Trustees for any Annuity subsisting, they are not compellable to part with the legal Estate out of them to the *Cestuy que Trust* in Tail. 2 Wil. 134.

In a Marriage-Settlement the Husband was made Tenant for ninety-nine Years, if he so long lived, Remainder to Trustees during the Life of the Husband, &c. Remainder to the first and other Sons by the Marriage in Tail Male, Remainder to the first and other Sons by any other Wife, Remainder over; a Son was born and of Age; the Wife died, and there were no other Sons by a subsequent Marriage; the Trust for preserving contingent Remainders descended to an Infant: A Court of Equity will, if it be for the Benefit of the Family, decree the Infant Trustee to join in a Recovery.

If an *Infant Tenant* appears by his *Guardian* either as Defendant or Vouchee, he shall be bound as well as one of full Age; and if the *Guardian* *feint pleads*, or *mifpleads*, the Infant has a good Action against him.

Where an Infant comes in *Person* as Vouchee, Error lies not after full Age, because it must be tried by Inspection, which cannot be after full Age.

And if he appears by *Attorney*, and suffers a Common Recovery, then it shall be reversed for Error; *aliter per Guardian*. Sid. 321. 2 Keb. 14. 1 Mod. 48. Style 248.

Recovery against an Infant who appears by *Guardian*, and vouches over, is not erroneous. *Earl of Newport and Sir H. Midway's Case*.

A. Tenant in Tail, Remainder to *B.* in Fee. *A.* sold the Land to *J. S.* and his Heirs, and for Assurance made a Feoffment in Fee, and levied a Fine to *J. S.* to the Use of *J. S.* and his Heirs: By the Indenture of Bargain and Sale *A.* covenanted to make such further Assurance within two Years as the said *J. S.* or his Heirs, or their Counsel should advise; before any Assurance made *J. S.* died, his Son and Heir within Age; it was devised that for such further Assurance and cutting off the Remainder, a Common Recovery should be suffered in which the said Infant should be Tenant to the *Præcipe*, and should vouch the Vendor; and that the said Recovery should be to the said Infant and his Heirs. After some Doubt upon the Appearance of a good and sufficient Guardian for the Infant, the Recovery passed. 1 Leon. N^o 29. b.

The King, by Letter under his Privy Signet and Sign Manual, signified to Lord Hobart and his Fellow Justices of C. B. that he was petitioned by Mountjoy Blunt, under the Age of twenty-one Years, and by his Friends, Kindred and Feoffees, into whose Custody the late Earl of Devonshire did commit his Estate in Trust, that he might be admitted to suffer a Recovery of his Manor of *W.* for Payment of Debts, &c. Says Lord Hobart, Tho' we did never hold such Recovery unlawful, or void in Law, yet we have refused many Motions of that Kind, as holding it very inconvenient; but Conveniency is discerned by Circumstances: Whereupon I (said his Lordship) sent for the young Gentleman, and secretly examined him, and he being eighteen Years of Age, satisfied me that he conceived it necessary for his Estate; and I called the Earl of Southampton, Lord Davers, and Mr. Wakeman, the Persons to whom his Estate was committed in Trust; they all confessed it was necessary, and the Recovery was passed openly at the Bar against *M. Blunt* in Person, and the said Earl, Lord, and Wakeman, were admitted his Guardians. Hob. 196.

Sir John St. Alban being of the Age of nineteen, his Sister (who was next in Remainder, and also his Heir) having married one of his Footmen, he petitioned the King for Leave to suffer a Recovery, who referred it to the Judges of C. B. before whom several Precedents of such Recoveries, suffered by Privy Seals, were cited, viz. one Bivarny, 1 June 10 Car. 1. one Young, 23 Novem. 11 Car. 1. another 13 Car. 1. another 14 Car. 1. another 1 Jac. 2. and two others 2 Jac. 2. and another by John the Son of Sir John Croke, 10 Car. 2. But the Judges observed that seven of these Petitions were by Fathers upon the Marriage of their Sons, and an equal Recompence given; whereas here was neither Father nor Marriage to induce this Recovery, and said, that this Matter had been carried too far already, and therefore disallowed it. 2 Salk. 567.

See of *Infant Feme Covert*, post.

Husband and
Wife.

A Common Recovery suffered by a *Feme Covert* jointly with her *Husband* is good, and will bind them, their Heirs and all others; but if she be an *Infant*, and appears as *Vouchee* by her Attorney, this Recovery will not bind her. 10 Co. 43. *Plow.* 515. *Bridgm. Rep.* 69, 70, 71.

And in *Pasf. 8 W. 3. Stokes and Oliver*, a Common Recovery suffered by an *Infant Feme Covert* was reversed for Error; and the Error assigned was, that she being *Vouchee* and under Age, had appeared by Attorney; and it was said, that if she had vouched in Person or by Guardian, it should not have been reversed for Error after full Age, because a Guardian is made by the Court, who will not admit of any one but such as shall be answerable for the Loss the Infant may sustain thro' his Default: But an Attorney is made by the Party, and an Infant is not supposed to have Discretion enough to chuse an Attorney who will be faithful to him; and therefore she having appeared by Attorney and suffered a Recovery, it shall be reversed for the same after she comes of Age, because it shall be tried by the Country, whether the Warrant of Attorney was made when under Age or not. Neither can the *Husband*, though of full Age, make an Attorney for himself and his Wife who is under Age, so as to bind the Inheritance of the Wife: But she being the Principal, must be barred by her own Act, and therefore must appear in Court in such Manner as the Law has directed, by reason of her Infancy. And it may be a Question, whether she can be barred by any Act of her own besides that of a Fine; for she is not examined in a Common Recovery, but she is in a Fine. But this is not like the Case of a Fine levied by an Infant, for that cannot be reversed but by the Infant himself during his *Nonage*: For it being the Act of the Court to suffer such a one to levy a Fine, the Court must therefore reform the same by Inspection, which cannot be after full Age. 5 *Mod.* 209, 210.

See more of *Infants*, ante.

Baron and Feme are Tenants, and vouch the Common *Vouchee*; the Feme was an Infant and appeared in Person, and not by Guardian, therefore it was reversed. *Cro. Eliz.* 321.

If there be *Tenant for Life*, Remainder to the Husband and Wife and their Heirs, and the Husband and Wife suffer a Recovery, being vouched by the Tenant for Life; this shall bind the Wife. *Style* 320.

Where Husband has Land wherein his Wife has a *Jointure*, or to which she may have Title of *Dower* after his Death, and the Writ of Entry is brought against them both, and they vouch the Common *Vouchee*, and so a Recovery is had, this Recovery will bar them both; but not if against the Husband alone, for in that Case she may falsify and avoid it after his Death. *Plow.* 514. 3 Co. 5.

A Recovery cannot be suffered to bar an *Intail*, where there is an Estate for Life in *Jointure*, without the Feme joins therein. 5 *Mod.* 210, 211.

If a Woman who has an Estate in *Dower*, for Life, or in Tail, jointly with her Husband, or only to herself, or to her Use, in any Lands, &c. of the Inheritance or Purchase of her Husband, or given to the Husband and Wife by the Husband's Ancestors, or any seised to the Use of the Husband or his Ancestors, do, after the Husband's Death, sole, or with another Husband, suffer a Recovery of it, it shall be void; and he to whom the Land ought to belong after the Death of the said Woman, may enter as if the Woman was dead; and yet if in this Case she does it with the Consent of the next Heir, or shall join with him, it is a good Recovery; or if a Writ be brought against her, and she vouches the Heir in Tail, and so the Recovery is had. *Stat. 11 H. 7. 20.* 3 Co. 51, 59, 60.

Where Lands are given to Husband and Wife, and the Heirs of the Body of the Wife; or to the Wife, and the Heirs of her Body, and the Writ of Entry is brought against the Husband and Wife, and they vouch the Common *Vouchee*; this is a good Recovery, and will bar the Estates of the Husband and Wife, and of them in Remainder and Reversion expectant thereupon.

If Land be given to Husband and Wife, and the Heirs of the Body of the Husband, the Remainder over, and the Husband alone suffers a Common Recovery; this is no Bar to the Remainder. 3 Co. 5.

If the Husband be *Tenant in Tail*, the Remainder to the Wife in Tail, and he suffers a Common Recovery of the Land, she is barred.

But if Land be given to two others, and the Heirs of the Body of one of them, the Remainder over to a Stranger, and the Writ of Entry is brought against one of them, and he vouches the Common *Vouchee*, and so a Recovery is had; this Recovery is good,

good, and bars all the Estates for one Half of the Lands; but between Husband and Wife there are no Moieties. 3 Co. 5, 6.

Where an Estate is to the Husband and his Wife for Life, Remainder to his Heirs Male on the Wife begotten; the Husband cannot dock this Estate by a Recovery during his Wife's Life. 2 Salk. 568.

If the Husband and Wife be Jointenants of an Estate in Fee-simple or Fee-tail of Land before Coverture, and the Husband alone suffers a Recovery of it; this is good for a Moiety.

And if Husband and Wife be Jointenants after the Coverture, and then they suffer a Recovery together; this will bind them.

And if they be Jointenants for Life, the Remainder to the Heirs of the Husband, and they suffer a Recovery of it; this is no Bar to the Issue of any Part of the Land.

Moor 350.

Persons attainted are disabled to suffer Recoveries; and therefore,

If Tenant in Tail be attainted, and Office found, the Land granted to A. who sells it to B. who suffers a Common Recovery, and therein vouches Tenant in Tail, the Remainders are not barred. Godb. 218. But Allen in 1 Keb. 30. contra arguendo, 1 Keb. 398. But notwithstanding the Opinion in Godb. yet it seems there is such a Scintilla Juris in the Tenant in Tail after Attainder, that by a Common Recovery he may bar the Issue, Reversions and Remainders, if there be a good Tenant to the Precipe; for if the King pardons the Party and restores the Land, tho' the Attainder is in Force, he may bar the Intail.

Aliens are also disabled to suffer Recoveries.

Aliens.

If an Alien be Tenant in Tail, the Estate-tail is good, but not descendible to his Issue. 9 Co. 141.

But if Lands are given to an Alien in Tail, Remainder to C. in Fee, and the Alien suffers a Common Recovery, and after an Office is found, the Recovery bars C. and the King has a good Fee, for till Office he was seised, and there was a good Tenant to the Precipe. Godb. 102. Noy 137.

Besides the before-mentioned natural and legal Disabilities, Conveniency, Decency and Order prevents some from suffering Recoveries; and therefore,

The King cannot suffer a Common Recovery, for if he does, he must be Tenant or Vouchee; and in both Cases the Demandant must count against him, which the Law does not suffer, so he cannot come in as Tenant by Receipt; but if the Party has any Warranty, he may pray him in Aid. Cro. Eliz. 96, 97.

But a Recovery suffered by an Idiot or Madman is unavoidable, because the Law has a great Regard to Matters of Record, as is manifest in 2 And. 163. where a Fine levied by an Idiot a Nativitate was held good, for both the Idiot and his Heirs are estopped to say he was an Idiot; and the Court would rather judge the Office void, than bring this judicial Act in Question, or the Judgment of the Court that accepted the Fine.

Idiots and Lunatics.

(N) Of what Things a Writ of Entry may be brought, i. e. of what a Common Recovery may be suffered, and what it will bar.

IN every good Common Recovery it is requisite that there be Land demanded as the Matter, and that the Thing be demandable.

And for this it is to be known, that of such Things and by such Names as a Writ of Covenant for the levying of a Fine may be had, a Writ of Entry for the suffering of a Recovery may be had, save only it may not be de fossato, stagno, piscaria, uncarucat' terræ, estoveriis, homag', fidelitat', de servitiis faciendis, de bovata marisci, de felion terræ, de gardino, cottagio, crofto, virgata terræ, fodina minera, mercatu, nec de superiori camera; and yet of some of these also it may be by other Names.

Of what Thing Entry may be.

But a Common Recovery may be of an Honour, Island, Barony, Castle, Mesuage, Curtilage, Dove-house, Land, Meadow, Pasture, Underwood, Chapel, River, County, Warren, Rectory, View of Frankpledge, Waif, Estray, Felon's Goods, Deodands, Furze, Heath, Moor, Tithes, &c.

Also a Recovery may be had of a Rent, Common, Advowson, Franchises, and the like, but not of any Annuity. Dect. & Stud. 52. 5 Co. 40, 41. 2 West, Tit. Recovery.

A Precipe for a Writ of Entry is a Precipe quod reddat.

A *Præcipe quod reddat* lies of
One Acre of Land.

Land covered with Water, or an Acre of Land. 12 H. 7. 1. 4.

A Water-Pit. 10 E. 3. 83 14 Ed. 3. 842. F. N. B. 191.

A Ferry. F. N. B. 191.

A Bailiwick. 34 Ed. 4. 423.

An Office. 27 H. 8. 12.

The Advowson of a Church, (*vide infra*) or fourth Part of Tithes. Dy. 84. pl. 83.

A certain Parcel of Land. Dy. 84. pl. 83.

The *Wardship* of Lands and Heirs, or the *Wardship* of Lands. Regist. 161. 22 E. 3. 29.

It also lies of all Manner of Ecclesiastical or Spiritual Profits; as of

A Rectory, Vicarage, Portions, Pensions, Tithes, &c. Per Stat. 32 H. 8. c. 7.

All and all Manner of Tithes Great, Mixt and Small, within the Vill or Hamlet of
B. in the Parish of A. wheresoever growing, happening, and annually accruing, &c.
Thel. lib. 8. c. 9. §. 2.

A fourth Part of the Tithes and Oblations of the Church of St. P. &c. 16 Ed. 3.

A certain Portion of Tithes or Land, not shewing how much. 1 H. 4. 1. Dy. 84.
pl. 83, 84, 85, 86.

In old Time, of a Hide of Land; per *Glanville*.

A Plough Land. 4 Ed. 3. 161.

An Ox-Gang of Land. 6 Ed. 3. 991.

Six Feet of Land in Length and four in Breadth. 14 Aff. 13.

It also lies of

A Toft and Site of a Mill. 14 Ed. 3.

The Hundred of C. and Bailiwick of B. 34 Ed. 1. 3 Ed. 3.

The Pasture of six Oxen. 3 Ed. 3. 23. 4 Ed. 2.

A Rood of Land. 3 Ed. 5.

An Advowson. 34 Ed. 1. 4 Rep. 74. But note, That this must be understood
an Advowson appendant to a Manor; for how can it be of an Advowson in Gross,
since the Parson has the Freehold; and therefore it ought not to be by Writ of
Entry *in le Post*, but by Writ of *Droit de Advowson*; which has been and now is the
Practice.

A certain Portion of Land. 11 H. 4. 40. 5 H. 7. 9.

A Moiety of one Rod of Land. 41 Ed. 3.

A Shop. Regist. 3.

Four Acres of Alderwood. 11 Aff. 13.

Turbary, by the Name of Moor. 1 Ed. 3. 387.

And it lies in a Town and not in a Hamlet. 8 Ed. 3. 55. 7 Ed. 3. 9.

Moiety third
Part.

If a Man has a Moiety or third Part of Lands, and suffers a Common Recovery
of the Whole, the Moiety or third Part passes, and shall be to such Uses as are de-
clared by the Common Recovery.

So if Lands be given to two and the Heirs of their Bodies, Remainders in Tail, and
one suffers a Recovery of the Whole; the Tenant as well as the Vouchee may by
Pleading abate the Writ: But if the Writ be admitted good, the Moiety well passes
to such Uses as are declared by the Deed that leads the Uses of the Common Reco-
very, and the Jointure is severed. 3 Co. 3.

So if one seised of a third Part of Land bargains and sells a Moiety, and a Common
Recovery is had of a Moiety; this is a good Recovery of an intire Third, and not of
a Moiety of a third Part. Cro. Car. 110.

Condition.

A Condition that runs with the Land cannot be barred by a Common Recovery;
aliter of a Condition Collateral. 2 Salk. 570.

Contingent
Estates li-
mited over.

A. seised in Fee of the Manors of B. and C. devised them to E. for Life, and if E.
should have Issue Male, then to such Issue Male and his Heirs for ever; but if E.
should have no Issue Male, the Manor of B. to J. S. in Fee, and that of C. to J. N.
in Fee; E. suffered a Recovery of these Manors; this barred the contingent Estates
limited to J. S. and J. N. 1 Wil. 509.

Rent *de novo*.

A Recovery may be of a Rent *de novo*; and therefore if one grants a Rent in Tail
to B. Remainder to C. in Tail, by a Common Recovery, the Remainder to C. may
be barred. Sid. 285. 2 Keb. 55.

But if one grants a Rent in Tail to B. who suffers a Common Recovery to the
Use of C. and his Heirs; B. dies without Issue, the Rent is determined, because by
the Common Recovery the Rent cannot be enlarged to the manifest Prejudice of the

the Tertenant, and the Recovery cannot give the Rent a longer Continuance than the Grantor gave it. 2 *Lutw.* 1225.

A *reputed Manor* may pass by a Common Recovery. 1 *Lev.* 28.

Reputed Manor.

So may Lands within a Liberty; as,

If S. and C. be two adjacent Towns, and a Tenant in Tail of Lands in both Towns being within the Liberty of S. suffers a Common Recovery of Lands in both Towns, but the Record is only in the Town of S. and Liberties thereof, yet it is good to pass the Lands in C. 2 *Vent.* 32.

A Recovery may be had of a Trust-Estate; as,

Trust Estate.

If *Cestuy que Trust* in Tail is in Possession with Remainders over, under the Trustees, who have the legal Estate, and suffers a Common Recovery; tho' there be no good Tenant to the *Præcipe*, yet the Recovery will bar both the Estate-tail and Remainder and Reversion. 2 *Chan. Rep.* 63, 79.

Common Recoveries are not suffered in the Court of Common Pleas of Copyhold Estates (they being in the Eye of the Law only Tenancies at Will, *secundum consuetudinem manerii*, and in their Institution only impleadable in the Lord's Court).

Copyhold Estates.

Lord Coke is of Opinion, that Copyholds could not be intailed without a Custom co-operating with the Statutes. 3 *Co.* 8.

But Lord Hale was of the contrary Opinion, 3 *Lev.* 327. which seems the better Opinion, because the Copyholder of Inheritance has Power by *Surrender* to make any Estate.

A Copyholder cannot make any Tenant to the *Præcipe* but by Surrender, therefore the way to suffer a Common Recovery of a Copyhold intailed is either,

1. By committing a Forfeiture by Custom; as,

If W. S. being Tenant in Tail of a Copyhold, makes a voluntary Lease for twenty-one Years without the Lord's Licence, which Lease is presented at the next Court, and the Lands seised into the Lord's Hands, and W. S. appointed the Forfeiture to be to the Use of A. S. and his Heirs, and a Custom is found that these Forfeitures were used to bar Intails, and held good. See 2 *Sand.* 422.

Or if Tenant in Tail, by Custom, commits a Forfeiture, and then the Lord makes three Proclamations, and seises the Copyhold, and then grants it to the Copyholder and his Heirs.

Or if Tenant in Tail, by other Custom, makes a Surrender to the Purchaser and his Heirs, and the Purchaser commits a Forfeiture, on which the Lord seises, and on the Proclamations made the Estate-tail and Remainders are barred. *Sid.* 315. 1 *Keb.* 752. 2 *Keb.* 127.

But where there is none of these Customs, then the way to bar the Estate-tail is,

2. By Surrender made by the Tenant in Tail of the Copyhold Estate to another Person to make him Tenant to the *Præcipe*, i. e. to a Plaintiff, who is admitted, and then a Plaintiff in the Nature of a Writ of Entry in *le post* is brought against him, who vouches the Tenant in Tail, and he the Common Vouchee, and so a Recovery is had; and then the Recoveror surrenders to the Use of the Tenant in Tail and his Heirs, who is admitted accordingly, and thereby the Estate-tail and Remainders are barred. *Vide Co. Ent.* 206, 207. *pl.* 10.

A Common Recovery of Lands in Antient Demesne is good and in Force till reversed by the Lord by Writ of Disceit. 4 *Leon.* 123.

Antient Demesne Lands.

A Common Recovery may be of Lands in a Place known, tho' it be neither a Vill nor Hamlet, as well as a Fine may be of Lands in a *Lieu Conus*. 2 *Mod.* 49.

Place known.

Every Thing as incident, appendant and appurtenant, pass by a Common Recovery as in other Common Conveyances. 6 *Co.* 67.

Incidents, Appendants, and Appurtenants.

And the Acres mentioned in Common Recoveries are computed according to the Custom of the Country, and not strictly according to the *Stat. de terris mensurandis*. 6 *Co.* 67. *Vide* 6 *Co.* 66, 67. *Cro. Car.* 308. *Cro. Eliz.* 52. 1 *Lev.* 28. 1 *Keb.* 592.

(O) Of what Things a Writ of Entry does not lie.

A *Præcipe quod reddat* lies not of a Ditch, nor of a Pool, nor of a Fishery. 8 *E.* 3: 381.

Nor of an Advowson of Tithes of one Plough (or Wain) Land. *Regist.* 29.

Nor Common of Pasture. 27 *H.* 8. 12.

Nor of Estovers. 2 *Ed.* 3.

Nor

Nor of Homage of Fealty, nor of Services to be done. 6 E. 2.
 It lieth not of an Ofgang of Marsh Land. 13 E. 3. 3.
 Nor of a Selion of Land, *Ed. 1.* for the Incertainty, because a Selion is a Parcel of Land, sometimes containing an Acre, sometimes more and sometimes less.
 It lieth not of a Garden, Cottage or Croft. 14 *Aff.* 13. 8 H. 8. 3. 22 E. 4. 13.
 A Rod of Land. 41, 43, 13 E. 3.
 A Quarry, a Mine, a Market. 13 E. 3. For they lie not in Demefne, but in Gain, nor of an upper Chamber. 3 H. 6. 1. 2 *West. Symb.* 77. b.
 It lies not of an Annuity, nor of a Tenement, but it must be of Houses and a certain Quantity of Acres. *Moor* 953.
 A Writ of Entry ought not to contain one and the same Thing twice, as a Messuage and an House, Parcel of the same Messuage. 3 *Ed.* 4. 28. 46 *Ed.* 3. 26.
 Nor to name a Town and an Hamlet within the same Town. 22 *Ed.* 3. 14. 41 *Ed.* 3. 22. 2 *West.* 77. b.
 But the Practice is now otherwise as to this, and some other of the Things before mentioned, as you may observe before, that a *Præcipe quod reddat* is said not to lie of a Fishery, Estovers, nor of a Garden, nor of Common of Pasture; but the Use is otherwise; and tho' it may be meant that a *Præcipe* lies not of one of those Things singly alone, as of a Common; yet being joined and expressed with other Things, it may well lie, and is every Day's Practice.

(P) *Rules to be observed in placing Particulars in a Writ of Entry.*

1. **T**HE more worthy Things must be placed before the Things less worthy; as a Castle before a Manor, a Manor before a Messuage, a Messuage before a Toft or Mill, &c.
2. Things General must be put before Things Special; as Lands being the General or *Genus* to Meadow, Pasture, &c. is placed before Meadow, &c.
3. Intire or whole Things are to be put before Parts; as one Messuage, and the Moiety of one Messuage, &c.

For the more orderly and formal placing of Particulars in a Writ, observe this Method:

The Manors of B. and S. with the Appurtenances, and two Messuages, one Shop, one Toft, one Mill, one Dovehouse, two Gardens, twenty Acres of Land, ten Acres of Meadow, five Acres of Pasture, six Acres of Wood, one Hundred Acres of Furze and Heath, one Hundred Acres of Moor, one Hundred Acres of Rushy Ground, ten Acres of Marsh, ten Acres of Alderwood, ten Acres of Broom, five Acres of Land covered with Water, twenty Pounds two Shillings one Penny one Half-penny and one Farthing Rent, and the Rent of one Pair of Gilt Spurs, ten Capons, two Cocks, two Hens, five Pounds of Pepper, three of Mace and Cloves, and one Pound of Cumin, Common of Pasture for all Kinds of Cattle, View of Frankpledge, free Warren, free Fishery, Liberty of Foldage and also Fairs and Markets, Toll, Stallage and Picage, the Chattels of Felons, Fugitives, Outlaws, and those that are put in Exigent, Deodands, Chattels waived and strayed with the Appurtenances in B. A. S. N. and B. and also the Rectories of B. and S. with the Appurtenances, and all and all Manner of Tithes to the same Rectories belonging and appertaining, and also the Advowson of the Church of N. and B. and the Advowson of the Vicarage of the Church of H. and in which, &c.

The Honor of A. with the Appurtenances.
 The Castle of B. with the Appurtenances.
 The Borough of C. with the Appurtenances.
 The Hundred of D. with the Appurtenances.
 The Manor of E. with the Appurtenances.
 The Forest of F. with the Appurtenances.
 The Chase of G. with the Appurtenances.
 The Scite of the Manor of H. with the Appurtenances.
 Land covered with Water.
 Common of Pasture for all Sorts of Cattle.

Ten Shillings Rent.
 The Rent of two Cocks, two Hens, one Pound of Pepper, &c.
 A Messuage.
 A Shop.
 A Cellar.
 A Toft.
 One Wharf.
 One Key.
 A Fair and Market with the Appurtenances.
 The View of Frankpledge with the Appurtenances.

The

The Chattels of Felons, Outlaws, and Persons put in *Exigent*, Chattels waived and strayed, Deodands.

The Rectory of *B.* with the Appurtenances, and all and all Manner of Tithes whatsoever to the same Rectory belonging and appertaining.

The Scite of the late Monastery of *J.* with the Appurtenances.

Meadow.

Pasture.

Wood.

Furze and Heath.

A Moor.

Rutty Ground.

Broomy Ground.

Marsh Land.

Alderwood.

A Mill.

A Dovehouse.

A Shambles.

A Garden.

Land.

A free Fishery.

A free Warren.

The Liberty of Foldage.

A Salt-Pit.

A Bullary of Salt Water.

The Advowson of the Church of *B.*

The Advowson of the Vicarage of the Church of *C.*

A Ferry or Passage over the River *Thames.*

Three Parts of one Messuage.

A Moiety of one Messuage.

A Moiety of one Messuage, Common of Pasture to all the Parts aforesaid, as also a Moiety and third Part of Common.

(Q) *How to suffer Recoveries.*

If the Parties live in *London*, or so near it that they can appear in Person in Court, it is much the easiest and cheapest way; but sometimes they either will not or cannot appear in Person, and then they appear and suffer the Recovery by Attorney: Of both which in order.

First, *Of suffering a Recovery by the Parties in open Court.*

Draw your *Præcipe* upon a Piece of Paper, wherein must be named the Demandant and the Tenant, the Quantity of Land, and what Nature, how many Acres, what Manors, Messuages, &c. and in what Place or Places they lie.

See the Form in the Second Part, Tit. *Recoveries*.

Next you may carry it to the Curfitor of that County where the Lands lie, for a Writ of Entry. But note; It is the common Use to pass a Recovery at the Bar before a Writ of Entry is sued out; therefore having drawn your *Præcipe*, then enter it upon the Prothonotary's Remembrance-Roll, and put the Voucher or Vouchers Names in the Margin.

Upon this Remembrance, after the *Præcipe*, enter the Return and *Tesie* of the Writ of Entry.

But the Recovery may for Dispatch be passed first at the Bar, which is the common Practice.

Therefore having entered your *Præcipe* on the Remembrance, (or it is common to enter it afterwards) and having your Tenant and Vouchers ready at the Bar, the Court being at Leisure, the Method used to be to deliver the Remembrance on which your *Præcipe* is entered (which Remembrances were always brought to the Hall in the Term Time) to one of the Serjeants at the Bar, having your Clients ready; but the Demandant needs not to appear, only the Tenant and Voucher.

If your Client be a Nobleman, you must place him in the Middle of the Bar between the King's Serjeants, or the two other eldest Serjeants in their Absence.

Your *Præcipe* being delivered, the Serjeants will plead, and soon dispatch your Business.

If the Recovery be with single Voucher three Serjeants plead it; one for the Demandant, one for the Tenant, and the third for the Vouchee.

If with a double Voucher, then four Serjeants.

If with a treble Voucher, then five Serjeants.

Every Serjeant's Fee is said to be 3 s. 4 d. out of which each Serjeant allows to the Clerk that sues out the Recovery 1 s. 4 d. so that you pay them only 2 s. a-piece.

But the most modern Way is to deliver the *Præcipe* to one of the Serjeants Clerks, to whom you pay,

	<i>l.</i>	<i>s.</i>	<i>d.</i>
If it be with a single Vouchee,	0	6	0
With a double Vouchee,	0	8	0
With a treble Vouchee.	0	10	0
With a quadruple Vouchee,	0	12	0
And if the Tenant appears by Attorney,	0	4	0 more.

The Tenant appearing personally, some of the Serjeants at the Bar will repeat the Count, and Prayer of an Impar lance.

Then give the *Præcipe* to one of the Criers of the Court, who will carry it to the Secondary, to whom you pay 4 *s.* 6 *d.* and 2 *s.* more if it be by Warrant of Attorney, and he marks the *Præcipe* thus: *At Bar.* And it usual to give the Crier 6 *d.*

After the *Præcipe* is passed at Bar, make a Copy of it for the Cursitor to make out the Writ of Entry by.

And as to entring it on the Remembrance-Roll, that may be done when you pass the Exemplification at the Prothonotary's Office.

The Manner of the Serjeant's Pleading in a Recovery with a single Voucher is thus: The Serjeant, who has the Remembrance, (or *Præcipe*) will ask which is the Tenant, and cause him to stand up, as also the Vouchers, to the Intent they may be shewn to the Court; then the Judge will ask, who knows the Parties? which you or some other will answer, you know them to be such Parties; lest there should be Fraud in it, as there has been formerly, where the Husband brought in another Woman a Stranger, saying, she was his Wife, and suffered a Recovery of his Wife's Land to cut off her Estate without her Consent.

And note, That Roll Chief Justice said, that tho' it was not necessary to examine a Feme Covert when she joins with her Husband to suffer a Recovery, yet he held it prudential, and that he used to do it. *Pract. Regist.* 134, 295.

Then the first Serjeant counts by the Prothonotary's Remembrance, (or the *Præcipe*) according as the Writ is there entered, after this Manner, viz.

Single
Voucher.

1st Serjeant.] *This shews to you J. D. that J. S. has desorced him of the Manor of D with the Appurtenances in the County of E. and that this is his Right and Inheritance whereof he himself was seised in his Demesne as of Fee and Right in Time of Peace, in the Time of the present King, and has taken the Profits to the Value of half a Mark and more, and into which the said J. S. has not Entry, but after the Disseisin which Hugh Hunt thereof unjustly and without Judgment has made to the said J. S. within thirty Tears last past; if the said J. S. will deny this, you have here the said J. D. who has brought his Proof thereof.*

2d Serjeant, who is for the Tenant.] *You have here the said J. S. who defends his Right, and vouches to Warranty Edmund Wilson, and prays that he may be summoned within the County aforesaid by the Aid of this Court.*

3d Serjeant.] *You have here the said Edmund Wilson, who is here present to enter into Warranty, and prays that the Demandant may count against him.*

1st Serjeant.] *The same Count, changing what ought to be changed.*

3d Serjeant.] *You have here the said Edmund Wilson, who defends his Right, and says, that the said H. Hunt did not disseise the said J. D. in Manner as the said J. D. by his Writ and Count supposes; and thereupon puts himself upon the Country.*

1st Serjeant.] *With your Leave we will imparl.*

If it be with a double Voucher, then the first Serjeant counts as before.

Double
Voucher.

1st Serjeant.] *This shews to you, &c.*

2d Serjeant.] He counts for the Tenant as before, only instead of calling the Common Vouchee, he calls the first Voucher *A. B.*

3d Serjeant.] For the Vouchee, desires the Judges to record the Appearance of the Vouchee, (and so of every Vouchee, unless it be the Common Vouchee) which done, he must say, *You have here the said A. B. who is here ready to enter into Warranty, and prays that the Demandant may count against him.*

1st Serjeant.] *The same Count, (changing what ought to be changed).*

3d Serjeant.] *You have here the said A. B. who defends his Right, and vouches to Warranty Edmund Wilson, and prays that he may be summoned within the County aforesaid by the Aid of this Court.*

4th Serjeant.

4th Serjeant.] *You have here the said Edmund Wilton, who is here ready to enter into the Warranty, and prays that the Demandant may count against him.*

1st Serjeant.] *The like Count, changing what ought to be changed.*

4th Serjeant.] *You have here the said Edmund Wilton, who defends his Right, and says, that the said H. Hunt did not disseise the said J. D. in Manner as the said J. D. by his Writ and Count doth suppose; and thereupon puts himself upon the Country.*

1st Serjeant.] *With your Leave we will imparl.*

And so in like Manner if it be with treble Voucher *mutatis mutandis*.

Secondly, Of suffering Recoveries when the Parties appear by Attorney.

When the Tenant or Vouchee lives distant from London, and cannot or will not appear in Person, they appear by Attornies.

Such Warrant may be taken two several Ways:

1. Either by any of the Judges of Assise of either Bench, Barons of the Exchequer, and as some say, by Serjeants at Law in their Circuits, without a *Dedimus Potestatem*; or,

2. By a *Dedimus Potestatem* directed to the Commissioners in the Country.

I. By Warrant before a Judge, &c.

Draw up the Warrant wherein there must be two Attornies at least, and their Authority joint and several, that if one dies the other may proceed, &c.

See the Form in the Second Part.

Then go before the Judge, and he will subscribe the Date of the Caption.

There must be a Transcript in Paper, to which the Judge also puts his Hand, and then it is to remain with the Clerk of the Fines.

Then make out a *Præcipe* for the Writ of Entry, &c. *ut postea*.

II. By Dedimus Potestatem.

When the Vouchee lives in the Country, and his Attorney employs an Agent in Town, then the usual Way is to make the Country Attorney Demandant, who has no Occasion to be in Court; the Agent Tenant who appears personally at Bar, and then there needs only a *Dedimus Potestatem* to take the Warrant of Attorney of the Vouchee.

How to sue out a Dedimus.

A *Præcipe* for the *Dedimus Potestatem* must be made out on Paper, and left with the Curfitor. *See the Form in the Second Part.* *Præcipe for Dedimus.*

You pay the Curfitor 1 l. 5 s. 8 d.

Then send it down into the Country, and there a Day must be appointed for two at least of the Commissioners to take Acknowledgment of the Warrant of Attorney, which you must have ready, written on Parchment, together with a Copy of the *Præcipe*. *See the Form in the Second Part.*

When the Acknowledgment of the Warrant of Attorney is taken, annex the Warrant to the *Dedimus Potestatem*, and indorse the *Dedimus*, as is directed in the Second Part.

If one of the Commissioners who took the Cognisance be not a Knight, (as many Times is the Case) then a Certificate must be drawn up on the Back of the *Præcipe* and Warrants, and a Judge's *Allocatur* had thereon.

Thirdly, How to sue out the Writ of Entry.

The *Præcipe* being passed at the Bar, if both the Tenant and Vouchee appeared in Person, you must make a Copy of it for the Curfitor to make out the Writ of Entry by; but if you had a *Dedimus Potestatem*, as before mentioned, you only carry that to him, with the Warrant of Attorney annexed; for these contain sufficient Instructions, both for the Writ of Entry and the *Mittimus* and Transcript.

You pay 7 s. 6 d. to the Curfitor for the Writ of Entry, and more if very long, by reason of a great Number of Parcels.

Fourthly,

Fourthly, *How to sue out the Writs of Summons and Seisin.*

Having got the Writ of Entry from the Curfitor, the Attorney makes out the Writs of Summons and Seisin himself.

There must be five Returns inclusive between the Return of the Writ of Entry and the Return of the Writ of Summons; for Example,

If the Writ of *Entry* be returnable in *three Weeks* from the Day of St. Michael, then the Writ of *Summons* must be returnable on the Octave of St. Martin.

If the Writ of *Entry* be returnable in *one Month* from the Day of St. Michael, then the *Summons* must be in *fifteen Days* from the Day of St. Martin.

If the *Entry* be returnable on the *Morrow* of All Souls, then the *Summons* must be on the Octave of St. Hillary.

If you account the Return of the Writ of Entry one, then the fifth Return is the Return of the Summons.

And so it is between one Summons and another.

The first Summons must be tested the fourth Day inclusive from (*i. e.* the Appearance Day of) the Return of the Writ of Entry, and so must the second Summons from the Return of the first.

The Writs of Summons and Seisin must be signed by the Prothonotary, for which he takes nothing till he signs the Exemplification.

Then they must be sealed, which costs 7 d. a-piece.

Fifthly, *Of passing the Writ of Entry, and of returning it, and the Summons.*

When you have got the Writ of Entry from the Curfitor, carry it to the Alienation-Office to be compounded by the Commissioners, who attend from nine to ten in the Morning in Term Time, and for one Week after every Term.

The Rule for the Payment of Money in the Alienation-Office.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Every five Marks and 20 s. pays	—	0	6 8
From five Marks and 20 s. to five Marks and 40 s.	—	0	10 0
Above five Marks and 40 s. to ten Marks and 20 s.	—	0	13 4
So in like Proportion for all others.			

<i>Lands rated at</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>		<i>l.</i>	<i>s.</i>	<i>d.</i>
<i>At above</i>	2	0	0	or under, pays	—	0	0 0
<i>At</i>	2	0	0	to 3 <i>l.</i> 6 s. 8 d. pays	—	0	6 8
	5	6	8	pays	—	0	10 0
	7	13	4	pays	—	0	13 4
	8	13	4	pays	—	0	16 8
	10	0	0	pays	—	1	0 0
	12	0	0	pays	—	1	3 4
	14	6	8	pays	—	1	6 8
	15	6	8	pays	—	1	10 0
	17	13	4	pays	—	1	13 4
	18	13	4	pays	—	1	16 8
	20	0	0	pays	—	2	0 0
	22	0	0	pays	—	2	3 4
	23	6	8	pays	—	2	6 8
	25	6	8	pays	—	2	10 0
	27	13	4	pays	—	2	13 4
	28	13	4	pays	—	2	16 8
	30	0	0	pays	—	3	0 0

When the Writ of Entry is compounded, you pay the Composition-Money to the Receiver of the King's Fines, who is at the same Office; and after that you must leave it longer in the Office for it to be entered, and for the Commissioners to indorse their Names on the Back of it.

You pay to the Clerk of that Office in Term,	—	s. d.
And to the Receiver,	—	1 6
If out of Term whilst the Commissioners are at the Office,	—	0 6
And after that, to the Clerk,	—	2 0
And to the Receiver,	—	2 6
		0 6

They pin the Writs of Entry, Summons and Seisin together, and leave them at the Return-Office, in Mr. Borrett's Office, to be returned; but it is usual for Readiness to indorse the Return of the Seisin (except the Sheriff's Name) before you carry it there. You pay 1 s. 6 d. for each.

When you have got these Writs from the Return-Office, carry the Writ of Entry to the Attorney General's Clerk, and he will get the Attorney General's Hand to it, for which you pay 10 s.

Sixthly, Of drawing Recoveries, and entering the Summons, Mittimus, Transcript and Recovery on the Rolls.

The Recovery may be drawn, entered on the Rolls and exemplified either during the Time the Writs are passing thro' the Offices, or afterwards, as Opportunity permits.

When a Draught is made of the Recovery, it is usual to get the Prothonotary, or one of his Clerks, to peruse it to avoid Mistakes.

There must be one Roll for the Summons, called the Summons Roll.

And where there is a *Dedimus Potestatem* to take the Warrant of Attorney of any of the Parties, then the *Mittimus* and Transcript must be entered on the Recovery-Roll in small Secretary Hand before the Recovery, the Recovery being immediately after ingrossed in large German Text, or Secretary Hand, in the Manner and Form described in the Second Part.

Of exemplifying the Recovery, examining, docketing, signing and sealing it, &c.

The Recovery must be exemplified on a 10 s. Stamp, in the Manner and Form mentioned in the Second Part.

You must *teste* the Exemplification after the Return of the Writ of Seisin, if such Writ be returnable in the same Term in which Judgment was given; but if there be not fifteen Days between the Return of the Writ of Entry (or a Writ of Summons when by Summons) and the End of the Term, then must the Writ of Seisin be returnable *indilate*, and the Exemplification must bear *Teste* the last Day of the Term in which the Writ of Entry (or Summons) came in; or if the Writ of Seisin be returnable of a subsequent Term, then *Teste* the Exemplification the last Day of the Term in which Judgment was given.

If the Writ of Entry (or Summons when necessary) be returnable so late in the Term that the Writ of Seisin cannot come in returnable in the same Term, but that it must be returnable the next Term; then in your Exemplification you must observe, that after awarding the Return of the Writ of Seisin, you must break off and conclude; and then upon the folding up of the Bottom of the Exemplification, or on the Label, you must indorse the *Ad quem diem*.

When the Exemplification is finished, (the Writs having been returned, &c. as aforesaid) carry it together with the Writ of Entry, *Mittimus* and Transcript, and the Writs of Summons and Seisin and the Rolls, to the Prothonotary's Office, and there you must docket the Rolls; enter the Recovery on the Remembrance-Roll, and the Prothonotary, or one of his Clerks, will examine the Writs, Entries and Exemplification, and then sign the Exemplification.

You pay the Prothonotary for the Entry of the Recovery, filing the Writs	}	l. s. d.
and signing the Exemplification, if the Recovery be with a double		
Voucher by Warrant of Attorney,		1 5 0
When a double Voucher in Person,		0 13 0
At the Seal-Office for sealing,		0 2 2
But if the Recovery is not past of the same Term it is of, it must be signed	}	0 2 0
by the Clerk of the Treasury before it be sealed, for which pay,		

(R) *Of Execution after Recovery, and the Estate the Recoveror has by the Recovery.*

AFTER the Demandant has Judgment in a Common Recovery against the Tenant, and the Tenant against the Voucher, and he against the Common Vouchee; the Court awards an *Habere facias seisinam* to the Sheriff of the County where the Lands lie, which the Sheriff returns, and so the Recovery is compleat and executed.

The Manner of suing out such Writ, and getting it returned, is already mentioned. And tho' this is only Matter of Form, yet in many Cases it is not safe to proceed till there is a Return of the *Habere facias seisinam*; for,

Whenever a Recovery is to Uses, as all Common Recoveries are, no *Seisin* is in Recoveror, nor no Use raised till the Execution of the Recovery; for before then the Land does not pass. *Moor* 281. *T. 7 H. 4. 17.*

So if no Use arises till Execution of the Recovery, the Party to whose Use the Recovery is declared to be, cannot convey the Thing recovered, for *Nemo dat quod non habet*.

If Tenant in Tail dies after Recovery and before Execution, Execution may be sued out against his Issue. *Plow.* 55, 375. *1 Co.* 6.

If *A.* has Lands conveyed to him and his Heirs with Warranty, and he suffers a Common Recovery to him and his Heirs, it is but the old Estate in Degree and Privity, as before.

So if he has Lands conveyed to him in Fee, with Warranty to him, his Heirs and Assigns, and he suffers a Common Recovery to the Use of a Stranger, the Recoveror may vouch as Assignee. *Hob.* 27.

When a Man suffers a Common Recovery to his own Use, he is in the Estate as he was before.

If a Tenant in Tail mortgages his Lands, and after suffers a Common Recovery to make a *Jointure*, this Recovery extends the Estate-tail, and lets in the precedent Mortgage in Prejudice of the Jointure, because the Recoveror comes in, in Continuance of the Estate-tail, and subject to all Incumbrances of Tenant in Tail; and in this Case the Court of Chancery will not relieve. *1 Chan. Rep.* 20.

(S) *The Remedy of Recoverors against Lessees for Rents, Services and Waste.*

THE Recoverors in Common Recoveries, their Heirs and Assigns, have the like Remedy against Lessees for Lives and Years of the Land recovered, their Executors or Assigns, by Distress, Avowry, or Action of Debt for the Rents and Services reserved upon their Leases that shall be due after the same Recoveries had: And also like Actions for Waste done after the Recovery had: And like Remedy upon a Disturbance in a Presentation to an Advowson, and in like Manner and Form as the Lessor should or might have had if the same Recoveries had never been had, altho' the same Lessees do never attorn to the same Recoverors.

And if a Man makes a Lease for Years to begin at *Michaelmas*, reserving Rent, and before *Michaelmas* he suffers a Recovery; in this Case the Recoveror shall distrain for this Rent which the Lessor before the Recovery could not distrain for.

But if the Recovery had not been had, he might have distrained. *Stat. 7 H. 8. c. 4. Dyer* 31. *Co. Lit.* 104.

(T) *Of Evidence allowed in Common Recoveries, in what Time to be disputed, or deemed valid, and of its Validity as to the Time of making Tenant to the Præcipe.*

BY *Stat. 14 G. 2.* reciting, That whereas by the Default or Neglect of Persons employed in suffering Recoveries, it has happened, and may happen, that such Recoveries are not entered on Record, whereby Purchasers for a valuable Consideration may be defeated of their just Rights: For Remedy thereof it is enacted, That where any Person or Persons hath or have purchased, or shall purchase for a valuable Con-

Consideration, any Estate or Estates in Lands, Tenements or Hereditaments, whereof a Recovery or Recoveries is, are or were necessary to be suffered, in order to complete the Title, such Person and Persons, and all claiming under him, her or them, having been in Possession of the purchased Estate or Estates from the Time of such Purchase, shall and may, after the End of twenty Years from the Time of such Purchase, produce in Evidence the Deed or Deeds, making a Tenant to the Writ or Writs of Entry, or other Writs for suffering a Common Recovery or Common Recoveries, and declaring the Uses of a Recovery or Recoveries, and the Deed or Deeds so produced (the Execution thereof being duly proved) shall, in all Courts of Law and Equity, be deemed and taken as a good and sufficient Evidence for such Purchaser and Purchasers, and those claiming under him, her or them, that such Recovery or Recoveries was or were duly suffered and perfected according to the Purport of such Deed or Deeds, in Case no Record can be found of such Recovery or Recoveries, or the same should appear not to be regularly entered on Record: Provided always, that the Person or Persons making such Deed or Deeds as aforesaid, and declaring the Uses of a Common Recovery or Recoveries, had a sufficient Estate and Power to make a Tenant to such Writ or Writs as aforesaid, and to suffer such Common Recovery or Recoveries.

Which Act also recites, That whereas it has frequently happened that the Deeds for making the Tenant to the Writs of Entry, or other Writs for suffering Common Recoveries, have been lost, or that the Fines or Deeds, making the Tenants to the said Writs, have not been levied or executed till after the Judgment given in such Recoveries, and the Writ of Seisin awarded, by Reason whereof great Doubts have arisen, whether such Recoveries, for want of proper Tenants to the Writs, are good and effectual in Law; to prevent such Doubts for the future, and in order to render Common Recoveries more certain and effectual, it is enacted, That every Common Recovery already suffered, or hereafter to be suffered, shall, after the Expiration of twenty Years, from the Time of the suffering thereof, be deemed good and valid to all Intents and Purposes, if it appears upon the Face of such Recovery that there was a Tenant to the Writ; and if the Persons joining in such Recovery had a sufficient Estate and Power to suffer the same, notwithstanding the Deed or Deeds for making the Tenant to such Writ should be lost or not appear.

And it is further enacted, That from and after the Commencement of this Act, every Recovery already suffered, or hereafter to be suffered, shall be deemed good and valid to all Intents and Purposes, notwithstanding the Fine, or Deed or Deeds making the Tenant to such Writ, should be levied or executed after the Time of the Judgment given in such Recovery, and the Award of the Writ of Seisin as aforesaid, provided the same appear to be levied or executed before the End of the Term, Great Session, Session or Assises in which such Recovery was suffered, and the Persons joining in such Recovery had a sufficient Estate and Power to suffer the same as aforesaid.

Provided always, that nothing in this Act contained shall extend, or be construed to extend, to make any such Common Recovery heretofore suffered, valid and effectual in Law, which has been avoided by any lawful Act or Means, or which shall hereafter be avoided by Entry duly made on or before the sixteenth Day of *January* One thousand seven hundred and forty, or by Judgment or Decree had or obtained upon some Action or Suit at Law or in Equity, commenced or to be commenced on or before the said sixteenth Day of *January*, and prosecuted with due Diligence; but every such Common Recovery shall remain and be of such Force and Effect only, as the same would have been if this Act had never been made, and of no other Force or Effect.

Provided that nothing in this Act contained shall be construed to prejudice or affect any Question of Law which may arise upon Common Recoveries not remedied, or intended to be remedied by this Act; but all such Common Recoveries shall remain and be of such Force and Effect, as the same would have been if this Act had never been made, and of no other Force or Effect.

(U) Of avoiding Recoveries.

A Recovery may be defeated, frustrated and avoided (which is called *falsifying of a Recovery*) in part or in all for many Causes, as for that there is some gross and substantial Error in the Manner of the Proceeding.

But a Recovery is not avoidable for false or incongruous *Latin*, Rasure, Interlining, Mis-entering of any Warrant of Attorney, Mis-returning or not Returning of the Sheriff, or other want of Form in Words, and not in Matter of Substance, because it is done by the Consent of the Parties.

Or it may be avoided for that he against whom the Writ of Entry is brought is not Tenant of the Freehold by Right or Wrong at the Time of the Writ brought; as when the Writ is brought against a Stranger that *has nothing in the Land*, and he vouches the Tenant in Tail in Possession of the Land.

Or a Recovery may be avoided for that he that has the Estate and the Right is *neither Party nor Privy* to the Recovery; as when the Writ of Entry is brought against a Disseisor, and he vouches a Stranger that has nothing in the Land, or a Recovery is had against the Husband alone of the Land whereunto his Wife has Title of Dower.

Or a Recovery may be avoided for that *another has some Estate in the Thing whereof the Recovery is had* at the Time of the Recovery suffered; as when there is a Recovery had of Land whereof there is a Lease or Estate for Years by Statute, *Elegit*, or the like.

Or it may be avoided for that the Recovery is had by *Covin*; as when it is suffered by Tenant for Life to disinherit him in Reversion, or when it is gotten by some undue Practice and sinister Dealing, for in this Case it is sometimes made void by a *Vacat* or Sentence of a Court.

And where a Recovery is avoidable or reverfable for any of these or such other like Causes, it must be avoided by him whom it does concern that is barred and bound by the same Recovery that should have had the Land if the same Recovery had not been, and not by any other whom it does not concern; as

If an erroneous Recovery be suffered by Tenant in Tail; in this Case his Issues, or if they fail, the next in Remainder or Reversion shall defeat it.

So also if the Land be recovered against a Stranger, the Tenant in Tail shall avoid it; and if the Land be recovered against a Disseisor, the Disseisee shall avoid it; and if the Land be recovered against him in Reversion or Remainder, the Tenant for Years by Statute or *Elegit* shall avoid it: But in these last Cases they shall falsify and avoid it during their particular Estates only.

So also the Wife shall falsify the Recovery suffered by the Husband alone as to her Title of Dower only, and no longer and further.

And he in the Reversion or Remainder shall falsify and avoid the Recovery suffered by the Tenant for Life either in the Life-time of the Tenant or afterwards.

But neither he in Reversion or Remainder, or any one by or under him, or any other, can falsify a Recovery suffered by the Tenant in Tail in Possession, except it be for some such Cases as before.

And the Recoveror himself cannot falsify a Recovery.

So neither can a Guardian, or a Tenant of a Manor; as if one holds Land of a Manor, and a Stranger recovers the Manor by a feigned Title, a Tenant of the Manor cannot falsify this Recovery.

And in all these Cases where a Recovery is avoidable, and a Man has Power given him to falsify, he must do the same sometimes by *Writ of Error*, as in the Case of an erroneous Proceeding; and sometimes by *Pleading* and setting forth the special Matter, as in the Case where the Tenant is not Tenant of the Freehold; or when the Recovery is had by *Covin* against the Tenant for Life, or the like; and sometimes by the shewing and setting forth of the Practice to the Court, and a *Motion* made that a *Vacat* may be made upon the Judgment for the Causes alledged. *Stat. 23 El. c. 3. 5 Co. 40. 21 H. 8. c. 15. Co. Lit. 46, 104. Dyer 249. 3 Co. 4. 78. Dyer 249. 1 Co. 62. Plow. 515.*

(W) Of Errors in Common Recoveries, and in what Cases they may be amended.

THE Law gives Common Recoveries all the favourable Constructions imaginable; and for their Support (they being Common Assurances of Land) the Stat. 23 Eliz. c. 3. enacts, That no Common Recovery shall be reversed for false or incongruous Latin, Rasure, Interlining, Misentry, Omission of the Return of the Sheriff, or any other want of Form.

False Latin,
Rasure, Inter-
lining, Mis-
entry, &c.

An erroneous Common Recovery is good till reversed, by reason of the intended Recompence; and if Tenant in Tail suffers an erroneous Recovery, and after disfeises the Recoveror, and dies, his Issue shall not be remitted, for the Recovery shall be presumed good till it is reversed. 3 Co. 3. 10 Co. 38.

And Common Recoveries being only Common Assurances, the Court of Common Pleas amends and supplies the Defects in the Entries of such Recoveries, or in Writs relating to the same.

And by the Stat. 10 & 11 W. 3. c. 14. No Fine or Common Recovery, or any other Judgment, shall be reversed for Error, unless a Writ of Error be brought in twenty Years; if Persons *infra*, &c. then within five Years after the Impediment removed.

Of Mistakes in naming the Parties.

A Common Recovery was agreed to be suffered, wherein John Chapham and Richard Elton were to be Demandants, and by Mistake of the Clerk the Writ of Entry was sued out in the Name of John Chapham and John Elton, and the Recovery was suffered in the Name of John Elton instead of Richard, and this Recovery was amended. Trin. 2 Car. 1. Chapham v. Bacon.

A Warrant of Attorney was given in order to suffer a Common Recovery by William Reynolds and Hester his Wife; but the Serjeant who took the Warrant of Attorney, certified the same to be given by the said William Reynolds and Margaret his Wife, and the Mittimus and Transcript were made of a Warrant given by Margaret, and the Recovery entered accordingly; all were ordered to be amended. M. 4 C. 1.

A Common Recovery suffered by R. Callow and Ux^s, but the Name of the Wife was totally omitted; ordered to be amended. M. 8 Car. 1. Turban v. Pautry.

In naming the Particulars of the Lands, &c.

A Common Recovery was agreed to be suffered of two Messuages and one Garden, and suffered only of one Messuage; ordered to be amended. T. 13 Car. 1. Brooke v. Bidolph.

As to the Place where the Lands lie.

A Common Recovery was agreed to be suffered of Lands in Alpbamton and Magna Hermy in Com' Essex, but by Mistake the same was suffered of Lands in Alpbampton and Lamarsh; ordered to be amended in the Writs of Entry, Seisin, and the Entry of the Recovery. M. 6 Car. 1. Skinner v. Land.

A Common Recovery was agreed to be suffered of Lands in New-Church, Levington and Mersham, but New-Church was omitted in the Recovery; this upon reading the Indenture was ordered to be amended. T. 13 Car. 1. Wbetwell v. Masters.

A Fine and Common Recovery were agreed to be levied and suffered of the Manor of Inkfield in Shropshire, and by Mistake the same was made Inglefield; both were ordered to be amended, viz. the Fine in the Record of the King's Silver, in the Foot and Note of the Fine, and in all the Places of the said Fine and Recovery; in the Writ of Covenant, Writ of Entry, Exemplifications, and Habere facias seisinam. 9 W. 3. Int. J. Fostre Ar' & Ux^s.

A Fine and Common Recovery were agreed to be levied and suffered of Lands in Cranley in Com' Surry, and by Mistake the same was written Crawley; on perusing the Deeds to make a Tenant to the Precipe, and declaring the Uses of the Fine and Recovery,

Recovery, they were ordered to be amended in the several Parts of the Fine and Recovery, and in the Writs of Covenant, Entry and Seisin. *T. 4 Jac. 2. Freeman, Gent. Plaintiff, Mountague, jun. Ar' & Ux' Deforc'.*

A Common Recovery was agreed to be suffered of Lands in *Weston* in Gloucestershire, and by Mistake it was written *Waston*; ordered to be amended in the Record, and other Places of the Recovery, and in the Writs of Entry, Seisin, &c. *M. 11 W. 3. Int' Simon Smith Ar' Peter' & Ric'um Comit' Dorset & al' Tenen'.*

In the Writ of Entry.

Writ of Entry returnable *Die lune quart' septiman' quadragesim' prox' futur'*, shall be referred to the fourth Week next, and not the next Lent. *Cro. Eliz. 389.*

A Deed to make a Tenant to the *Præcipe* was executed, dated 1 Nov. 33 Car. 2. and a Common Recovery suffered thereon, and the Writ of Entry made returnable *tres Mic'* before the Date of the Deed; ordered to be amended, and the Writ of Entry made returnable *Craftin' Animarum*. *M. 4 W. & M. Bunce & al' v. Greenway & al'.*

A Deed to make a Tenant to the *Præcipe* was dated 11 Nov. and a Common Recovery suffered, and the Writ of Entry made returnable *Menſe Mic'* before the Date of the Deed; ordered to be amended. *M. 5 W. & M. Wattry v. Jodrell.*

A Common Recovery was suffered, and the Writ of Entry made returnable before the Date of the Deed which led the Uses of it, and which made the Tenant to the *Præcipe*; on reading the Deed, this was ordered to be amended. *M. 5 W. & M. Warkbouse v. Watts.*

As to the Appearance.

If Tenant be present and vouch to Warranty *A.* and one appears for him, it is Error, and the Appearance is void; for he ought to appear in Person, or else a *Sum' ad Warr'*; and where Summons is entered on the Roll, there, at the Return, the Vouchee may appear in Person, or by Attorney. *1 Leon. 86.*

As to the Warrant of Attorney.

Error was assigned, that the Summons is dated after the *Dedimus Potestatem*, and so no Warrant of Attorney at the Time of Appearance; but held good. *Sid. 219.* And in this Case, to support the Common Recovery, the Court will intend there was another Warrant of Attorney. *T. Raym. 11, 34, 90. 1 Keb. 34. 1 Lev. 130. Dyer 220. contra, 1 Leon. 86.*

And in *T. Raym. 71.* it is held that the *Dedimus Potestatem* is no Part of a Fine, tho' a Warrant of Attorney is of a Recovery; but if the Party be dead, then it is ill. *2 Vent. 96. 20 H. 7. 9.*

As to the Writ of Seisin.

The Writ of Entry was sued out returnable *Craftin' Animar'*, and a Recovery suffered thereon; but the Writ of Seisin was made returnable the same Return as the Writ of Entry; ordered to be amended. *Paſ. 16 Car. 1. Doncaſter v. Campion.*

As to the Death of Parties, and Non-age.

If the Vouchee dies before Judgment, or be under Age, and appears in Person, or by Attorney, it is Error. *1 Roll. 301. Dyer 90. Palm. 224.*

S E C T. VI.

Of Deeds declaring (or leading) the Uses of Feoffments, Fines and Recoveries.

HAVING already, in the three last Sections, largely treated of Feoffments, Fines and Common Recoveries, the next Thing in Order, is to treat of Deeds declaring or leading the Uses of Feoffments, Fines and Recoveries; but as introductory thereto, it seems necessary first to shew the Nature, Kinds, Incidents, &c. of Uses.

(A) *Use what.*

AN Use (as some define it) is the Profit or Benefit of Lands or Tenements. Or, as others define it,

It is the Equity and Honesty to hold the Land in *Conscientia boni viri*. Or, by others, described thus:

An Use is a Trust or Confidence reposed in a Person, not as to Profits issuing out of Land, but as a Thing collateral annexed in Privy to the Estate of the Land, and to the Person touching the Land, so that he for whom he is trusted shall take the Profits of the Land: And the Tertenant shall dispose of it according to his Direction; as for Example,

If a Feoffment be made to J. S. and his Heirs, to the Use, Profit or Behoof of W. S. and his Heirs; in this Case heretofore J. S. had the Estate and Property of the Land, but W. S. had and was to have the Profits in Honesty and Equity.

So if one agrees with W. S. for a Piece of Land for 20 l. and pays him the Money, but has no Assurance of the Land, yet the Equity and Honesty to have this Land is in him that has contracted and paid his Money for it.

This Trust was called the Use of the Land; and hence came the Course in Conveyances to set down in the *Habendum* to whose Use the Land is to be held; as *Habendum* to A. and his Heirs, to the Use of A. and his Heirs. 1 Co. 121, 122. Co. Lit. 171, 272: b.

The Use before described is an Use at Common Law.

But Uses may be raised either by *Transmutation* of the Estate and Possession, as by Feoffment, Fine or Recovery, &c. Or out of the Estate of the Owner of the Land, as by Bargain and Sale by Deed indented and inrolled, or by Covenant to stand seised to an Use, upon lawful Consideration, without Transmutation of the Estate or Possession. Co. Lit. 271. b.

An Use cannot rise out of an Use, or a Way or a Common newly created. Carter 46. Cro. Jac. 189, 190. pl. 13. Popb. 81.

(B) *Trust or Confidence what.*

THERE is an Use of Goods and Chattels, which is properly called a Trust or Confidence, for one may have such Things to the Use of another.

(C) *Of the Difference between Uses and Trusts.*

AS to the Difference between Uses and Trusts, there ought to be the utmost Care not to let Trusts be carried on beyond the Bounds of Uses; for it will introduce different Rules, which will make great Confusion, and be mischievous to the Publick: And Perpetuities in Trust will have all the Inconveniences as Perpetuities in Estates in Law have. Mic. 9 W. Int' Lloyd and Carew.

(D) *Cestuy*

(D) *Cestuy que Use who.*

HE for whom a Trust or Confidence is reposed in any Person, and who ought to have the Profit of the Land by Conveyance as aforesaid, is called *Cestuy que Use*. He had neither *Jus in re*, nor *Jus ad rem*, but only a Confidence and Trust, for which he had no Remedy by the Common Law: But for the Breach of Trust his Remedy was only by *Subpœna* in Chancery. *Co. Lit.* 272. b.

But now the Statute of Uses, 27 H. 8. c. 10. has transferred the Possession to the Use. *Co. Lit.* 272. b. *Plow.* 352. b. 349. b. 1 *Co.* 121. a. b. 122, 127. 2 *Co.* 58, 78. 6 *Co.* 64. 7 *Co.* 34. 1 *Leon.* 196. 2 *Leon.* Case 25.

(E) *Of the different Kinds of Uses.*

USES are either *in Esse*, or *in Posse* or *Contingency*.

1. *Uses in Esse* are either in Possession, Reversion or Remainder; as when a Feoffment is made to *J. S.* to the Use of *J. W.* and his Heirs; or to the Use of *J. W.* and after to the Use of *J. D.* and the Heirs Male of his Body, and after to the Use of *S. T.* and his Heirs for ever.

2. *Uses in Posse*, or in *Contingency*, may possibly happen to be in Possession, Reversion or Remainder; as where an Use is limited to me for Life, and after to him that shall be my first Son in Tail; this is only the Possibility of an Use, for it may or may not be. 1 *Co.* 121, 122, 176.

Also Uses are either *express* or *implied*.

1. *An Use express* is when the Use or Intent is openly declared and expressed between the Parties upon making the Estate of Land whereunto the Use is annexed; as when a Feoffment is made of Land to *J. S.* and his Heirs, to the Use of *W. S.* and the Heirs of (or Heirs Male of) the Body of the said *W. S.* or to the End and Intent that *W. S.* and his Heirs, or *W. S.* and the Heirs of his Body shall take the Profits of it, or the like; or when I covenant to stand seised of Land to the Use of my Wife for Life, and after of my Eldest Son and the Heirs of his Body, or the like.

2. *An Use implied*, is when the Use is not declared upon the Agreement between the Parties, but is left to the Construction and made by the Operation of Law; as,

When a Man seised of Land makes a Feoffment in Fee, levies a Fine, or suffers a Common Recovery of it to another without any Consideration, and it is not agreed nor declared to what Use or Intent it shall be; this by Construction of Law shall be to the Use of the Feoffor, Conusor or Recoverer.

But if there be any Consideration of Money or other Thing paid or given, or any Rent or Tenure reserved, then by Construction of Law it shall be to the Use of the Feoffee, Conusee or Recoveror; for otherwise the Law presumes that the Intent of him that did part with the Land was so, (*viz.*) and the other should have the Property of the Land to his Use, and that he himself should take the Profits of it.

So when one bargains and sells his Land for Money to another, and no Use is expressed; in this Case the Law says it shall be to the Use of the Bargainee and his Heirs. *Doct. & Stud.* 95. *Perk.* §. 533. 2 *Co.* 50. 9 *Co.* 11. *Dyer* 18, 146. 2 *Roll.* Abr. 781, 782, 789.

(F) *Of the Nature of Uses.*

AN Use at Common Law, before the Statute hereafter mentioned was made, and where that Statute does not take place, is nothing but a mere Confidence and Trust collateral to and distinct from the Land annexed in Privy of Estate, and to the Person touching the Land to this Purpose, that *Cestuy que Use* should take the Profit of the Land, and the Feoffee or Tertenant that was trusted should make Estates, and otherwise dispose of the Land, as the *Cestuy que Use* in his Life, or at his Death by his last Will and Testament, should direct and appoint; and if he made no Disposition, then that it should go to his Heir, so that the Feoffee had the Freehold or sole Property of the Thing in him, and *Cestuy que Use* had neither *Jus in re* nor *Jus in rem*, (for if he against the Will of the Feoffee had entered into the Land, he had been

a *Trespassor*) but a bare Confidence or Trust for which the *Cestuy que Use* had no Remedy, but in Chancery upon Breach of the Trust, and there to have the Feoffee imprisoned until he performs the Trust according to the Order of the Court.

These Uses, to some Purposes, were reputed in Law as *Chattels*, and therefore were devisable by Will.

And to some Purposes as *Hereditaments*, and a Kind of Inheritance, of which there was a *Possessio fratris*, &c.

And to some Purposes, *neither Chattels nor Hereditaments*, for they were not esteemed Assets in the Heir or Executor, neither were they reputed as Commons, Rents, Conditions, and such like Inheritances which are discontinued or taken away by the Alienation of the Tertenant, Escheat, Disseisin, &c. but an Use is not so. 1 Co. 120. in *Cbudleigh's Case*; & 1 Co. 93. *Shelly's Case*. *Kelw.* 160. *Dyer* 12. *Bro. Feoffment al' Uses* 25.

(G) Of Incidents to Uses.

TO every of these Uses there were two inseparable Incidents: 1. *Confidence* in the Person; and 2. *Privity* in the Estate, *expressed* by the Parties, or implied in Law.

When either of these failed, the Use was either *gone for ever*, or *suspended* for a Time at least. And therefore,

If the Feoffee to Use, upon good Consideration, had infeoffed another of the Land that had not Notice of the Use, the Use had been gone for ever; because howsoever here was a Privity of the Estate, yet here was no Confidence in the Person; but if the Feoffment had been without Consideration to such a one, in this Case the Use had remained still, because the Law implied a Notice.

So also it seems the Law was when it was made in Consideration of Marriage only.

And if a Disseisor, Abator or Intruder, had come to the Possession of the Land whereof the Use was, altho' he had Notice of the Use, yet the Use was suspended during their Possession, and they should not have been seised to Use, as the Feoffee was, for they came not to the Land in the *Per*, but in the *Post*.

And if a Lord by Escheat, Lord of a Villain, or one who had entered for Mortmain, or had recovered in a *Cessavit*, &c. had come to such Land and had Notice of the Use, the Use had been gone for ever, for these came to the Land in the *Post*, and above the Use.

And Tenant in Dower and by the Curtesy should not be seised to Uses in Being, for all these wanted Privity of Estate.

And if there had been Tenant for Life, the Remainder in Fee to the Use of another, and the Tenant for Life had made a Feoffment in Fee to one that had had Notice of the Uses, this second Feoffee should not have stood seised to the first Uses.

So if the Husband had made a Feoffment in Fee of the Land of his Wife, upon Consideration and without any Use expressed, he should not have had a *Subpœna*, because the Feoffee was not in Privity of Estate of the Wife.

And if *Cestuy que Use* for Life or in Tail, the Remainder in Tail, with divers Remainders over in Use, had made a Feoffment to one that had Notice, he should not have been seised to the first Uses, *Causa qua supra*.

But otherwise it is of Commons, Advowsons, and such like Appendants or Appurtenants; for if Tenant in Tail, or Husband in Right of his Wife, makes a Feoffment of a Manor, or of Part of it, with an Advowson appendant: The Advowson, at least after Presentment, shall pass as appendant to the Manor, or to Part of the Manor, and not to the Estate of the Land, which is discontinued by the Feoffment. So if a Disseisor, Abator, Intruder, or the Lord by Escheat, or the like, shall have these Things as annexed to the Estate of the Land in Privity, and Commons, Advowsons, and other Hereditaments that are annexed to the Possession of the Land. *Shep. Touch.* 502, 503.

(H) Of the Original and Antiquity of Uses.

USES began first when the Custom of Property began and was brought in, that one Man knew his own from another Man's, and then was to enjoy his own, and not to be deprived of it without Consent or Order of Law; for then he that had Land had two Things in him, a Possession of the Land, and Power to take the Profits

Profits of it, and those being to be distinguished, he might give the Freehold or Possession to another, and take the Profits himself; and they were the rather allowed by the Law for a Time as reasonable, because they gave a Man Power to dispose of his Land by Will, which otherwise he could not have done but in some special Cases by Custom of the Place. *Shep. Touch. 503.*

By *Manwood*, Justice: The Commencement of Uses has been as long as Mankind has been guided by Reason; and tho' no Mention is made of Uses in our antient Books, yet that is no Argument that Uses have been but of late Times. That Uses were not common, therefore were not at all, is *non sequitur*. 2 *Leon. Case 25.*

Harper, Justice, said, That Uses began about 18 *Ed. 2.* after which Time there was such a general Liking of them, that they were used a-new; but they did not come into common Practice before the Time of King *H. 6.* when the great Contention fell out betwixt the two Houses of *Tork* and *Lancaster*, at which Time Uses were in great Estimation for the Safety of Inheritances. 2 *Leon. Case 25.*

By *Dyer*, Chief Justice: As to the Beginning of Uses, the same was immediately after the Statute of Mortmain, at which Time all their Shifts then in Practice were found out, for which see the said *Stat. 7 Ed. 1. Stat. de Religiosis*. And in the *Stat. 15 R. 2. c. 5.* the Words *Beboof* and *Use* are used, which is the first Time they were so in our Law; and yet a long Time before that Statute, Uses had been in Practice. 2 *Leon. Case 25.*

By *Manwood*, Justice: As long as Wills have been, Trusts and Confidences have been; and also as long as Marriage has been; and refers to the Writ of *Causa Matrimonii prolocuti*, and the Statute of *Marlb. c. 6.* 2 *Leon. Case 25.*

But by *Harper*, Justice: Whereas it has been said, that an Use has been as long as any Marriage has been, and so conceived upon the Writ *de causa Matrimonii prolocuti*; the same is not any Reason, because in that Case there is not any Confidence or Trust; for if the Marriage does not take Effect, the Woman shall have her Writ *de causa Matrimonii prolocuti*. In Conveyances we are to respect two Things, the Form and Effect of them; and in all Cases where the Form and Effect cannot stand together, the Form shall be rejected, and the Effect shall stand. *Same Case.*

And by *Manwood*, *Littleton* says, That the *Cestuy que Use* shall be sworn upon Inquests, which was not enacted by any Statute, but practised by the Common Law. *Ibid.*

And that he himself had seen divers antient Deeds of Uses; and that in antient Time no Man would purchase Land to himself alone, but had two or three joint Feoffees with him; and he who was first named in the Deed was *Cestuy que Use*, altho' no Use was declared to him upon the Livery, and so the Use was known by the Occupation of the Lands. And then says, that the Reason why no Mention is made in our antient Books of Uses is, because Men were then of better Consciences than they are now; so that the Feoffees did not give Occasion to the Feoffors to bring *Subpœna's* in Chancery to compel them to perform the Trusts reposed in them. And before the Statute of *Westminster* the third, if a Man had made a Feoffment in Fee without declaring the Uses of it, it should have been to the Use of the Feoffee, because there is a sufficient Consideration between the Feoffor and Feoffee to raise an Use, (viz. the Seigniorie created by the Law between them): But now by the said Statute such Consideration is taken away, and then upon such Feoffment without Consideration or Declaration of Uses, it is to the Use of the Feoffor himself. *Same Case.*

(I) *Why Uses were invented, the Mischiefs thereof, and the Remedies by sundry Statutes.*

FEAR and Fraud were the Occasions of inventing Uses.

1. Fear in the Time of Troubles and Civil Wars, for saving Persons Estates from Forfeiture.

2. Fraud to defeat just Debts, lawful Actions, Wards, Escheats, Mortmain, &c. 1 *Co. 121. b. Popb. 73.*

Uses in Time were turned into Abuses, and the greatest Part of all the Lands in the Kingdom (especially in the Time of the Broil between the Houses of *Tork* and *Lancaster*) were put in Use, partly of Fraud and partly of Fear, which produced not a few Inconveniences.

The Stat. 27 H. 8. c. 10. of Uses, was made for remedying all Mischiefs and Abuses in Uses, which Act was divided into two general Branches, viz.

1. The Preamble, which expresse the Mischiefs.
2. The Body of the Act, which provides the Remedies. 1 Co. 123. b.

The Mischiefs in the Preamble are these:

1. Whereas by the Common Law, no Land or Tenement can pass but by Livery or Matter of Record, or Writing if it lies in Grant; now by divers and sundry Imaginations, subtil Inventions and Practices, by fraudulent Feoffments, Fines, Recoveries and Assurances, craftily made to secret Uses, Intents and Purposes.
2. By last Wills, sometimes by Parol, and sometimes by Signs, in great Extremity.
3. By these fraudulent Uses many Heirs have been unjustly disinherited.
4. The Lords have lost their Wards, Reliefs, and in Effect their Seigniories.
5. No Purchaser could be assured of his Estate.
6. Nor could any Man know against whom to bring his Action, or have his Execution.

7. Estates created by Law in Consideration of Marriage, as Tenancy in Dower and by Curtesy were defeated.

8. Perjuries upon Trials of secret Uses were committed, and daily increased.

9. The King had lost his Escheats for Attainders, Purchases of Aliens, &c.

10. The Lords had also lost their Escheats. 1 Co. 123. b.

These were the Mischiefs; then comes the Body of the Act, which provides that, Where any Person stands and is seised of any Lands, Tenements, &c. (Note; *This Statute extends to Persons seised, not possessed of any Lands, &c.*) to any Use, all and every such Person and Persons that have or shall hereafter have any such Use, &c. shall from henceforth stand and be seised, and adjudged in lawful Seisin, Estate and Possession, of and in the same Lands and Tenements, and of and in such Estates as they had in the Use; and that the Estate, Right and Possession that were in such Persons as were or hereafter shall be seised to the Use of any such Person or Persons, be from henceforth clearly deemed in *Cestuy que Use*, after such Quality, Manner and Form as they had in the Use.

This is the Remedy that the Makers of that Act have provided to salve all the Mischiefs aforesaid. 1 Co. 125. b.

By Harper, Justice: As to the making the Stat. 27 H. 8. c. 10. the Truth is, the King was displeased at the Loss of Wardships, and other Injuries done to him, for which Cause he complained to the Judges of the Defect of the Law in that Case, who thereupon shewed the King the Causes of those Injuries and Losses to him; and that if the Possession might be joined to the Use, all would go well, and all the Injuries, Wrongs and Losses which came to him by reason of Uses, Wills and secret Feoffments, would be avoided; for which Reason the King, in the 24th Year of his Reign, commanded his Council to frame a Bill for that Purpose, and present it to the House of Commons; but it was then rejected; and the King at that Time would have been contented, that the fourth Part of the Land only should descend; and from that Time the King staid further Proceedings in the said Cause till the 27 H. 8. at which Time it took Effect; and their Care was to pen the Statute so precisely that the whole Estate should be executed by it, so as it did utterly take away all from the Feoffees. 2 Leon. Case 25.

By the said Statute, the Use and Possession of Land at this Day is coupled and conjoined so that they cannot stand apart and divided, but he who has the one must have the other, and the one ensues the other as the Shadow does the Body; and therefore now upon Fines, Recoveries and Feoffments, the Estate settles as the Use and Intent of the Parties is declared by Word or Writing before the Act done; as for Example,

If a Writing be made between two or more, that one of them shall levy a Fine, make a Feoffment, or suffer a Recovery to the other, to the Use and Intent that one of them, or another Man, shall have it for Life, and after another in Tail, and after a third in Fee-simple; in this Case the Law settles the Estate according to the Use and Intent declared, so that now what Estate a Man has in the Use, the same he has in the Possession.

But for the more full Understanding the said Statute, and the Law at this Day, observe, That the Statute does not extend to all Manner of Uses, neither are all Uses executed and united to the Possession thereby; for

By

By such Act it plainly appears that every Use *in esse*, viz. in Possession, Reversion or Remainder, is executed by it.

But no contingent Use or Right is executed by the said Act until it comes *in esse*; for

To every Execution of an Use these four Things are requisite:

First, There ought to be a Person seised.

Secondly, There ought to be a *Cestuy que Use in esse*.

Thirdly, There ought to be an Use *in esse* in Possession, Reversion or Remainder.

Fourthly, The Estate out of which the Use arises ought to be vested in *Cestuy que Use*; for the Words are, that the Estate of such Person seised to the Use, shall be adjudged in *Cestuy que Use*. 1 Co. 126. a.

So that when these four, viz. 1. Seisin in the Feoffees; 2. *Cestuy que Use in rerum natura*; 3. Use *in esse*; and 4. That the Estate of the Feoffees vests in *Cestuy que Use*, then there is an Execution of the Use within this Statute; but if any one of these fail, there is no Execution of the Use within this Statute; and therefore it is agreed that this Statute does not execute any Use, but only Uses *in esse*, so that the Right of a present and a future or contingent Use are excluded until they come *in esse*, and then the Statute executes them also, if no Alteration be of the Estate of the Land before.

And if *Cestuy que Use* in Tail, with divers Uses in Remainder, had made a Feoffment, and died before the Statute, no Execution should have been of this Right of an Use until Entry by the Feoffees.

So if *Cestuy que Use* in Possession had made a Feoffment before the Statute, no Right of the Use in Possession or Remainder shall be executed by the Statute until the Regress by the Feoffees.

So if a Feoffment had been made before the Statute to the Use of the Feoffee for Life, and after to the Uses of others in Remainder, and the Feoffee had made a Feoffment in Fee to another; this Use shall not be re-continued, or the Re-possession of the Land executed unto it by this Statute; so that the Right of Uses *in esse*, and Uses in Contingency until they happen to be *in esse*, remain at the Common Law as they were before the Statute.

And therefore if the Estate of the Feoffees be in such Cases devested by Disseisin; or the King, or a Corporation, or an Alien, or a Person Attaint, &c. be infeoffed of the Land before the Use come *in esse*; or if the Land be aliened *bona fide* upon Consideration to one who has not Notice of the Use, this Use can never be executed until these Possessions be removed by lawful Entry or Action of the Feoffees; and if their Entry or Action be barred, the Use is gone for ever.

And therefore if *Cestuy que Use* in Tail, the Remainder in Tail restrained with a Clause of Perpetuity be disseised, no Use in Contingency can be executed by this Statute.

And if before the Statute a Feoffment had been made in Fee to the Use of J. S. for Life, and after to the Use of the right Heirs of J. N. and the Feoffees had been disseised, and then the Statute had been made, and after J. N. dies, and after his Death J. S. dies; this Use shall never be executed in the right Heir of J. N. 1 Co. 126, 136. Plow. 391. Dyer 58, 88, 330.

And so also if a Disseisin be after the Statute, and before the Death of J. N. no Possession shall be executed in the right Heir of J. N.

Also Uses that need no Execution by the Statute, as when a Man conveys Land to J. S. and his Heirs, to the Use of J. S. and his Heirs; this needs not the Help of this Statute.

Also Uses that are against the Rules of the Common Law shall not be executed by this Statute; and therefore,

If a Feoffment be made to the Use of A. for Life, and after to the Use of every Person that shall be his Heir one after another for Term of his Life: So if one make a Feoffment to the Use of another in Tail, with Remainders over, with a Proviso that neither of them shall discontinue or alien, &c. these Uses shall not be executed because the Limitations are wholly void; and in these Cases there is no Remedy in Chancery against the Feoffees.

So from all this it appears that some Uses are executed presently, as Uses *in esse* and some are executed by Matter *ex post facto*, if they be according to Law, and come *in esse* in due Time; but if they be Uses invented and limited in a new Man

ner, and not according to the antient Common Law, they are altogether void, and extinguished and abolished by this Statute.

And where Lands are conveyed to others in Trust after this or the like Manner, viz. that the Feoffees shall take the Profits, and deliver them to the Feoffor and his Heirs, &c. or that the Feoffees shall convey it to the Heir of the Feoffor at his Age of twenty-one Years.

And where Lands are conveyed to certain Uses expressed and declared, and there be other secret Uses and Intents agreed upon between the Parties; these Uses or Trusts are not within this Statute, neither will the Statute execute them, but they remain as they were before the Statute, determinable in Chancery: Also Leases for Years of Lands in Use that have their Being before, and are granted over in Use, are not executed by this Statute. 1 Co. 138.

And therefore if a Lessee for Years of Land grants or assigns over his Estate to A. and B. and their Assigns, to the Use of the Grantor and his Wife for the Term of their Lives; this Use or Trust is out of the Statute, and not executed thereby; and therefore in this Case all the Estate is in A. and B. and the Grantor has nothing but an Use, for which he has his Remedy in Chancery.

So if one be seised of Land in Fee, and he bargains and sells it, or makes a Lease of it to another in Trust, and for the Benefit of a third Person; this is but a Chancery Trust, &c. in this third Person, as was held clearly, M. 8 Car. B. R.

And yet if a Feoffment be made to the Use of J. S. and Assigns for the Term of twenty Years; this Term of Years shall be executed by the Statute.

And so in all such like Cases and Questions of Trusts and Uses that are not within the Statute of Uses, the Law is now as it was before the same Statute was made, and all those Matters are determinable in Chancery; for as the Questions of Uses and Trusts that are within the Statute are to be decided and ruled by the Judges of the Common Law, so are all other Questions of Uses and Trusts that are out of the Statute to be ruled and decided by the Judges of the Chancery. Dyer 369, 356. Comp. Jur. 65.

(K) *What shall be said a good Use of Land, or not; and when and where such an Use shall be raised, altered or created, or not.*

First, *In Respect of the Manner of raising it, and the several Ways whereby Uses may be raised.*

TO make a good Use, or to make an Use to rise, especially such an Use as may be within the Statute, Respect must be had to divers Things:

1. *To the Ways or Means of creating and raising of Uses*, wherein it is to be observed, that altho' the Quality of the Uses be changed in most Cases by the Statute of Uses, yet Uses, and Utes within this Statute, are and may be raised as they might before the Statute, either by Transmutation of the Estate, as by Fine, Feoffment, Common Recovery, &c. or out of the Estate of the Owner of the Land, as by Bargain and Sale by Deed indented and inrolled, or by Covenant to stand seised to Uses upon good Consideration: And therefore a Fine, Feoffment or Recovery, may be had of Land, to the Use and Intent that either of the Parties thereunto, or others, shall have it for any Time or Estate; and by this Means what Uses, and consequently what Estates a Man will may be raised and created: And in these Cases the Conusor, Feoffor or Recoverer, may appoint the Use of the same Fine, Feoffment or Recovery, to whom he will, without any Respect of Marriage, Money, Kindred, or the like; for in this Case his Will guides the Equity of the Estate. Co. Lit. 271. Plow. 301.

Or if a Man makes a Lease to A. for Life, to the Use of B. for Life; this is a good Use and Estate in B. during the Life of A. Dyer 186.

Or if a Man by Bargain and Sale for good Consideration sells his Land to another; whereby the Use will rise according to the Estate bargained and sold unto the Bargainee; but in this Case if it be an Estate of Freehold, as of Fee-simple, Fee-tail, or for Life, that is sold, the Bargain and Sale must be made by Deed indented and inrolled within six Months after, in some of the Courts at Westminster, or in the Sessions Rolls in the Shire where the Land lieth, except it be in Cities and Corporate Towns where

where they use to inrol Deeds, otherwise no Use will arise by it; but if it be an Estate for Years only that is sold, there the Use will arise well enough without any such Matter.

Or if a Man seised of Land in Fee covenants to stand seised of it to the Use of his Wife, Children, Brethren, or other Kindred, for Life, in Fee-simple or Fee-tail; or if one seised of Land in Fee-simple covenants to stand seised of the Use of a Woman he is to marry; or to the Use of a Woman, his Son, or other Kinsman is to marry; hereby the Uses, and consequently the Estates, will rise accordingly; and in these Cases there is no need it should be by Deed indented, &c. or that the Deed be inrolled, for Uses may be raised by Deed Poll as well as by Deed indented. 6 Co. 68. *Dyer* 155. 2 Co. 35, 36. 7 Co. 40. 8 Co. 93, 94. 4 Co. 17.

Also Uses may be created (as some hold) by Word or Parol Agreement as well as by Deed or Writing; for it is said it has been adjudged, that if a Man says to his Son and a Woman that his Son is to marry, that in Consideration of the same Marriage they shall have the Land to them two in Tail; that hereby a good Estate-tail will arise after the Marriage.

And that where one by Word without Deed grants Land to his Son and to his Wife in Tail, in Consideration of their Marriage; that it was agreed by all the Judges that the Use did rise upon this Agreement. *Crompt. Jur.* 60, 61. *Plow.* 301, 308. and see the better Opinions of the Judges in *Corbin's Case*, 38 *Eliz.*

Howsoever it is more safe in these Cases to do it by Deed and in Writing; for *Dyer* 296. *Plow.* 12. seems to oppose this; and if a Man makes a Feoffment, levies a Fine, or suffers a Recovery to the Use of his last Will, or to the Intent to perform his last Will, or to the Use of such Person and Persons, and of Estate and Estates as he shall limit by his last Will, and then afterwards by his last Will declares the Uses; these are good Uses, and this is a good way of raising Uses.

So if a Man devises his Land by Will to *J. S.* and his Heirs to the Use of *J. D.* and his Heirs; it seems that the Use will rise to *J. D.* and his Heirs by this Means.

And if a Man by a verbal Agreement, in Consideration of Money, or the like, sells his Land to another, or agrees and promises that the Bargainee shall have it for any Time howsoever; that hereby no Use nor Estate will arise (if it be a Freehold that is sold) within the Statute, because it is not by Deed indented, &c. yet it seems a good Use will arise at the Common Law, and that the Bargainee shall have Relief in Equity for his Purchase. *Lit. §.* 462, 463. 6 Co. 17. *Vide Stat.* 27 H. 8. of Uses, ante. *Fitz. Devise* 22. *Dyer* 229.

An Use will not rise as an Use upon an Use at the Common Law, but it may be a Trust in Equity. *Q. 1 Chan. Ca.* 114.

If Lands are limited by Will to *A.* in Trust for a Feme Covert, and that *A.* shall receive the Rents, and pay and dispose of them to the Feme, or to such Persons as she shall direct and appoint, without the intermeddling of her Husband, &c. This is a Trust only, and not an Use executed by the Statute. 1 *Vern.* 415.

There are three Ways of creating an Use or Trust remaining at Common Law, notwithstanding the *Stat.* 27 H. 8. which Ways are subject only to the Controul and Direction of the Courts of Equity.

First, Where a Man seised in Fee raises a Term of Years, and limits it in Trust for *A.* &c. for this the Statute cannot execute, the Termor not being seised.

Secondly, Where Lands are limited to the Use of *A.* in Trust to permit *B.* to receive the Rents and Profits; for the Statute can only execute the first Use.

Thirdly, Where Lands are limited to Trustees to receive and pay over the Rents and Profits to such and such Persons, for here the Lands must remain in them to answer these Purposes. *Abr. Ca. Eq.* 383.

Secondly, *In Respect of the Persons trusted, and what Persons may not be seised to the Use of another, but to their own Use.*

The second Thing whereunto Respect must be had, is to the Persons trusted, or to him to whom the Conveyance is made; for to every good Use there must be a Person seised to Use, and he must be a Person capable of such a Seisin.

And as to this observe, that any sole Person who may make an Estate to himself may make an Estate to other Uses.

Also a Man may be seised of his own Land to other Uses, as in the Case of *Covenant to stand seised to Uses.* 1 Co. 122, 127, 135. *Plow.* 238. *Dyer* 8, 283. B2

But the King, or any Body Corporate, Alien born, or Person Attaint, cannot be seised to other Uses, no more by an original Feoffment to Use, than where they come by the Land in Use at the second Hand, in which Case (as hath been shewed) neither such Persons, nor Disseisors, Abators or Intruders, or Lord of Villains, or Escheats, shall be seised to other Uses; but in all these Cases the Uses are void, and the Parties shall hold the Land to their own Uses, or to the Uses of the Feoffors, &c. and not to the Use of *Cestuy que Use*. Resolved in Dr. *Atkin's Case* 44. C. B.

And a Bargainee of Land for valuable Consideration cannot be seised of the Land to any other Use but his own. *Dyer* 155.

Thirdly, *In Respect of the Persons for whom the Trust is, or the Cestuy que Use.*

The third Thing to be respected is the *Cestuy que Use*; for to every good Use, as there must be a Person seised to Use, so there must be a Person to whose Use he is seised, and he must be capable also. 1 Co. 136.

And as to this observe, that any Man that is capable of an Estate directly or immediately to himself, is capable of the same Estate by way of Use: But if the Use be limited to a Corporation, there must be a Licence had; otherwise it will be an Alienation in Mortmain. *Bro. Mortmain* 37.

And if future Uses upon Contingencies be limited to such Persons as are not in Being; these Uses howsoever they are good at the Common Law, yet they are not good within the Statute, neither does the Statute execute them at all until they come in Possession.

And if a Feoffment be made to J. S. and his Heirs to the Use of the Parishioners of Dale; this Use is void, for they are incapable by this Name, and it shall be to the Use of Feoffor. 12 H. 7. 27. 49 E. 3. 4.

Fourthly, *In Respect of the Estate and Possession of him that creates the Use.*

The fourth Thing to be regarded, is the Estate of him that raises the Use in the Land whereof the Use is raised; for howsoever the Tenant in Fee-simple of Land may create what Uses he will in Fee for Life or Years upon it, and such Uses are good; and the Tenants in Tail or for Life may perhaps grant their Land for their own Lives to the Use of a third Person.

Yet if a Tenant in Tail for good Consideration covenants to stand seised to the Use of himself for Life, and after to the Use of his Eldest Son in Tail; no Use will arise by this Covenant.

So if Tenant in Tail of an Advowson in Gross grants it by Deed to one and his Heirs to the Use of himself for Life, and after to the Use of another in Fee; this Grant is void by the Death of the Tenant in Tail. *Hil. 38 Eliz. C. B.* 2 Co. 52. *Plaf. 13 Jac. C. B. Say v. Smith.*

And if such a Tenant in Tail bargains and sells his Land by Deed indented and inrolled; hereby the Bargainee has an Estate descendible to his Heirs, but determinable upon the Death of the Tenant in Tail.

And if such a Tenant in Tail bargains and sells his Land by Deed indented and inrolled; hereby the Bargainee has an Estate descendible to his Heirs, but determinable upon the Death of the Tenant in Tail. 10 Co. 96.

And if one covenants by Indenture to stand seised to the Use of B. of Whiteacre, which he has not then, but he afterwards purchases it; by this no Use will arise. *Telwerton's Case*, 37 Eliz. B. R.

And if one who has but a Term of Years grants it to J. S. to the Use of himself for Life, &c. This is no good Use within the Statute, but a Chancery Trust only. *Dyer* 369.

Fifthly, *In Respect of the Estate and Possession of him that takes by the Conveyance.*

The fifth Thing to be respected, is the Estate of him that takes by the Conveyance out of which the Uses are derived; for

Where a Man grants in Fee-simple to another and his Heirs, he may limit what Uses he will upon this Estate.

And

And if a Man makes an Estate for Life to another, he may limit an Use thereupon; yet if a Man makes a Gift in Tail to another, he can limit no Use thereupon: And therefore if one grants his Land to *J. S.* and the Heirs of his Body to the Use of *J. S.* and his Heirs in Fee; this Limitation of Use is void, and *J. S.* has hereby an Estate in Tail. *Vide 2 Co. 78. Co. Lit. 19.*

And if a Feoffment be made to *J. S.* to have and to hold to him and the Heirs of his Body, to the Use of him, his Heirs and Assigns for ever; this Use is void. *Trin. 14 Jac. B. R. Couper and Franklin's Case.*

And where one bargains and sells Land for Money, (in which Case the Law makes an express Use) no other Use can be appointed.

And therefore if *A.* for Money bargains and sells Land to *B.* and his Heirs, to the Use of *A.* for Life, and after of *B.* in Tail, and after of *A.* in Fee; all these Uses are void, for an Use cannot rise out of an Use.

So if *A.* makes a Lease to *B.* for Years, rendring Rent, to have and to hold to the Use of the Lessor; this Use is void, as being also against Reason. *Dyer 169. Cromp. Jur. 53. Lit. §. 284.*

And if a Feoffee to Use before the Statute of Uses, had bargained and sold the Land to one who had Notice of the former Use; no Use had been made hereby, for there might not be two Uses in Being of the same Land at one Time.

And if *A.* infeoffs *B.* to the Use of *C.* and his Heirs, with Proviso that if *D.* pays to *C.* 100 *l.* that *C.* and his Heirs shall stand seised to the Use of *D.* and his Heirs; this last Use is void, for the Use must arise out of the Estate of the Feoffee, and not out of the Estate of the *Cestuy que Use.* *Dyer 255. 1 Co. 136, 137.*

A Rent shall (by Virtue of the Statute) arise out of the Estate of *Cestuy que Use*, upon a Recovery, which was to arise out of the Estate of the Recoveror and his Possession; because by the Intention of the Parties the *Cestuy que Use* was to pay the Rent. *Vaugh. 52.*

An Use cannot arise out of an Use, or a Way or a Common newly created. *Carter 46. Cro. Jac. 189, 190. pl. 13. Poph. 81.*

Where an Estate in Use is to begin on a Contingent precedent, which is impossible, or against Law, the Use shall never rise. *1 Leon. 199.*

Sixthly, *In Respect of the Cause or Consideration of an Use, and what shall be a sufficient Consideration to raise or alter an Use, or not.*

The sixth Thing whereunto Respect must be had, is the *Cause or Consideration*; for howsoever in Cases where Uses pass by the way of Transmutation of Possession, as by *Fine, Feoffment or Recovery*, there the Consideration is not at all material; for he that makes the Estate may appoint the Use to whom he will, without any Respect to Marriage, Kindred, Money, or other Thing; for in this Case his own Will and Consideration guides the Use and Equity of the Estate; yet in *Bargains*, and *Sales* and *Covenants to stand seised to Uses*, it is otherwise; for there a *Consideration* is so necessary that nothing will pass, neither will any Use rise without it, *i. e.* some Matter that may be a Cause or Occasion meritorious, which amounts to a mutual Recompence in Deed or in Law; which must be expressed or implied in the Deed whereby the Use is created, or else supplied by Averment and Proof.

For howsoever in this Case an Averment shall not be allowed and taken against a Deed, that there was no Consideration given when there is an express Consideration upon the Deed; yet when the Deed expresseth no Consideration or Faith (for divers good Considerations) or the like, there an Averment of a good Consideration given shall be received, for this is an Averment that may stand with the Deed, and without Consideration Inrolment will not help.

And therefore if one bargains and sells his Land to another by Deed indented and inrolled without any Consideration, it seems no Use will rise by this to the Bargain. *1 Co. 176. 11 Co. 25. Dyer 146, 169, 312. Cromp. Jur. 62.*

So if one (for divers good Causes and Considerations, or for divers great and valuable Considerations) bargains and sells his Land to another, or covenants to stand seised of his Land to the Use of another that is not of his Kindred; no Use will rise by this, unless it be proved that Money, or something else, was given for it. *41 El. adjudged.*

But if a Man by Deed, in Consideration of Money, as in Consideration of the Sum of 100*l.* to him paid, or in Consideration of a competent Sum of Money to him paid, or otherwise promised to be paid, or in Consideration of other Land, or of giving of Counsel, or the like, *bargains and sells*, or by such like Words *grants* his Land to another in Fee-simple, Fee-tail, for Life or Years; in these Cases the Use will arise to the Bargain well enough. *Plow.* 301. *Bro. Fait Inrol.* 9. *Doct. & Stud.* 99. *Crompt. Jur.* 60, 61. *Dyer* 90.

And therefore if I covenant with *B.* that when he infeoffs me of *Whiteacre*, I will stand seised of *Blackacre* to the Use of him and his Heirs, and he infeoffs me accordingly; in this Case the Use of *Blackacre* will rise to *B.* and he and his Heirs shall have it according to the Agreement. *Crompt. Jur.* 61.

So if I agree with my Lessee for Years, that if he pays me 100*l.* within his Term, that I will stand seised of the Land to the Use of him and his Heirs, and he pays me the 100*l.* accordingly; in this Case the Use will rise, and he and his Heirs shall have it according to the Agreement.

So if I covenant that my Son shall marry the Daughter of *A.* and *A.* promises to give me 100*l.* for the Marriage-Portion, and I covenant that if the same Marriage do not take Effect, I and my Heirs will stand seised of the Land to the Use of *A.* and his Heirs until the 100*l.* be paid; in this Case a good Use will rise of the Land accordingly, if the Marriage do not take Effect; but in all these and such like Cases the Covenant must be by Deed indented, and it must be inrolled, otherwise no Use will arise. *Bro. Exposition of Words* 44.

And when the Deed is inrolled, it shall take Effect as from the Beginning by Relation to avoid all intervenient Estates and Charges whatsoever.

And in like Manner it is, if one for no Cause, or for no Consideration, as [because he is of his antient Acquaintance, or because there has been intire Love or great Familiarity between them, or because he has been his Chamber-fellow, School-fellow, or Fellow-servant, or because he has done him good Service, or because he was his Master and taught him, or to the End that he may pay his Debts and Legacies, and discharge his funeral Expences, or for divers good Causes and Considerations]; if one for any of these, or any such like Cause and Consideration, covenants with another that he will stand seised of his Land to the Use of that other and his Heirs, or that he and his Heirs shall have the Land, &c. by this Covenant whether it be inrolled or not, no Use at all will rise. *Plow.* 302. 21 *H.* 7. 20.

So if one covenants to stand seised to the Use of *J. S.* (who is a Bastard Son) and his Heirs, no Use will arise thereby; and yet perhaps upon such a Covenant as this, whereupon no Use or Estate arises, an Action of Covenant may lie. *Dyer* 374.

But if one [in Consideration of Nature, Kindred, Blood or Marriage with one's self, or any of his Blood, Payment of Debts, or for the like Cause] or without any such express Consideration at all, covenants to stand seised to the Use of himself, his Wife, Children, Brothers, Sisters or Cousins, or their Wives; these are good Considerations, and the Uses and Estates thereupon thus raised and made are good.

And therefore if one covenants by his Deed, without Expression of any Consideration, to stand seised of his Land to the Use of himself for Life, and after of his Wife for Life, and after of his Child in Tail or for Life, and after of his Brother in Tail or for Life, or in Fee, or in any such like Manner; these Uses will rise, and the Estates will be well made hereby accordingly. 7 *Co.* 11. 10 *Co.* 143. 1 *Co.* 83, 134. *Plow.* 801. *Lit.* §. 284.

So if I agree with another, that if he marries my Daughter, that from the Time of the Marriage they shall have my Land to them and their Heirs; in this Case, and by this Agreement, if he marries my Daughter, they will have my Land according to the Agreement.

So if I being about to marry with a Woman, covenant with *J. S.* to stand seised of my Land to the Use of myself for Life, and after to the Use of the Woman I am to marry, for her Life, and after to the Use of the Heirs of my Body begotten on her; these are good Uses and Estates that are made by this Covenant. *Plow.* 301. *Bro. Feoffment at Uses* 54.

But here by the way, this Difference must be observed where a Man covenants in Consideration of a Marriage to be had, to stand seised to Use, and the Marriage doth not take Effect, there no Use shall arise. *Cur.* *T.* 10 *Car.* *B. R.* *Hoskin's Case.*

So also if the Parties disagree at their Age of Consent: And so was it held in the *Lord Herbert's Case.*

But where one Covenants to make a *Feoffment*, or levy a *Fine* to such Uses, and the *Feoffment* is made, or *Fine* levied accordingly; there notwithstanding the Marriage does not take Effect, yet the Use shall arise, for there he is in by the *Fine* or *Feoffment*, in which Case there needs no Consideration.

And therefore if *A.* covenants with *B.* that in Consideration *C.* is his Kinsman, and in Consideration of a Marriage to be had between *C.* and *E.* he will make a *Feoffment* and other Assurances to the Use of himself for Life, the Remainder to *C.* and *E.* and the Heirs of their two Bodies, and after Assurances are made accordingly by *Fine* or *Feoffment*, but they do not intermarry, but marry others; in this Case notwithstanding *E.* shall have a Moiety of the Land.

So if I covenant (in Consideration of the Love I bear to my Wife) to stand seised to the Use of her and her Heirs of my Body upon her begotten, and after to the Use of my Brother; hereby the Use will rise to my Brother also altho' he be not within the express Consideration.

So if one covenants with his two Sons, for the Love he bears to them, to stand seised of his Land to the Use of himself for Life, and after his Wife for Life, and after of his two Sons in Tail, one after another; in this Case the Consideration is sufficient to raise the Use to the Husband and Wife also. 7 Co. 40. 11 Co. 24. Dyer 374.

So if one (in Consideration of the Love he bears to his Brother) covenants to stand seised to the Use of his Brother, and the Wife of his Brother for Life, or in Tail; in this Case the Consideration is sufficient to raise the Uses to them both.

So if I covenant (in Consideration of the Marriage of my Son with the Daughter of another) to stand seised to the Use of myself for Life, and after of my Son and his Wife in Tail; these are good Uses, and will rise accordingly. Plow. 307.

If I covenant with *J. S.* to stand seised to the Use of him, his Executors, &c. (he being none of my Kindred) for twenty Years, and after to the Use of my Son in Tail; in this Case the Use will not rise to *J. S.* but it will rise to my Son well enough.

For altho' the Consideration of Money given by one may be a Consideration to all the Estates, yet the Consideration of Blood, &c. is singular, and will raise the Use of that only to which it goes.

But if I covenant with *B.* in Consideration of the Marriage of my Son with the Daughter of *B.* to stand seised to the Use of *R.* (a Stranger) for Life, and after to the Use of my Son and his Wife in Tail; in this Case the Use shall rise to *R.* altho' he be a Stranger, and that for the Supportance of the Remainder, which cannot be without a particular Estate; and in all these and such like Cases no Inrolment of the Deed is necessary. Plow. 307. Dyer 174.

If I (in Consideration of 10*l.* given to me by my Son) covenant with him to stand seised of Land to the Use of him and his Heirs; in this Case no Use will rise without Inrolment by the implied Consideration, because there is an express Consideration, *Et expressum facit cessare tacitum.* 11 Co. 24, 25. 7 Co. 40.

And yet if I covenant, that in Consideration that *J. S.* is my Son, and hath paid me 10*l.* that I will stand seised of Land to the Use of him and his Heirs; in this Case the Use will rise without Inrolment.

And if I covenant (in Consideration of 100*l.* and of a Marriage) to stand seised to the Use of myself for Life, and after of my Son in Tail; hereby the Use is raised, and the Possession charged without Inrolment. *Maurel's Case*, T. 3 Jac. B. R. Plow. 4. Bro. *Feoffment al' Uses* 15.

So also where a *Feoffment* is made, *Fine* levied, or *Recovery* suffered, and no Use declared thereupon, and the same is without any Consideration of *Fine* or *Rent*; by this the Use is not changed, for it results to the *Feoffor*, *Conusor* and *Recoveree*; and he hath the Estate as he had it before; but if in these and such like Cases there be but a Penny or a Pennyworth of Consideration given, or any *Rent* reserved upon the *Feoffment*, the Use will rise well enough to the *Feoffee*, &c.

And if any Tenure be created, as where a Gift in Tail, Lease for Life or Years is made; in these Cases, altho' there be no Consideration given, yet the Use will rise well enough to the Donee or Lessee, and especially if any *Rent* be reserved, for that is a Kind of Consideration: But if a Lessee for Years grants over his Term to another without any Consideration at all, it seems by this no Use at all will rise to the Grantee, and therefore that the Grantee shall hold it to the Use of the Grantor.

sed Quare. 1 Co. 24. Doct. & Stud. 97, 99, 101.

If Uses are limited without Consideration, they are void; and the Estate returns to the Covenantor again, or rather was never out of him. 1 Vent. Pibus and Midford. 1 Mod. 159, 160, &c.

There are no Considerations at this Day to raise Uses upon Covenants but *natural Love and Affection*, which is for *Advancement of Blood*, or Consideration of *Marriage*, which is joining of Blood and Marriage together: Other Considerations, as *Money* for Land, or *Land* for Land, tho' the Words are *stand seised to Uses*, yet they are *Bargains and Sales*, and without Inrolment they will raise no Use. Carter 139. Vide 1 Leon. 138 to 201.

If I covenant that *A.* a Stranger shall have my Land to him and his Heirs to pay my Debts and Legacies; the same is by way of Bargain and Sale, and nothing passes without Inrolment. 1 Leon. 201.

Seventhly, *In Respect of the Manner and Frame of the Words used in raising of Uses, and what Manner of Uses may be made or not.*

The seventh Thing whereunto Respect is to be had, is the Manner and Form of Words used in the making and raising of Uses, wherein there is much Regard to the Mind and Intention of Parties: For

If one covenants in Consideration of 20 l. paid him by *J. S.* to *stand seised* of Land to the Use of *J. S.* and his Heirs; or if one covenants that *J. S.* and his Heirs shall have his Land; if this Deed be inrolled, this is a good *Bargain and Sale* to raise the Use, and will do it as well as when it is made by the Words *bargain and sell*. 8 Co. 94.

So if one for good Consideration, by the Words *Demise* and *Grant*, makes a Lease of his Land for a Term of Years; hereby the Use will rise to the Lessee as well as if the Lease were made by the Words *bargain and sell*, & sic de similibus.

And yet if one by the Words *bargain and sell*, conveys his Land to his Son, no Use will arise by this, except there be Money paid, and the Deed be inrolled.

And if one in Consideration of Money grants his Land to his Son, or any other, by the Word *infeoff*, no Use will rise by this unless Livery of Seisin be made thereupon, because the Intent of the Parties in these Cases appear to be to pass it in another Manner.

And if in the last Case Livery of Seisin be made, then the Use shall be guided by Law, that is, if nothing be given, it shall be to the Use of the Feoffee, and not amount to a Limitation of Use to the Son. *Wards v. Lambert*, C. B. Pas. 37 Eliz. *Stile's Case*. Vide 2 Co. Rowland Hayward's Case.

If one covenants with his Son that his Land shall remain, or that his Land shall descend to him; this is a good Covenant to raise the Use according to the Limitation.

And yet if one covenants with his Son upon his Marriage that his Land shall remain, revert or descend to his Son in Fee, or in Fee-tail; by this no Use will be raised, because it is so incertain; but perhaps this may amount to a Covenant, whereupon the Son may have an Action of Covenant.

If I covenant for me and my Heirs, that I and my Heirs, and all others that are seised, shall be thereof seised to the Use of, &c. this is a good Covenant to raise the Use, altho' it be in Words of the future Tense. 21 H. 7. 18. *Plow.* 308, 301. *Bro. Feoffment ap' Use* 16.

If I covenant with my Eldest Son, and Strangers, to convey my Land to the same Strangers, to the Use of myself for Life, and after of my Son in Tail, &c. and I grant by the Deed, that the said Persons seised of the said Land shall be from thence seised to the said Uses, and no other Use, and no other Conveyance is made; it seems this is sufficient to raise the Use.

And yet if I be seised of Land in Fee, and covenant with *J. S.* that *A. B.* and *C. D.* and their Heirs, shall stand and be seised of this Land to the Use of, &c. it seems this is not a good Covenant to raise the Uses. *Dyer* 874.

If a Feoffment or other Conveyance be made to the Use of the Feoffor and the Heirs of his Body, on the Body of *M.* the Wife of *S. T.* and for Default of such Issue, to the Use of him and the Heirs of his Body of *S.* the now Wife of *W. K.* and for Default of such Issue, then to the Use and Performance of his last Will for ten Years immediately after his Death, and after the Term ended, to the Use of the Feoffee and their Heirs during the Life of *W.* (Eldest Son of the Feoffor) and after his Death, to the Use of the first Issue Male of the Body of the Feoffor lawfully begotten, and the Heirs of the Body of such first Issue Male; and for Default of such first

first Issue Male, to the second Issue Male, &c. (in the same Manner) these are good Limitations of Uses. 1 Co. 120.

So if an Use be limited to J. S. for Life without Impeachment of Waste, and after to the Use of B. and C. their Executors and Administrators, for the Term of twenty Years, and after to the Use of C. and the Heirs Male of his Body, &c. these are good Uses. 1 Co. 90.

So if an Use be limited after this Manner, viz. to the Use of a Man's last Will and Testament; or to the Use of such Person or Persons, and of such Estate and Estates as he shall limit and appoint by his last Will and Testament; or to the Use of such Person or Persons, or to such Uses and Purposes as he shall by any Writing under his Hand and Seal declare and appoint; these are good Limitations. 6 Co. 18. Lit. §. 462, 463.

If I covenant with another in Consideration of Blood, &c. that I will stand seised of my Land to the Use of such of my Sons, or such of my Cousins, as the Covenantor shall name; in this Case, after a Nomination made, the Use will rise well enough.

But if I (for and in Consideration of 10 l. or the like good Consideration) covenant to stand seised of Land to the Use of such Persons as the Covenantor shall name; in this Case, altho' the Covenantor nominates some of my Cousins, or Blood, yet no Use will rise by this for the Incertainty of it.

If a Feoffment or other Conveyance be to the Use of J. S. and his Heirs, provided that if the Feoffor pays 10 l. at such a Day, that then it shall be to the Use of the Feoffor and his Heirs; this is a good Limitation, and the Use will rise accordingly. 1 Co. 176.

An Use may be limited to a Woman *durante viduitate sua*, and this is good. 4 Co. 3.

If a Man be seised of two Manors, and covenants to stand seised of the same to the Uses following, viz. of the one to the Use of the Covenantor for his Life, and after to the Use of his Wife for Life, and after to the Use of his Eldest Son in Tail, &c. and for the other Manor, to the Use of the second Son in Tail, &c. these are good Limitations, and the Uses will rise accordingly. 11 Co. 23.

If a Man seised of Land in Fee, agrees with another that a *Fine* shall be levied of it, and that the same shall be to the Uses following, viz. that J. S. (the Conusor) shall have one yearly Rent of 50 l. during his Life, to be issuing out of the same Land; and as touching the Land charged with the Rent, &c. to the Use of J. D. (the Conusee) until Default of Payment of the said yearly Rent, and then to the Use of J. S. and his Heirs for ever; this is a good Limitation, and the Use will rise accordingly; *Et sic de similibus*. 2 Co. 69, 70.

If a Feoffment be made by J. S. to the Uses in certain Indentures *Tripartite* of the same Date, and therein is declared that it shall be to the Use of A. for Life without Impeachment of Waste, and after to the Use of such Farmers or Tenants to whom he shall demise any Part of the Premises for Life or Lives, or for any Term of Years, as in any such Demise shall be limited and appointed, and after to the Use of the Performance of the last Will of the said L. and to the Use of such Person or Persons severally to whom the said L. by his last Will and Testament shall appoint any Estate, and after to the Use of, &c. these are good Uses, and the Estates shall rise accordingly. 10 Co. 78.

An Use may be limited upon Condition, and the Condition may be annexed to one of the Uses, and not unto another. 4 Co. 24.

If Lands be conveyed to J. S. and the Heirs of his Body, to the Use of J. S. and his Heirs, or to the Use of a Stranger and his Heirs; this Use will not rise in this Manner.

And yet if Lands be conveyed to J. S. and his Heirs, to the Use of him and the Heirs Male of his Body, and after to the Use of a Stranger and his Heirs; it seems this is a good Limitation. Co. Lit. 19.

If one grants Lands by Deed to Husband and Wife, to have and to hold to the Use of the Husband and Wife, and of the Heirs of their two Bodies; this is a good Estate-tail by this Limitation, altho' he does not say *Habendum* to them and their Heirs, &c. but *Habendum* to their Uses; but it would be otherwise if the Uses were limited to a Stranger in this Manner. Adjudged H. 6 Car. B. R.

If Lands be conveyed by J. S. to J. D. to the Use of J. S. or to the Use of his Wife for Life, or to the Use of any other for Life, the Remainder to another in Tail

Tail or for Life, the Remainder to a third, his Executors, &c. for six Months, and after the six Months ended, to the Use of a fourth and his Heirs; these are good Limitations, and the Estates will rise accordingly. *Dyer* 314.

If an Use be limited to the Conusee of a *Fine*, or a Recoveror in a *Recovery* until he makes a Lease for forty Years, and after to the Use of the Recoveerees or Conufors and their Heirs; this is a good Limitation, and the Use will rise accordingly. *Dyer* 290.

Contingent Uses, or Uses *in posse*, may be created as well as Uses *in esse*; and therefore if Lands be conveyed to the Use of a Man and the Wife he shall afterwards marry, or to the Use of his first, second or third Wife, or to the Use of *J. S.* for Life, and after to the Use of the right Heirs of *J. D.* and *J. D.* is then living; or to the Use of *J. S.* for Life, and after to the Use of him that shall be his first Heir Male, and the Heirs of the Body of such Heir Male, &c. all these and such like are good Uses; but they are Uses at the Common Law still, and are not executed by the Statute until they come *in esse*. 1 Co. 135. in *Chudleigh's Case*.

Eighthly, *In Respect of the Nature and Quality of the Use.*

The last Thing whereunto Respect is to be had, is the Nature and Quality of the Use.

And herein observe, that a Man may at this Day by Act executed in his Life-time, or by his last Will and Testament at his Death, give his Lands, Tenements or Hereditaments to any Person or Persons *not Corporate*, and their Heirs, for any *Religious, Charitable or Civil Use*, as well as for any private Use.

And therefore a Man may so dispose of his Lands for the Finding of a *Preacher*, Erecting or Maintenance of a *School*, Relief and Comfort of maimed *Soldiers*, Sustainance of *poor People*, Reparations of *Churches, Highways, Bridges*, discharging of the *poor Inhabitants* of a Village of the common Charges, to make a Stock for *poor Labourers* in Husbandry, and *poor Apprentices*, and for the *Marriage of poor Virgins*, or other such like Uses; and these Uses are not prohibited by any Statute.

And it is good Policy upon every such *Feoffment* or Estate to reserve to the Feoffor and his Heirs some small Rent, or to set down some small Consideration.

But these Uses are not such Uses as are executed by the Statute of Uses, neither are they to be resembled to the Uses aforesaid; for in these Cases if there be any Misemployment of the Lands, or Breach of the Trust by the Parties trusted, Redress is to be had by the Lord Chancellor by a special Course of Proceeding: For which see the Statutes of 39 *Eliz. chap. 6.* 43 *Eliz. chap. 9.* 7 *Jac. chap. 3.* 1 Co. 26. 8 Co. 131. 4 Co. 113.

Dr. Downham having given several Lands to charitable Uses, for the Maintenance of a Master and Usher of a *Free-School*, &c. and they being incorporated, in Consideration of a small Fine, and Surrender of a former Lease, granted a long Term of Years in the Lands to *W. R.* at a great Undervalue: This was found by Inquisition, upon a *Commission of charitable Uses*; whereupon the Lease was set aside, and the Lessee decreed to deliver up the Possession, and pay the Arrears of Rent according to the full Value. *Vern.* 415.

No Agreement of Parishioners, where there are *Parochial Charities* given to certain Uses, can alter or divert them to other Uses; for if they might change and apply the Charities as they thought fit, it would be a great Step towards destroying all Charities. A Corporation for a Charity are but Trustees, and may improve the same, but cannot do any Thing to the Prejudice thereof, or in Breach of the Rules of the Pounder. 1 *Vern.* 42, 44. 2 *Vern.* 412.

Money given to a *Parish* generally, without saying to what Use, was decreed to the use of the Parish, on the Minister, Churchwardens and Overseers of the Poor exhibiting a Bill in Chancery, and suggesting that the Testator intended it for the benefit of the Poor. It was objected against this Decree, that the Devise was void, there being no Use limited touching the Legacy, whether it was for the Poor, or for the Repair of the Church or Highways, &c. 1 *Chan. Ca.* 134, 135. *Vide Abr. Ca. Eq.* 98.

The Statute 9 *Geo. 2.* restrains and makes void the Disposition of Lands, or Sums of Money, &c. to be laid out in Lands to *charitable Uses*, unless it be by Deed indented executed before two Witnesses twelve Months before the Death of the Donor, and enrolled.

But this Act is not to extend to the two Universities, or the Colleges of *Eaton, Winchester or Westminster.*

The Devise of a *Charity* not good at Law, by reason of the Misnaming of the Devisee, &c. has been held a good Limitation in Equity, within the Statute of charitable Uses; which Statute supplies all Defect of Assurance, where the Donor is of Capacity to dispose: And Legacies given to charitable Uses are more favourably construed than all others. *Finch's Rep.* 221. 1 *Vern.* 230. 2 *Vern.* 755. *Abr. Ca. Eq. Tit. Charity.*

Pious Uses.

Pious Uses are wholly subject to the *Chancery.*

And no *Appeal* lies to the House of Lords from a *Sentence* by the *Delegates*, or a *Decree* of the Lord Chancellor, upon the Statute of charitable Uses.

Also the *Decree* on hearing Exceptions being once confirmed by the Chancellor, there can be no Rehearing, for that is final by the Act of Parliament. 2 *Vern.* 118. 2 *Chan. Ca.* 32.

Superstitious Uses.

If any Man has heretofore given, or hereafter shall give, any Lands, Tenements or Hereditaments, by Act executed in his Life, or by his last Will at his Death, to any Person singular or corporate, in Fee-simple, Fee-tail, for Life or Years, to the Intent or upon Condition to maintain any *superstitious Use*, as to find a Chaplain, and have the Service of a Priest to say *Mass*, or to have a Priest or other Man to pray for the Soul of any dead Man in such a Church or other Place; or to have or maintain perpetual *Obits*, *Lamps* or *Torches*, &c. to be used at certain Times to help to save the Souls of Men out of the supposed *Purgatory*; all these and such like Uses are void; and the Lands that are so given to such superstitious Uses, are to be forfeited, and given to the King, and he shall have them: And yet if so that there be any *charitable Use* intermixed with the *superstitious Use*, and they may be distinguished, the King shall have only so much as is given to the *superstitious Use*, and not that which is given to the charitable Use also: For which see *Adams and Lambert's Case* at large, 4 *Co.* 104. 3 *Stat.* 15 R. 3. c. 5. 37 *H.* 8. c. 4. 1 *Ed.* 6. c. 14.

A *Devise* to *superstitious Uses*, is where it is to find a Priest to pray for the Souls of the Dead, &c. and the Lands or Goods so devised are forfeited to the King by the Statute 1 *Edw.* 6.

But if Land is given to find an *Obit*, and for another good Use; if there is no Certainty how much shall be employed to the *superstitious Use*, the Gift to the good Use shall preserve the whole from Forfeiture. 2 *Koll.* 205. See 2 *Vern. Rep.* 266. *Abr. Ca. Eq. Tit. Charity.*

A *Lecture* is not within the Statute of 43 *Eliz.* of *charitable Uses*, but that Statute took Pattern from 1 *Ed.* 6. c. 14. against *superstitious Uses*, and here the Charity is mistaken.

But where a Gift is of 10 *l.* per *Ann.* to maintain a *superstitious Use*, so long as the Law would allow it; when the Law did abrogate that Superstition, it was turned to a good Use, and decreed to be, to maintain a Catechist there, to be approved of by the Bishop. 2 *Chan. Ca.* 18. *Abr. Ca. Eq. Tit. Charity.*

(L) Of Deeds declaring (or leading) the Uses of Feoffments, Fines or Recoveries.

AS to a Declaration of Uses, *i. e.* the Manifestation or Agreement of the Parties to what Uses and Intents the Assurance made shall be, observe these Things:

First, On what Assurances Uses may be declared.

Uses may be declared or averred on a *Fine*, *Feoffment*, or *Recovery* of Land; but on a *Bargain and Sale* of Land, no Use may be declared or averred but what the Law doth make.

And upon a *Covenant of Uses*, no other Use may be declared or averred but what is contained within the Deed. 1 *Co.* 175, 176. *Dyer* 169.

Secondly, Of declaring the Use according to the Estate the Party has in the Land.

Every one may declare and dispose the Use of Land according to the Estate that he has in the Land; for the Declaration and Disposition of the Use ensues the Ownership of the Land, *Sicut umbra sequitur corpus*.

And at this Day the Use draws the Land to it, as the Body or Principal the Shadow or Accessary.

And therefore the Owner of the Land, or he from whom the Land moves, ought to limit and declare the Use of the Land; as if the Husband and Wife levy a Fine of the Land whereof he is seised in the Right of his Wife, the Husband alone may declare the Use of this Fine, and this Declaration shall bind the Wife, altho' her Assent to the Limitation of the Uses do not appear, if her Dissent doth not appear; but in this Case it is most proper to have a Declaration of the Uses by the Husband and Wife both; for she alone, because she is *sub potestate viri*, cannot alone declare or limit any Use; neither can the Husband alone limit any Use against her good Will, because he hath not the Estate of the Land.

And therefore if *A.* and *B.* his Wife be seised of Land in the Right of his Wife, and she without the Consent of her Husband covenants by Indenture with *C.* and *D.* 14 Martii 14 Eliz. that a Fine shall be levied of this Land, and that it shall be to the Use of herself for Life without Impeachment of Waste, and after to the Conusees for their Lives, to the Intent that they shall suffer *J. S.* to take the Profits for his Life, with divers Remainders over; and afterwards, and before the Fine levied, the Husband alone by another Indenture, 31 February 22 Eliz. (wherein the Wife is named a Party) without the Consent of his Wife, does agree that a Fine shall be levied to the Use of him and his Wife, and after to the Uses limited by the Wife's Indenture, and after the Fine is levied accordingly; in this Case, altho' the Variance be in one Particular only, and the Limitations in all the Rest of the Uses and Estates do agree, yet all the same Limitations by both Indentures are void, and the Use upon the Conveyance is left to Construction of Law, and therefore shall be to the Wife and her Heirs for ever.

And yet if the Husband and Wife agree in the Limitation of the Uses for Part of the Land, and differ in the Rest, the Limitations for so much as they agree in are good, and void for the Residue.

And in these Cases where the Declaration is good, the Wife and her Heirs shall be bound by it.

So if two *Jointenants* are, and they and two others, having several Estates, join in a Fine, and one of them declares the Use in one Manner, and the other declares the Use in another Manner; this Declaration is good for either of their Parts, for the Declaration shall be governed according to their Estates.

And if an *Infant*, or a Man *De non sane memorie* declares the Use of a Fine levied by him; this Declaration is good, and shall bind him so long as the Fine shall continue in Force. 2 Co. 57. Dyer 290. Hughes's Abr. 802.

Husband and Wife levied a Fine of the Lands of the Wife, and he alone declared the Uses of the Fine; this shall bind the Wife if her Dissent does not appear, because it shall be intended that she did consent, if the contrary doth not appear; but if the Husband declares one Use and the Wife another, they are both void, because the Husband, tho' he is *sui juris*, hath no Estate in the Land, and the Wife, tho' she hath the Estate, yet she is not *sui juris*, but under the Power of her Husband; and in such Case the Use shall follow the Ownership of the Land. 2 Co. 89.

Thirdly, By what Deed Uses may be declared.

A Declaration of Uses may be made either by *Deed indented* (which is the most usual and safe way) or by *Deed Poll*; as where the Parties by such a Writing agree that an Assurance passed, or to be passed, shall be to such and such Uses; as that a Fine shall be levied by such a Time, and that it shall be to the Use of one for Life, another in Tail, another in Fee.

Or it may be made by a *verbal Agreement* without any Writing at all, (See the Stat. 4 & 5 Ann. post.) as where an Agreement is so had and made between two or more, that a Fine or Recovery shall be had, and it shall be to such and such Uses, and the

the same is had accordingly; in this Case this is a sufficient Declaration, being proved; but it is not safe in these Cases to depend upon slippery Memory. 2 Co. 73.

And the Use of a Fine may be declared by Word without any Deed; and if there be such a Declaration by Parol made to lead the Use of a Fine, and it be defective to declare the Intent of the Parties, it may afterwards be supplied and made good by subsequent Parols. *Style's Reg.* 148. *Quere.*

The Uses of a Fine may be levied within the Fine itself without any Indenture. *Hutt.* 112.

An Use may be averred without a Deed upon a Fine *sur Render*; for the Deed is but to shew the Intent of the Parties, which may appear as well without as by Deed. *Poph.* 105.

A general Covenant shall direct the special Uses of a Fine, and the special Operation thereof, according to the Intent of the Parties. 1 *Bull.* 256.

The Render of a Fine may not be alledged to any other Use than what is expressed upon the Fine without a Writing to shew for it. *Poph.* 104, 105. 3 *Bull.* 318, 319.

A Bargain and Sale, Fine and Recovery made at several Times to one Purpose, shall be esteemed but as one Conveyance. *Bendl.* 101.

Fourthly, *When a Declaration of Uses may be made.*

A Declaration of Uses may be made before, at or after the Time of making the Assurance, for an Indenture subsequent may direct and declare the Uses of a Fine precedent.

And therefore one may covenant or agree that *J. S.* shall recover against him, or that he will levy a Fine, or make Feoffment to *J. S.* of such Land, and that they shall be to the Use of, &c.

And if one makes a Feoffment, he may declare the Uses of it at the same Time, and that within the same, or in another Deed at his Pleasure.

And if the Assurance be past, and no Declaration of Uses had before, or at the Time of passing it, a Declaration may be subsequent, *viz.* That the same Assurance was and shall be, and the Recoverors, &c. shall stand and be seised to such and such Uses; for an Indenture subsequent may direct and declare the Uses of a Fine or Recovery precedent; but observe these Differences, that when precedent Indentures are made to direct the Uses of a subsequent Assurance, and after the Assurance is made accordingly, there no Averment shall be taken by Word, that the same Assurance was to other Uses than are declared by the Indenture.

But against an Indenture subsequent, declaring the Uses of an Assurance precedent, an Averment may be taken, that there were other Uses expressed and limited before or at the Time of the Assurance than those which are contained in the Indenture.

If a precedent Indenture be made to direct the Uses of a subsequent Assurance, when the Assurance comes the Land is bound, and the Conusor or Recoveree cannot by any Act of his, after the Recovery had, charge or avoid it; but if the Declaration be subsequent, if in the Interim, between the Assurance had and the Declaration of the Uses, the Conusor or Recoveree sells, gives or charges the Land to others, this subsequent Declaration will not subvert the mean Estates, Charges or Interests, unless it can be otherwise proved, that by a certain and compleat Agreement of the Parties, the Assurance was had and made to these Uses. 2 Co. 69, 70. 6 Co. 27, 63. 7 Co. 40. 9 Co. 8. *Dyer* 136, 290.

By the Statute of 4 & 5 Ann. c. 16. §. 15. Declaration of Uses or Trusts by Deed made after Fines and Recoveries, shall be good in Law notwithstanding the 29th of Car. 2. c. 3. which requires Writing to pass Estates at the very Time of Conveyance.

Fifthly, *Of a precedent Agreement for the Limitation of Uses.*

When an Agreement for the Limitation of Uses is precedent, whether it be by Writing or Word, it is but *directory*, and does not bind the Estate until the same Assurance be afterwards had, and therefore by a new Agreement or Declaration made in the same Manner as the former, *viz.* in Writing, if the former be so, and between the same Parties either before or at the Time of the same Assurance passed, new Uses may be made and the former Uses changed; but when the same Assurance is pursued

purfued accordingly, and no intervenient Alteration is made, it shall be expounded to be to the same Uses, and shall bind the Parties, and no naked Averment shall be received of any later or other Agreement contrary to the Indentures.

Where an Indenture *precedent* is to limit the Uses of a *subsequent Fine* or *Recovery*, and it is not purfued in some Circumstance of Time, Person, Quantity, or the like, yet if no other new mean Agreement may be proved, the Assurance shall be in Judgment of Law to the Uses contained in the same Indenture; but if a Variance be in these Particulars, and the Form of the Indenture be not purfued, ~~there~~ an Averment without Writing may be taken, that the Fine or other Assurance was to other Uses than are contained in the Indenture; and if none such can be made, then it is left to the Construction of Law.

And therefore if *A.* be seised of divers Manors in Fee, and by his Indenture dated 10 Martii 21 Eliz. covenants with *B.* and *C.* that he before the End of *Trinity* Term next will by Fine or other Conveyance assure one of these Manors to them, and that the same Assurance shall be to the Use of *A.* and *E.* his Wife, and of the Heirs of *A.* and the 28th Day the Deed is inrolled; and the 29th Day of the same Month, he by another Indenture covenants with the same *C.* and *D.* to convey all the same Manors to the same *C.* and *D.* before the *Annunciation* next, and that the same Assurance shall be to the Use of *A.* and the Heirs Male of his Body; and for Default of such Issue, to the Use of divers others in Remainder; and by this Indenture covenants, that if he shall not sufficiently convey this Land by the Day, that he will stand seised to the same Uses, &c. and no Fine is levied by the End of *Trinity* Term, but 17 September following a Note of a *Fine* is acknowledged to *B.* and *C.* and the Heirs of *B.* of the Land within the first Indenture; and the 18th of the same Month another Note of a *Fine* is acknowledged to *C.* and *D.* of the same and other Land in the last Indenture, and both these Fines are entered in *Octabis Mich.* following; in this Case these Fines cannot be directed and declared by both Indentures, and therefore it seems these Declarations are void. 2 Co. 69, 70. 6 Co. 27, 63. 7 Co. 40. 9 Co. 8. Dyer 136, 290.

Where a Man makes a Feoffment to such Uses as he shall appoint in his last Will, there the Use and Estate vests in the Feoffee, and the last Will is directory. Co. Lit. 111. b.

Sixthly, Of the Certainty of the Declaration of Uses.

A Declaration of the Uses must be *certain*, and especially in three Things:

(1) In the Person to whom, (2) In the Lands, &c. of which, and (3) In the Estates by which the Uses are declared; and if there want Certainty in either of these, the Declaration is not good; and it must be compleat of itself without any Reference to Indentures, or other Writings to be made afterwards, for then it is but an imperfect Communication, and no compleat Declaration.

Where the Uses of a Fine are agreed, there it must go to the Uses agreed upon; but where no Uses are agreed upon, but only that it is agreed a Fine shall be levied, and not said to what Use, or a Fine is levied, there the Law appoints the Use according to Conscience. 2 Co. 37, 38. Dyer 18. Co. Lit. 271. Moor 472, 473, 842, 843.

More Acres of Land do not pass by a Fine than the Fine names, altho' the Indenture to lead the Use of it speaks of more Acres; for the Fine is the Foundation of the Estate, and the Estate riseth out of it. Jenk. Cent. 6. Case 45.

If the Conufee of a Fine levied of Land pays Money to the Conufor of the Fine at the Time of the Fine levied, and there be no Use declared, nor is it set forth to what Use it shall be: In this Case the Law will construe the Fine to be levied of these Lands to the Use of the Conufee to whom the Fine is levied.

But if there be no Money paid by the Cognifsee, nor any Use declared, it shall be to the Use of the Cognifor who levied the Fine; for nothing appears whereby it can be supposed that the Parties had any Intention the Estate in the Lands should be altered by the Fine, but that the Fine was levied in Corroboration of the Title of the Cognifor. Bendl. 134, 135. Style's Pract. Reg. 147.

One seised in Fee as Heir of the Mother's Side levies a Fine, and declares the Use thereof to himself in Fee; this is the old Use, and there is no Diversity between an exprefs Declaration of an Use and an implied one. 2 Will. 139.

(M) *Of Averment of Uses, or the Proof of Uses by Witnesses.*

AS to *Averment of Uses*, i. e. *the Proof of Uses by Witnesses*, observe these Things: Where any Use is expressed upon Charter of Feoffment, no other Use *contra* or *præter* the Use which is expressed shall be admitted.

But in Cases of Fines and Recoveries wherein no Uses are expressed, other Uses than what Law Construction will make may be shewed and proved to be agreed upon, and the same Assurances shall be to such Uses as by Proof shall be made to appear to be the Intent of the Parties; as,

If a Man and his Wife sell her Land for Money, and after levy a Fine to the Vendee and his Heirs; in this Case it may be averred it was for Money, and this shall carry the Use to the Vendee without any Declaration of Use, which otherwise would result to the Woman and her Heirs; and yet if a Fine be with a Grant and Render, no Averment to prove it to be to other Uses than what are contained in the Fine shall be received. *Doct. & Stud. 95. 2 Co. 57. 5 Co. 20, 25. 9 Co. 8.*

And where the Uses of a Conveyance be declared by Indenture before or at the Time of the same Conveyance, no Averment shall be received of any other Uses than what are contained in the Indenture.

But if the Indenture of Declaration be subsequent, there an Averment lieth and shall be received that there were other Uses agreed upon at or before the Time of the Conveyance made. *9 Co. 8.*

And where an Agreement is made to levy a Fine, or suffer a Recovery before or at a Time certain, and that it shall be of such and such Lands, and to such and such Persons; and after it falleth out the Fine or Recovery is not had by that Time, or not of the same Land, or not between the same Persons; in these Cases an Averment may be had of other Uses, and of other Agreement. *5 Co. 26.*

No Averment of Uses by Proof of Witnesses shall be admitted against an Use expressed in a Fine; but in Case where no Use is expressed in a Fine, there other Uses than what the Law will make upon the Fine may be averred and proved to be agreed upon, and the Fine shall be to the Uses. *5 Co. 26, 9, 8, 2, 57.*

T. P. levied a Fine, and afterwards suffered a Common Recovery, wherein the Conufee of the Fine was Tenant to the *Præcipe*, but no Uses of the Fine were declared; it was therefore insisted, that the Uses of the Fine resulted to the Conufor, and tho' the Intent might be to make him Tenant to the *Præcipe*, yet since the *Stat. 29 Car. 2. c. 3.* there shall be no Averment of an Use or Trust; but adjudged, that at the Common Law the Use of a Fine was always intended to be in the Conufee, and that this Statute doth not extend to Uses by Operation of Law, but to such Uses as are to a third Person, (i. e.) that neither the Conufor or Conufee of a Fine shall aver the Uses to be to a third Person; so that in the principal Case the Party was immediately in by the Fine, and the Cognifee was a good Tenant to the *Præcipe*. *2 Salk. 676.*

(N) *To what Use an Assurance of Land shall be by Construction of Law, and how the Limitation of the Uses of Land by a Deed shall be construed.*

WHERE the Uses of an Assurance are certainly agreed upon and declared between the Parties thereto, there regularly it shall be to such Uses as are declared and agreed upon, and to no others.

But if a Conveyance be made of Land by *Fine, Feoffment* or *Recovery*, and no Uses thereof declared and agreed upon, the Law will limit and appoint the Use according to Equity and Conscience.

And therefore if a Man levies a Fine, and makes a Feoffment, or suffers a Recovery of Land without any Consideration, the Law will adjudge the Use to be in the *Feoffor, Conufor* and *Recoveree*, who parts with the Land.

And so if a Man makes a Feoffment to the Intent to perform his last Will, or to the Use of his last Will, or to such Persons as he shall limit by his last Will; in all these Cases the Use shall be in the Feoffor and his Heirs whilst he lives, to dispose at his

his Pleasure. *Doct. & Stud.* 95. *Perk.* §. 533. 1 *Co.* 24. *Co. Lit.* 271. *Dyer* 18. *Crompt. Jur.* 62.

And so if one makes a Feoffment of Land to *J. S.* and his Heirs, to the Use of *W. S.* for twenty Years, and limits the Use no further; in this Case the Residue of the Use after the twenty Years shall be to the Feoffor and his Heirs.

But if in these Cases there be any Consideration of Money, or the like, tho' never so little given, or any Rent reserved upon the Feoffment, the Law will adjudge the Use in Feoffee, Conusee or Recoveror. *Hil.* 37 *Eliz.* *C. B.* *Baker's Case.*

And yet in that Case also if other Uses be expressed upon the Deed, it shall go to the Uses expressed; as if *A.* for 20 *l.* paid by *B.* infeoffs *B.* and his Heirs, to the Use of *C.* and his Heirs. *Doct. & Stud.* 95.

If the Husband and Wife levy a Fine of the Wife's Land without Consideration and without any Declaration of Use, the Law will adjudge this to be to the Use of the Wife and her Heirs; but if they sell her Land for Money, and after levy a Fine thereof to the Vendee; this shall be to the Use of the Vendee and his Heirs.

And if a Man be seised of Land of the Part of his Mother, and without any Consideration makes a Feoffment in Fee of it; this shall be said to be to his Use in the same Nature he had it before.

So if two Jointenants be of Land, the one in Fee-simple and the other but for Life, and they without any Consideration levy a Fine of it, and make no Declaration of Use; the Use shall be to them of the same Estate as they had before in the Land.

So if *A.* Tenant for Life of Land, and *B.* in Reversion or Remainder levy a Fine of this Land generally; this shall be to the Use of *A.* for Life, and to the Use of *B.* in Fee afterwards, as it was before.

So if *A.* be seised in Fee of an Acre of Ground, and he and *B.* join together and levy a Fine of it to another without any Consideration; this shall be to the Use of *A.* and his Heirs only. 2 *Co.* 57, 58.

If one makes a Gift in Tail, or Lease for Life or Years, altho' it be without any Consideration of Fine or Rent, yet the Law will adjudge the Use in the Donee or Lessee, and not in the Donor or Lessor. *Perk.* §. 533.

If one at this Day by Deed indented bargain and sell his Land to another for Money, and limits no Estate, but the Deed is *Habendum* to him only, and not *Habendum* to him and his Heirs, or to him and the Heirs of his Body, or to him for Life; howsoever in this Case before the Statute of Uses was made, it was otherwise; yet now the common received Opinion is, that by this there passes only an Estate for Life, and not a Fee-simple. *Plow.* 539. 1 *Co.* 87. *Crompt. Jur.* 47. 27 *H.* 8. 6. o *Co.* 111.

If a Feoffment be made to *J. S.* and his Heirs, to the Use of *J. D.* without any more Words; by this Limitation *J. D.* has only an Estate for Life.

So if a Feoffment be made to *J. S.* and his Heirs to the Use of *J. D.* for ever, without saying, *and his Heirs*, hereby *J. D.* has only an Estate for Life.

And so of other Uses the Construction shall be according to the Rules of Law. *Co. Lit.* 42. *Dyer* 169.

If an Estate be limited to *J. S.* and his Heirs until *A.* shall come from beyond Sea, and attain his full Age, or die; in this Case if he comes from beyond Sea, attains his full Age, or dies, the Use shall cease. *Pas.* 3 *Eliz.* *B. R.* *Lord Mordant's Case.*

If one covenants to stand seised to the Use of *A.* his Eldest Son and the Heirs Male of his Body, and after to the Use of *B.* his second Son in Tail, in the same Manner, or according to the Limitation to *A.* by this *B.* has an Estate-tail to him and the Heirs Male of his Body. *Hil.* 17 *Jac.* *B. R.* *Ridgway's Case.*

If a Feoffment in Fee be made to the Use of a Man and his Wife for their Lives, and after to the Use of their next Issue Male to be begotten, in Tail, and after to the Use of the Husband and Wife, and of the Heirs of their two Bodies begotten, (they having no Issue Male then) by this the Husband and Wife are Tenants in special Tail executed; and after they have Issue Male they are Tenants for Life, the Remainder to the Son in Tail, the Remainder to them in special Tail. *Co. Lit.* 28.

If one makes a Feoffment to the Use of himself for Life, and after his Decease to the Use of *Alice*, whom he intends to marry, until the Issue he shall beget of her shall be of the Age of one and twenty Years, and after the Issue comes to that Age, then

then to the Use of the Wife during her Widowhood, and the Husband dies without Issue; by this the Wife shall have an Estate at least during her Widowhood. *Dyer 300.*

If I covenant with B. that in Consideration he will marry my Daughter, that from the Time of the Marriage I will stand seised to the Use of myself for Life, and after to the Use of C. a Stranger and the Heirs Male of his Body, and after to the Use of B. and my Daughter and the Heirs of their two Bodies; in this Case altho' the Use limited to C. the Stranger be void, yet B. and my Daughter shall not have the Land till the Death of C. without Issue, that my Heirs shall have it till that Time. *1 Co. 175.*

If I covenant with B. to stand seised to the Use of myself for Life, and after my Death to the Use of C. a Stranger for the Term of twenty Years, and after the End of the Term to the Use of my Son in Tail; in this Case the Use limited to C. is void, and my Son after my Death shall have the Land.

But if the Words of the Covenant be, *and after the End of twenty Years*, instead of *and after the End of the Term*, my Son shall not have the Land until the twenty Years be expired. *1 Co. 155.*

Lands and Tenements conveyed upon Confidences, Uses and Trusts, are to be ruled and decided (if a Question arises upon the Confidences, Uses or Trusts) by the Judges of the Law. *Co. Lit. 271. b. Carter 197. T. Raym. 317.*

The Intention of the Parties shall be observed in the Creation of Uses; but when they are created, they shall be governed by the Rules of Law. *Lutw. 824.*

Before the *Stat. 27 H. 8. c. 10.* Uses were to be executed according to the Rules of Equity, but now they are reduced to the Common Law, and are to be construed according to the Rules of Law. *2 Mod. 251.*

(O) *Where and how Uses of Land may be extinguished and destroyed, or suspended, or not; and where the antient Uses shall be revived by the Entry of the Feoffees, or not.*

ALL such Uses as are not within nor executed by the Statute of *27 H. 8.* but remain at the Common Law, may be destroyed, discontinued or suspended, as Uses before the Statute might have been; and therefore contingent Uses may be extinguished or suspended at this Day.

As if a Man seised of Land in Fee have three Sons A. B. and C. and he makes a Feoffment of his Land to divers Feoffees, to the Use of them and their Heirs during the Life of A. and after to the Use of the first Son that A. shall beget, and the Heirs Male of the Body of such first Son; or if a Feoffment be made to the Use of a Man, and the Wife that he shall marry, or the like; if in these Cases the Feoffees make a Feoffment over before the contingent Uses happen to be *in esse*, as before A. have any Son, or the Man takes a Wife, &c. altho' it be to one that has Notice of these Uses, yet the Uses are destroyed for ever, and the Feoffees cannot enter and revive them contrary to their own Feoffment.

And if in these Cases the Feoffees before the contingent Remainder vest be disfeised, hereby the Uses are suspended; but then by the Re-entry of the Feoffees the antient Uses will be revived again.

And therefore if the Feoffees release to the Disseisor, and so bar themselves of their Entry, the Uses are extinguished, and shall not be revived; and the Party grieved has no Remedy but in Chancery against the Feoffees for Breach of Trust.

And if the Feoffees in the first Case before die before A. have any Son born, the contingent Remainder is gone.

As where a Feoffment is made to the Use of the Feoffor for Life, and after to the Use of the right Heirs of J. S. in Fee, and the Feoffor dies before J. S. in this Case the Remainder is gone, for a Remainder cannot be without a particular Estate no more of a Use than of an Estate made in Possession, and such a Remainder must vest during the particular Estate, or at least *eo instanti* when the particular Estate ends. *1 Co. Chudleigh's Case.*

If a Feoffment be made to the Use of J. S. and the Wife he shall afterwards marry, and of the Heirs Male of their Bodies, and J. S. makes a Feoffment of this Land to another before he takes a Wife; hereby the contingent Remainder is destroyed. *1 Co. 136.*

If *A.* infeoffs *B.* and his Heirs, to the Use of *C.* and *D.* his Wife and the Heirs of the Survivor of them, and *C.* makes a Feoffment to *E.* and dies, this Feoffment destroys the contingent Remainder. *Hil. 2 Car. in Scac'* adjudged.

When the Estate out of which the Uses arise is gone, the Uses are gone also.

As if a Lease be made to *A.* for his Life, to the Use of *B.* for his Life, and *A.* dies, hereby the Estate of *B.* is gone. *Dyer* 186.

Also Uses of Lands may be gone by Revocation; where see in the next Division.

(p) *Where a Power to revoke Uses of Land shall be good, and how they shall be taken; and what Revocation by reason of such Power shall be good, and what not.*

PROVISOS and Powers of Revocation of Uses of Lands very frequent in voluntary Conveyances (whether by Feoffment or otherwise) that pass Land by way of raising of Uses, and are executed by the Statute of 27 H. 8. and the Inheritances of many depend thereupon.

As if a Man seised of Land in Fee have divers Sons, and he covenants to stand seised of that Land to the Use of himself for Life, and after of his Eldest Son in Tail, and for want of such Issue, to the Use of his second Son in Tail, &c. with a *Proviso* that it shall be lawful for him at any Time during his Life to revoke any of the said Uses, and to limit and appoint other Uses, &c.

Or if *A.* by Indenture between him and *B.* his Heir apparent an Infant, covenants with *B.* for the Advancement of his Blood, &c. to stand seised to the Use of himself for Life, and after to the Use of his said Heir apparent and the Heirs Male of his Body, and after to the Use of his right Heirs, *provided* that if *A.* by himself, or any other during his Life, shall deliver or offer to *B.* a Ring of Gold, to the Intent to make void all the same Uses, that then the said Uses shall be void, and he may limit new Uses.

Or if *A.* by Indenture covenants with *B.* to stand seised to the Use of himself and his Wife and his Daughter for their Lives, and after, &c. *provided* that if the said *A.* during his Life, and after the Debts mentioned in the Schedule annexed to the Indenture shall be paid, shall be disposed to determine, disanul, change, alter or enlarge, diminish or make void the Uses or Estates, or any of them, of the Premises, or any Part thereof, and by Writing indented under his Hand and Seal, subscribed in the Presence of three Witnesses, shall declare his Mind to be so, that then the same Uses shall be void; all these and such like Provisoes being coupled with an Use, are allowed to be good, and not repugnant to the former Estates.

But in Case of such a Feoffment or other Conveyance whereby the Feoffee or Grantee is in by the Common Law, as where *A.* infeoffs *B.* and his Heirs to the Use of *B.* and his Heirs, it is said such a *Proviso* is merely repugnant and void.

As to these Provisoes or Revocations observe these Things:

First, These Revocations are favourably interpreted, because many Mens Inheritances depend upon them.

And therefore he that has Power may revoke Part of the Uses at one Time and Part at another Time; and the Revocation of the old may be made by the making of new Uses without any expresse Revocation.

And by the same Conveyance whereby the old Uses are revoked, the new Use may be created and limited, and then the former Uses cease *ipso facto* by this Revocation without any Entry or Claim; as,

If one covenants to stand seised to the Use of himself and his Wife for their Lives, and after to the Use of *A.* his Daughter for Life, and after to the Use of *B.* his Daughter in Tail, &c. *provided* that if he shall be minded, &c. he may by Writing, &c. make void the same Uses, and declare the Uses to others, and he makes void the Use to his Wife at one Time and no more, and after by a Deed limits and appoints new Uses of the Whole by a new Covenant to stand seised to other Uses; these are good Revocations, for there needs no real and expresse Revocation of former Uses, but the creating of new Uses is in Law an actual Revocation of the old Uses, as the making of a latter is *ipso facto* a Revocation of a former Will.

Secondly, The *Proviso* must for the Substance of it be pursued in the Revocation, and all incident Circumstances thereof must be observed, as Sealing, Subscription of Names, Witnesses, and the like, otherwise the Revocation will not be good.

And therefore if the Proviso be, that if the Covenantor shall be minded to revoke, and shall declare his Mind by Writing indented under his Hand and Seal, delivered before three Witnesses, the Uses shall be void; in this Case a Revocation by Word without Writing, or by a Writing and not indented, or by Writing indented and not under Hand and Seal, or under Hand and Seal and before two Witnesses only, is not good. *Co. Lit.* 237. 7 *Co.* 11, 12. 10 *Co.* 143. 1 *Co.* 110, 173, 107. *Dy.* 372.

And yet if a Proviso be, that if the Covenantor shall at any Time during his Life, by Writing under his Hand and Seal delivered before two Witnesses, revoke the same, &c. the old Uses shall be void; and the Covenantor by his last Will and Testament in Writing, under his Hand and Seal before two Witnesses, gives the Land to another, and makes no express Revocation of the former Uses; this is a good Revocation in Law. *Trin.* 18 *Jac.* C. B. *Tibbet* and *Lea's* Case.

If the Proviso be, that if the Covenantor be minded at any Time during his Life to revoke the same Uses, &c. and shall pay or tender to A. B. 20 s. in such a Place; in this Case the Tender of this 20 s. in that Place at any Time is not good unless he happens to meet with A. B. at the Place, for then Tender at any Time is good; but otherwise the Covenantor must give Notice to A. B. what Time he will tender the 20 s. in that Place, otherwise the Revocation is not good. 8 *Co.* 921.

If one be to marry his Daughter to the Son of another Man, and they mutually covenant to stand seised of their Lands to the Uses of their Son and Daughter, with Proviso to revoke the Uses with the Consent of the Mother, if they or either of them be then living, and one of them dies; in this Case a Revocation by the Consent of the surviving-Mother is sufficient.

Thirdly, When the Covenantor makes void such Uses by Virtue of such a Revocation, he is seised again of the Land in Fee-simple, as he was at the first, without any Entry or Claim. *Trin.* 18 *Jac.* B. R. *Savil* and *Sterling's* Case.

Fourthly, This Power of Revocation, whether it be *present*, as those before mentioned, and most are, or *future*, as when they are upon contingent; as if the Covenantor overlives J. S. or the like, when it is reserved to the Party himself that made the Uses, and Provisoes are annexed, may by his Fine or Feoffment be utterly extinguished; as if he makes a Feoffment, or levies a Fine of Land whereunto the Uses and Proviso are annexed, by this the Proviso is extinct.

And yet so as if he makes a Feoffment, or levies a Fine of Part of the Land only, this shall extinguish his Power but to that Part only: But if the Power be reserved to a Stranger, a Fine or Feoffment of him that made it will not extinguish it. This Power also when it is present may be extinguished by a Release made by him that has the Power to any one that hath any Estate of Freehold in the Land in Possession, Reversion or Remainder; or it may be avoided by Defeasance whether it be present or future. 1 *Co.* 111, 112, 113. *Co. Lit.* 237.

(Q) *Other Trusts and Confidences of Lands and Chattels real and personal; the Nature of such Trusts, the Duty of them that are trusted, and the Remedy to be had against them for Breach of their Trust.*

IF one conveys his Lands to certain Friends in Trust, to the Intent that they shall convey it to such Persons as he shall set down in his last Will and Testament; or if a Man delivers Money to a Friend in Trust to purchase Land for him and his Heirs, to the End that he may have the Profits thereof for his Life, and to the End it may be conveyed to them afterwards.

Or if a Man delivers Money to his Friend to buy Land for him that delivers the Money in his own Name; or if a Man infeoffs his Friend and his Heirs of Land, to the Intent that he shall alien the Land to whom J. S. shall appoint.

Or if Land be conveyed to me in Mortgage, and I pay all the Money, but I to prevent the Jointure of my Wife, or for some such like Cause, name a Friend joint Purchaser with me, and so the Conveyance is made to us both; if in any of these Cases, or in any other such like Case, the Friend trusted proves false, and does not perform the Trust, but turns the Profits of the Land to their own Use, or refuses to settle it according to the Trust, or the like, the Party grieved must have his Remedy in Chancery, for these are not Trusts or Uses within the Statute, nor such for which there is any Remedy at the Common Law; and in that Case where the Land is settled to the Intent that the Friends trusted shall settle it where J. S. shall appoint,

if *Y. S.* does not appoint how it shall be settled, the Feoffees shall have it to their own Use. *Cromp. Jur.* 48, 54, 58, 59. *Dyer* 160. *Fitz. Accompt* 122.

And if a Man gives or grants his Goods or Chattels, as Leases for Years, or the like, to Friends in Trust to the Use of himself for Life, and after to perform his Will, or the like; these are such Uses and Trusts as are not within the Statute of Uses, and for the Breach of which there is no Remedy at the Common Law, but in Chancery only.

So if an Obligation or Statute be made to *A. B.* to the Use of *C. D.* this is a Trust of the same Nature; and if *A. B.* releases the Obligation without the Consent of *C. D.* or gets the Money into his own Hands, *C. D.* shall have Relief in Chancery.

And in all these and such like Cases, the general Rules by which Uses were governed at the Common Law are still in Force and take Place as those by which Uses and Trusts are now for the most part governed. *Cromp. Jur.* 62, 45, 65. *Dyer* 369. 11 *Ed.* 4. 2. 7 *Ed.* 4. 29. *Bro. Feoffment al' Use* 60.

As *First*, If there be any Cause to sue for or about the Lands or Goods wherewith the Parties are trusted; as if they deny or delay to perform the Trust, they must be compelled thereunto by Suit in Chancery. 7 *E.* 4. 29.

Secondly, The *Cestuy que Use*, or Party for whom the Trust is, cannot of himself dispose of the Lands or Goods, for the Property and Interest in Law is in the Trustees; and if it be an Obligation or Statute that is made to the Use of another, *Cestuy que Use* cannot release it, but the Trustee must release it.

Thirdly, If the Party trusted so with Lands, Goods or Chattels, gives, grants or sells the same Lands, Goods or Chattels, to one who has Knowledge of the same Uses or Trusts, (as it is always presumed he has, where the Trusts are expressed upon the same Deed by which the Lands, Goods or Chattels are given or granted) or if the Things so given or granted, be granted upon the same Trusts, or to the same Uses, or without any Consideration at all; in these Cases he to whom the Thing about which the Trust is shall have the same Thing upon the same Trust, and to the same Use as he that gave or granted the same had it.

But where no Trust or Use is expressed upon the Deed, the Purchaser or Buyer has no Notice or Knowledge of the Use or Trust, and he gives a valuable Consideration for the Thing, there for the most part the Sale is good, and the Party grieved thereby has no Remedy but against the Party first trusted in Chancery; and the Purchaser shall have and enjoy the Thing so bought to his own Use for ever; but he that is the Party trusted will be forced in Chancery to make the Party grieved an Amends in Damages for this Breach of Trust: And if there be any Practice or Combination between the Buyer and the Seller in the Matter, there perhaps the Suit may hold against them both, and the Buyer may be forced to restore the Thing itself. *Cromp. Jur.* 62, 63, 65. 11 *Ed.* 4. 24.

And yet if *A.* enters into a Statute to *B.* and *C.* to the Use of *B.* and *A.* having Notice of this Use, gets a Release from *C.* in this Case *B.* must have his whole Remedy against *C.* and shall have no Remedy against *A.* 11 *Ed.* 4. 8.

Fourthly, If the Trustor or *Cestuy que Use* in these Cases commit Felony, &c. so that the Things, if he had the Property of them, were forfeited; in this Case it seems that neither they nor their Heirs, Executors, &c. nor the Lord, &c. shall have them, but the Trustees shall keep them for ever. *Bro. Feoffment. al' Use* 34.

Fifthly, If the *Cestuy que Use* or Trustors die and appoint how the same Things shall be disposed of, the Trustees are bound to see it done; as if the Trustor appoints it shall pay his Debts, or provide Legacies, the Parties trusted must take Care it be so employed; and in this Case the Debtors and Legatees also may compel the Trustees in Chancery. 15 *H.* 7. 12. *Cromp. Jur.* 54.

Sixthly, In all these Cases regularly the Thing whereof the Trust is, is in Equity at the Disposing of him that is the *Cestuy que Use*, unless he otherwise appoints it; and if at his Death he makes no Disposition thereof, it shall go to his Heir, Executor, &c. *Dyer* 49.

Seventhly, In all these Cases the Trustees shall have their reasonable Allowance in Chancery for whatsoever they have laid out about the Land, &c. in Suits or otherwise for the Profit of the Trustor.

Out of all which appears how dangerous it is for a Man to meddle with any Lands, Goods or Chattels so conveyed or settled in Trust, for the *Cestuy que Use* or Trustors have no Property in the Thing, and therefore they cannot sell or give it, and the Trustee has it but to another's Use; and it is not safe therefore to deal with either.

of them alone, nor yet indeed safe to deal at all in these Cases, unless the Buyer may have the Consent, Sale and Assurance, or the Release, &c. of the Trustors and Trustees altogether :

And if there be any Feme Covert, or Infant within the Trust, it is most of all dangerous. 8 H. 7. 11.

And if Goods or Chattels be given to, or to the Use of a Feme Covert or Infant, and certain Friends are trusted therewith, if they sell or give away these Goods or Chattels contrary to the Trust, they must be sure to answer it :

If therefore they sell them, let them see that the Money made thereof be as beneficial, and be bestowed for the Wife or Children ; for it is not sufficient in this Case that the Money made thereof be paid to them. 7 Ed. 6. 14. Fitz. Subpœna 5.

(R) *What Uses require no Execution by the Statute of Uses.*

THERE are Uses which require no Execution by the Statute of Uses, (27 H. 8. c. 10.) as when a Man conveys Lands to J. S. and his Heirs, to the Use of J. S. and his Heirs.

And when Lands are conveyed to others in Trust after this or the like Manner, viz. That the Feoffees shall take the Profits, and deliver them to the Feoffor and his Heirs ; such a Trust is not executed by the Statute, but remains as before at Common Law, and is determinable in Equity in the Court of Chancery. *Crompt. Jur.* 48.

Also *Leases for Years* of Lands in Use (which Leases had their Being before, and are granted over in Use and Trust) are not executed by the Statute ; and therefore,

If a Lessee for Years of Lands assigns over his Estate to A. and B. and their Assigns, to the Use of the Grantor and his Wife ; all the Estate is in A. and B. and the Grantor has nothing but an Use, for which he has his Remedy in Chancery only.

And yet if a Feoffment be made to the Use of A. and B. and his Assigns for Years ; this Use is executed by the Statute, because the Lease had not its Being before ; and because the Words of the Statute are, *If any shall stand or be seised of any Lands* ; whereas the Lessee for Years of Lands that had their Being before, was *possessed only* of his Term, and not *seised* of any Freehold. *Dyer* 369. *Crompt. Jur.* 66.

So there still remains an Use of *Goods and Chattels* Personal, which is properly called a Chancery Trust and Confidence ; for one may still have such Things in Trust, and to the Use of another. Here still the Use and Possession are divided, because not united by the Statute. Thus if an Obligation, or Statute Merchant or Staple be made to A. to the Use of B. this is a Trust of the same Nature.

And if A. releases the Obligation, &c. without the Consent of B. or gets the Money into his own Hands, B. shall have Relief in the Chancery.

And when there are other Trusts and Confidences of Lands that are not executed by the Statute, or of Chattels real or personal, and the Trustee proves false, or delays to execute the Trust, the Party grieved must have his Remedy in Equity, for there is no Remedy at Common Law. *Crompt. Jur.* 45, 62.

Lands were devised to Trustees and their Heirs, in Trust to pay several Legacies and Annuities, and to pay the Surplus of the Rents and Profits to a married Woman during her Life, for her separate Use, or as she should direct, and after her Death the Trustees to *stand seised to the Use* of the Heirs of her Body, with Remainders over ; and the Question was, whether this Devise to pay the Surplus of the Rents and Profits to the Wife, was such an Use or Trust as was executed by the 27 H. 8. And it was held by the Court, that she had only a Trust for Life, and consequently the Heirs of her Body must take by Purchase ; and the rather in this Case, because it was limited to the Heirs of her Body severally and successively, as they should be in Seniority of Age and Priority of Birth, and the Heirs of their respective Bodies issuing ; and a Difference was taken between this Case and that of *Broughton and Langley*, 2 Salk. 679. 1 Lut. 823. S. C. for there it was to permit A. to receive the Rents and Profits for Life ; but here it is a Trust in the Trustees to pay over the Rents and Profits to such and such Persons, and therefore the Estate must remain in them to answer these Trusts, otherwise she must be the Trustee, contrary to the express Words of the Will. *Abr. Ca. Eq.* 383, 384.

The Father covenanted with B. G. that in Consideration of a Marriage between his Son and the Daughter of the said B. G. that before such a Day he would levy a Fine of certain Lands, which should be to the Use of the Son and Daughter in Tail.

Tail, &c. the Fine was acknowledged accordingly; the Father died; adjudged that the Deed did not mention any Marriage had between the Son and Daughter, yet the Estate-tail was executed in them before the Marriage had, because the Fine without any Consideration carries the Uses, and they are perfected by the Fine, tho' the Consideration is executed afterwards; but without a Fine, such a Consideration would not have raised an Use, for in such Case the Marriage must be had, and the Consideration executed before any Use could arise. 1 Leon. 138.

In Covenant, &c. the Plaintiff declared that the Defendant had bargained and sold to him (the Plaintiff) four Messuages, by the Name of all his Lands in H. and did covenant to levy a Fine of them for farther Assurance, (but in Fact the Covenant was to levy a Fine of all his Lands in H.) and sets forth, that he tendered a Fine to the Defendant, to be levied by him, of all those four Houses comprehended in the Deed; the Defendant pleads, that at the Time of the Covenant he was seised of two Houses, &c. and that the other two descended to him afterwards upon the Death of his Ancestor, and traversed that he was seised of the said Lands *modo & forma*; and upon a Demurrer the Defendant had Judgment; for that the Plaintiff had declared that the Defendant was seised, and sold him four Messuages, and that he tendered him a Fine of so many; and the Defendant pleaded, that he was seised of two, and no more, and so would have the Fine extend beyond the Covenant; and therefore he might well refuse it when tendered. 1 Roll. Rep. 103, 117.

(S) *Remedy at Law as to Uses, and Questions as to them how decided.*

BY the Common Law *Cestuy que Use* had neither *jus in re* nor *jus ad rem*, but only a Confidence and Trust, for which he had no Remedy: But for the Breach of Trust his Remedy was only by *Subpœna* in Chancery. Co. Lit. 272. b.

But now the Statute of Uses, 27 H. 8. c. 10. has transferred the Possession to the Use. Co. Lit. 272. b. Plow. 352. b. 349. b. 1 Co. 121. a. b. 122, 127. 2 Co. 58, 78. 6 Co. 64. 7 Co. 34. 1 Leon. 196. 2 Leon. Case 25.

Lands and Tenements conveyed upon Confidences, Uses and Trusts, are to be ruled and decided (if a Question arises upon the Confidences, Uses or Trusts) by the Judges of the Law. Co. Lit. 271. b. Carter 197. T. Raym. 317.

The Intention of the Parties shall be observed in the Creation of Uses; but when they are created, they shall be governed by the Rules of Law. Lutw. 824.

SECTION VII.

Of Deeds of Covenant to stand seised to Uses.

(A) *What a Covenant to stand seised to Uses is.*

A Covenant to stand seised to Uses is when a Man (who has a Wife, Children, Brother or Kindred) by bare Covenant in Writing under his Hand and Seal agrees, in Consideration of natural Love and Affection, Marriage or other good Consideration, that for their or any of their Provision or Preferment he and his Heirs will stand seised of Land to their Uses, either in Fee-simple, Fee-tail, or for Life.

As to the Nature, Kinds, &c. of Uses, see the last Section, where they are fully treated of.

This Covenant to stand seised to Uses is become a Conveyance of Land since the Stat. 27 H. 8. c. 10. and it needs not be by Deed indented and inrolled, which is requisite to a Bargain and Sale of a Freehold; of which see the next Section.

A Covenant for a valuable Consideration to stand seised to another's Use, if inrolled, is in the Nature of a Bargain and Sale. 2 Inst. 672.

(B) *The Things necessary to raise an Use by way of Covenant to stand seised.*

THERE are five Things necessary to raise an Use by way of Covenant to stand seised.

1. A sufficient Consideration.
2. A Deed.
3. Seisin in the Covenantor at the Time of the Deed.
4. A clear and apparent Intent.
5. Apt and proper Words. 1 Vent. 140.

(C) *Of the Consideration in Covenants to stand seised to Uses.*

IF the Party to whose Use one covenants to stand seised of the Land is not his Wife, or one that he intends to marry, his Child, Uncle, Cousin, or one that his Kinsman intends to marry, no Use will arise, and so no Conveyance.

The Law allows in such Cases the Consideration of Blood and Marriage to raise Uses, as well as Money, and other valuable or profitable Consideration, when the Use is to a Stranger.

But it does not allow any trifling Consideration of Service, old Acquaintance, &c. Plow. 302. 2 Roll. Abr. 783.

Yet where a Man conveys an Estate of his Land to others by Feoffment, Fine, Recovery, or by Feoffment, Fine or Recovery, to the Use of his last Will, and afterwards declares the Uses in his last Will, he may appoint an Use without any Consideration. 2 Co. 58. 6 Co. 18. Co. Lit. 271. b. 2 Roll. Abr. 781.

But in a Covenant to stand seised, or in a Bargain and Sale, there must be a Consideration expressed, or specially averred, where the Consideration is general, (as for good Consideration, &c.) tho' the Matter so averred is traversable. 1 Co. 176. 2 Co. 15. 11 Co. 25.

Always, where there is no Transmutation of the Possession, it is necessary and requisite that there be a good Consideration to create an Use. Plow. 202. b. 7 Co. 13. b.

Where there is a Covenant to pay certain Sums of Money, and a Declaration that if these Sums be not paid, the Feoffees shall stand seised of the Premises till they have levied the said Sums; when there is a Failure of Payment they may enter, and if the Heir has not entered upon them they may hold over, *Pari ratione* when he continues and receives the Profits. Cart. 77.

Even if he had assigned, or for a valuable Consideration conveyed over the Land, after the Failure of Payment, the Feoffee or Assignee takes the Estate, subject to his Use, and liable to this Charge. *Ibid.*

For a future Use is a Charge and Burden upon the Land in whosesoever Hands it comes, and cannot be destroyed. Cro. Eliz. 688, 689.

If a Man in Consideration of Money received and Marriage to be had with his Son covenants to stand seised, there no Use will arise to the Son and Woman without Marriage, altho' the Money be paid, because the Marriage is the principal Consideration in the Intent of the Parties, and the Money is but the Accessary which attends the Marriage; but it would have been good by Estate executed by Fine, Feoffment or Recovery. Moor, Case 247.

A Covenant to stand seised, &c. in Consideration of natural Affection to the Covenantor's Son, and of one Hundred Pounds. *Per Bridgman*, The principal Consideration, (*i. e. the Consideration of Blood*) will carry it: And in this Deed there is a mix'd Consideration, and there needs no Inrolment. Carter 114.—So adjudged 2 Vent. 266. 3 Lev. 291. 4 Mod. 149.

A. seised in Fee, covenanted to stand seised to the Use of *B.* in Consideration of Payment of his Debts out of his own Estate; this Use is void, because there was no Consideration on the Part of *B.* to raise the Use, the Money appointed to be paid being to be raised out of the Profits of the Estate of *A.* the Covenantor. 1 Leon. 194, 195.

A. covenants that in Consideration of discharging his funeral Expences, and Payment of his Debts and Legacies out of the Profits of his Lands, and for the Advancement of his Son, that he would stand seised to the Use of himself for Life, and after his Death to *C.* and *D.* for Twenty-five Years, and after the End of that Term

to his Son in Tail: This Term of Twenty-five Years is void for want of a good Consideration, because C. and D. were Strangers to the Consideration, viz. To the Payment of his Debts and Legacies. But if they had been Executors, whereby they became privy to the Consideration, and chargeable with the Payment of the Debts and Legacies, then the Consideration had been good. 1 Co. 154. a.

Note; This is in Case of a Term for Years where there needs no Inrolment.

Money will not raise an Use upon a Covenant to stand seised without Inrolment.

1 Leon. 201.

An Use will arise upon a Lease and Release if there be five Shillings Consideration in the Lease, and no Consideration at all in the Release.

A Covenant, in Consideration of the Covenantor's natural Love and Affection to his Wife, to stand seised to the Use of himself for Life, then to the Use of the Wife for Life, with Power for her to limit over the Estate to such Person as she should appoint; no Use can arise to the Person appointed. Fitz-Gib. 229. Ca. in Chan. and K. B. from 4 to 7 G. 2. 107.

(D) *What amounts to a Covenant to stand seised, or not.*

A. Seised in Fee of a Reversion expectant upon an Estate for Life, by Deed Poll, in Consideration of natural Love to his Wife, and B. his Son, begotten on her Body, and C. his Daughter, did give, grant and confirm unto B. his Son, all those Lands, &c. the Reversion and Reversions, &c. To hold to him to the Uses following, viz. To the Use of himself for Life, and after to the said B. in Tail, and after to C. his Daughter in Tail. A. died, B. the Son devised to the Lessor of the Plaintiff, and died without Issue. C. the Daughter, by Pretence of her Remainder, entered, against whom an Ejectment was brought of the Demise of B. the Devisee; there was no Execution of this Deed but Sealing and Delivery. Now the sole Question was, whether this Deed amounts to a Covenant to stand seised, or is void? Whereupon it was first adjudged to amount to such a Covenant, but the Judgment was afterwards reversed, and the Deed adjudged void, and the Reversal affirmed in Parliament. 2 Vent. 318, 319.

A Rent granted, as well in Consideration of natural Affection as for Money, amounts to a Covenant to stand seised, and may be so pleaded without Inrolment.

4 Mod. 150.

W. seised of a Reversion in Fee, expectant upon an Estate for Life, in Consideration of natural Love and Affection, did give, grant and confirm to his Son all those Lands, and the Reversion and Reversions, &c. *Habendum* to the Son and his Heirs, to the Use of himself for Life, and after to the Use of the Grantee (who was his Son) and the Heirs of his Body; and for want of such Issue, Remainder to his Daughter in Tail: There was no Execution of this Deed by Attornment or Inrolment, or otherwise; this does not amount to a Covenant to stand seised. 2 Vent. 319.

(E) *Who may covenant to stand seised to Uses.*

A Man at Common Law could not during the Coverture limit an Estate to his Wife: But now by Deed he may covenant to stand seised to her Use, or make other Conveyance to another for the Use of his Wife. Co. Lit. 112. a. 7 Co. 40. Braff. lib. 2. c. 12.

It is requisite that the Covenantor be seised at the Time of making the Deed; for a Man cannot covenant to stand seised to an Use of Land which he shall afterwards purchase, or is not then seised of. 3 Lev. 306, 307.

(F) *To whose Use Covenants to stand seised may be, or not.*

A Husband may now covenant to stand seised to the Use of his Wife, or may make other Conveyance to another for her Use. Co. Lit. 112. a. 7 Co. 40. Vide Braff. lib. 2. c. 12.

Such Covenant may be to the Use of a Stranger, but then it must be for Money, or other valuable Consideration, and not for Love and Affection, &c. Vide 1 Co. 176. 2 Co. 15. 1 Lev. 55, 56.

A

A Father cannot covenant that his Son shall stand seised of the Lands whereof the Father is seised; for a Man cannot stand seised of that which he is not seised of.
3 Lev. 306, 307. 1 Vent. 140.

See of Considerations in Covenants to stand seised to Uses.

(G) *Of what a Covenant to stand seised may not be.*

A Covenant to stand seised of an Office is void. 3 Mod. 145.

(H) *What Words amount to a Covenant to stand seised.*

A Settlement was made as follows, viz. *That if I have no Issue, and in Case I die without Issue of my Body lawfully begotten, then I give, grant and confirm my Land, &c. to my Kinswoman J. S. to have and to hold the same to the Use of myself for Life, and after my Decease to the Use of the said S. and the Heirs of her Body to be begotten, with Remainders over, &c.* The Question was, whether this amounted to a Covenant to stand seised, so as to raise an Use to S. without Transmutation of the Possession? It is a Covenant to stand seised tho' the formal Words are wanting to make it so; and so it was adjudged. 3 Mod. 237. Comb. 128. 3 Salk. 384.

A Man seised in Fee by Indenture inrolled within six Months, for the Consideration of natural Love to his Daughter, and for the Augmentation of her Portion and Preferment in Marriage, and other valuable Considerations, did give, grant, bargain, sell, alien, infeoff and confirm to his said Daughter and her Heirs. The Question thereupon was, whether this be a good Deed? *Per Finch* Attorney General, The Word *Covenant* is not absolutely necessary, so that there be other Words sufficient in Law to declare the Parties Intent, for all Words will not serve. Adjudged a good Deed. All held that Words proper for a Conveyance at Common Law will raise an Use, as *Demise* and *Grant* in Consideration of Money has amounted to a Bargain and Sale. And *per Cur'*, If an Use should not arise by such Conveyance, it would overthrow all Conveyances by Lease and Release. 1 Vent. 140, 141, 142.

For more concerning Covenants to stand seised, see the last Section, and before at p. 452. Tit. Covenants.

S E C T. VIII.

Of Deeds of Bargain and Sale.

(A) *A Bargain and Sale, what.*

A Bargain and Sale is the Transferring of the Property of a Thing from one to another upon valuable Consideration.

And herein only it differs from a Gift, that a Gift may be without any Consideration or Cause at all, and a Bargain and Sale has always some meritorious Cause moving it, and cannot be without it.

The Words Bargain and Sale also are sometimes applied to the Assurance or Conveyance whereby the Bargain and Sale is done and made, which is called a *Deed of Bargain and Sale*; for a Bargain and Sale may be by Writing, or without Writing. *Terms de la Ley.* Plow. 301. 2 Co. 35.

A Bargain and Sale is also called an Instrument whereby the Property of Lands or Tenements is for a good and valuable Consideration granted and conveyed from one Person to another;

And is also termed a real Contract on a valuable Consideration for passing of Manors, Lands, Tenements or Hereditaments, by Deed indented and inrolled within six Months after the Date thereof. 2 Inst. 612. Co. Lit. 672. Kelw. 85. 1 Co. 87.

But these two last Definitions omit the Transferring the Property in Goods and Chattels, which may also be by Bargain and Sale; of which see hereafter.

Deeds of Bargain and Sale are by Virtue of the Stat. 27 H. 8. c. 10. of *Uses*; and the Inrolment thereof by Virtue of the Stat. 27 H. 8. c. 16. of *Inrolments*.

If the Bargainor be in Possession, this is an easy and ready Assurance; but a Feoffment reduces and restores the Possession to the Feoffor tho' the Feoffor had been disseised. 2 *Inst.* 672.

If the Bargainor be not in Possession, the Deed must be delivered on the Ground, *ut post.*

He who sells is called the Bargainor, and he to whom the Sale is made is called the Bargainee. Bargainor,
Bargainee,
who.

(B) *Kinds of Bargains and Sales, viz. of Lands or Goods.*

Sometimes a Bargain and Sale may be of Lands, Tenements and Hereditaments, and then that Term is most properly applied.

And in that Case it is said to be, where a Recompence is given by both Parties to the Bargain.

As where one bargains and sells his Land to another for Money; in this Case the Land is a Recompence to the one for the Money, and the Money to the other for the Land. *Terms de la Ley.* Plow. 301. 2 Co. 35.

A Bargain and Sale is now become one of the common Assurances of the Kingdom, so that such an Assurance may now be averred to be fraudulent within the Statute of 27 *Eliz.* as well as any other Assurance, a Rent may be reserved upon it, or a Condition made by it as well as by any other Kind of Assurance. *Per Ch. J. Hide, 3 Car.*

And sometimes a Bargain and Sale may be of moveable Things, as Trees, Corn, Grass, Oxen, Kine, Household-Stuff, and the like; the Property whereof is and may be altered by this Kind of Conveyance, as well as by Gift or Grant. 2 Co. 54.

And this Kind of Bargain and Sale is that which is commonly called a Contract; which largely taken is an Agreement between two or more concerning something to be done, whereby both Parties are bound to each other, or one is bound to the other.

But strictly it is the Buying and Selling of some personal Goods whereby the Property is altered. *Terms de la Ley, Tit. Agreement.*

(C) *The Effect of a Bargain and Sale.*

THE Effect of a Bargain and Sale is to transfer the Property, which it will as effectually do as any other Kind of Conveyance whatsoever.

And therefore the Bargainee of a Reversion howsoever he may not have Benefit of a Condition upon the Demand of a Rent without giving Notice of the Bargain and Sale to the Lessee.

And howsoever, if A. Conusee by a Fine of a Reversion before Attornment of the Tenant, bargains and sells the Reversion to B. that B. cannot distrain for this Rent until he can get an Attornment of the Tenant; yet the Bargainee shall have Benefit of a Condition as an Assignee within the Statute of 32 H. 8.

And he may vouch by Force of a Warranty annexed to the Estate of the Land, because he is in partly in the *per* and partly in the *post.* 8 Co. 94. 5 Co. 113. Co. 62.

An Heir apparent sold Land in his Father's Life-time, and received the Purchase-Money for the same; he shall be bound to make good the Sale after his Father's Death, if he hath no Title but as Heir when he comes to be Owner of the Lands he sold: But here the Money raised on the Sale was employed for the Benefit of the family; and the Father was absent beyond the Sea, &c. Duke of Newcastle's Case, Chan. Ca. 113.

Upon a Bargain and Sale, the Bargainee has presently so far actual Possession that he is a good Tenant to the *Præcipe*, and may surrender, assign, alien, release, &c. Vent. 361.

But upon this Possession he cannot bring Trespass until he has made his actual entry. Carter 66, 78. W. Jones 7. Cro. Jac. 604.

The Bargain and Sale vests the Uses, and the Statute of Uses the Possession. Cro. ac. 696. pl. 9. Lucas 47.

(D) *Who may make a Bargain and Sale, or not.*

See Chap. 4. §. 4. before.

NO Person can make a Bargain and Sale who has not the actual Possession at the Time of Sale: If he has not the actual Possession, then the Deed must be sealed upon the Land, upon an *Entry* made for that Purpose; for the Entry puts the Grantor into Possession, and purges Disseisins, &c. See before Title *Entry*, and see *Carter* 161. 2 *Inst.* 672. 3 *Leon.* 312, 387, 388. 1 *Lev.* 270, 271, 272. *Cro. El.* 483. *pl.* 19, 446, 447. *pl.* 11.

(E) *To whom a Bargain and Sale may be, or not.*

A Bargain and Sale of Lands for Money cannot be to one Man to the Use of another; for an Use cannot be upon an Use, but it must be to the Bargainee only. *Popb.* 81. *Dyer* 155.

If a Man bargains and sells his Land for Money by Deed inrolled, to hold to the Bargainee in Fee, to the Use of the Bargainor for Life, &c. or to the Use of any other; this Limitation of the Uses is void, and it shall be to the Use of the Bargainee in Fee, because the Consideration and Sale implies the Use to be in him only. *Bendl.* 61. *Dyer* 155.

(F) *Of what Things a Bargain and Sale may be, or not.*

ALL Things for the most part that are grantable by any other way from one Man to another are grantable, and may be transferred by way of Bargain and Sale from one to another.

And therefore *Lands, Rents, Advowsons, Commons, Tithes, Profits of Courts*, and the like, may be granted by way of Bargain and Sale in Fee-simple, Fee-tail, for Life or Years.

And all Manner of *Goods and Chattels*, as *Leases for Years, Wardships, Cattle, Corn, Household-Stuff, Wood, Trees, Merchandizes*, and the like, are grantable by way of Bargain and Sale. See 2 *West. Symb. Tit. Bargain and Sale*.

But it seems *Estovers*, and such like Things *de novo*, and that have not Effence before, are not grantable by way of Bargain and Sale, as they are by way of *Grant* or *Lease*, and therefore a Bargain and Sale of such Things is void. 6 *Jac. B. R.* adjudged. 21 *H.* 6. 43.

A Bargain and Sale by Deed may be of Land, rendring a Rent, and the Reversion shall be good, because the Use and Possession pass *uno flatu*; and therefore it is all one with a Grant of the Land itself, for if the Use passes first, then the Rent cannot be reserved out of the Use, and then the Reservation of the Rent will be void. But they both passing at the same Time makes it good. 2 *Co.* 54. a.

(G) *By what Deed a Bargain and Sale of Land may be made.*

IF any Estate of Freehold or Inheritance be made of Land by way of Bargain and Sale, the same must be made by a Writing or Deed indented, and cannot be made by Word of Mouth only, as a Lease for Years, whether it be created *de novo*, or be in esse before, may be. *Stat.* 27 *H.* 8. c. 16.

But Lands in London, by a special Proviso within the Statute, may be bargained and sold by Word of Mouth, without any Writing.

(H) *By what Words a Deed of Bargain and Sale of Land may be made.*

THE very Words bargain and sell, tho' it is good and proper that they be in a Bargain and Sale, (being the Words mentioned in the Statute of Inrolments) yet they are not absolutely necessary, for other Words equivalent will suffice to make Land pass by way of Bargain and Sale.

For whatsoever Words upon valuable Considerations would have raised an Use at Common Law, the same amount to a Bargain and Sale within the Statute; as,

Where a Man by Deed indented and inrolled, covenants in Consideration of Money to stand seised to the Use of his Son in Fee; this by Reason of the Inrolment is a good Bargain and Sale, and yet there is not one Word of Bargain and Sale in the Deed. *Carter 66. 2 Inst. 672. Cro. Jac. 210. Moor 34. Cro. Eliz. 166.*

And if a Man seised of Land in Fee, by Deed indented, and by the Words *alien* or *grant*, sells them to another; or if such a Man covenants to stand seised of his Land to the Use of another, and these Deeds are made in Consideration of Money, and the Deeds be after inrolled; these will amount to good Bargains and Sales. *Carter 66, 78.*

And if a Man by Deed indented and inrolled, in Consideration of 10 *l.* paid to him, by the Words *Demise* and *Grant*, passes his Lands to another for twenty Years; this is a good Bargain and Sale. *8 Co. 94. 7 Co. 40. 2 Co. 36. 1 Vent. 141. 1 Mod. 1. Cro. Eliz. 166.*

(1) *What Consideration is requisite in a Bargain and Sale of Land.*

THERE must be some good Consideration given, or at least said to be given for the Land. *1 Co. 176.*

And therefore if *A.* (for divers good Considerations) or in Consideration that the Bargainee is bound for the Bargainor, and (for divers other good Causes) or (for divers great and valuable Considerations) bargains and sells his Land by Deed indented and inrolled to *B.* and his Heirs; *nihil operatur.*

But if in these Cases there be really Money or other good Consideration given, altho' it be not expressed upon the Deed, the Bargainee may aver it, and being proved the Bargain will be good. *Ward v. Lambert, Pas. 37 Eliz. 41 Eliz. adjudged. Dyer 169.*

And if the Deed makes Mention of Money paid, as in Consideration of 100 *l.* or the like, and in Truth no Money is paid, yet the Bargain and Sale is good.

And no Averment will lie against that which is expressly affirmed by the Deed. *Dyer 90. Moor 378.* Unless it comes to be questioned, whether fraudulent or no upon the Statute against fraudulent Conveyances, for the Affirmative is proved by the Deed, and it is impossible to prove the Negative. *Moor 378.*

And if the Deed mentions and says for a certain Sum of Money, or for a certain competent Sum of Money; these are good Considerations. *Dyer 90. 2.*

The best way is to mention a Consideration of Money, which, tho' but ten or twenty Shillings, is sufficient to pass an Estate, but a general Consideration will not raise an Use. *1 Co. 175. a. 176. b. Moor 578, 378. 7 Co. 40. 11 Co. 24, 25.*

A Consideration might formerly have been averred altho' no valuable Consideration was expressed in the Deed. But *Quære* if it can be so now, since the Statute of Frauds.

A. a Tenant for Life, Remainder to *B.* his Son in Tail, Remainder over. *B.* the Son being in Debt, was desirous to sell his Reversion to his Father, who proposed a Sum for that Purpose; but *C.* (who had been an Attorney) dissuaded the Son from it, declaring that this was no valuable Consideration. But in about a Year afterwards, when the Father was antient and sickly, *C.* himself bought this Reversion of *B.* for 1050 *l.* when the Estate was worth 150 *l.* per Ann. and *B.* was at this Time Thirty-four Years of Age, and had a Child about ten Years old, who was inheritable to the Intail; and *B.* levied a Fine of this Reversion to *C.* In about two Years Time *A.* the Father died; *B.* brought his Bill to set aside this Conveyance, and in order to gain an Injunction, by the Direction of the Court, suffered a Common Recovery, and declared the Uses of it to the two senior six Clerks, subject to the Order of the Court. Upon the Hearing of this Cause Lord Chancellor decreed Relief upon Payment of Principal and Interest, and full (meaning liberal) Costs, grounding his Opinion chiefly upon the Case of *Berney and Pitt*, in 2 *Vern. 14.* 1 *Williams 310.*

A Sale at Undervalue from one who was a Lunatick, was set aside; but the Conveyances decreed to stand as a Security for what was paid for the Lunatick's Use. *2 Vern. 678.*

A Bargain and Sale of Lands, &c. of excessive Advantage, gained from a young Heir by Extremity and in his Necessity, was decreed to be set aside; and that altho' the

the Bargain be of his own seeking, and hazardous to the Bargainor, yet in this Case the Defendant was to have five Times the Value of his Money in Land; which was a very unconscionable Bargain. 2 Chan. Ca. 120, 121.

H. bought of the Defendant N. in the Life-time of his Father, the Reversion of a House at an Undervalue, by Reason of the Contingency, That if N. had died in his Father's Life-time, the Plaintiff had lost all his Purchase-Money: On the Death of the Defendant's Father, who died about ten Years after this Conveyance was made, N. exhibited his Bill to be relieved against the Bargain, and was relieved by the Lord Nottingham; but upon a Rehearing before the Lord Keeper Guildford, that Decree was reversed: And afterwards a Bill was brought by the Executor of H. to compel N. to perform a Covenant to make further Assurance; but he was denied Relief therein, and the Plaintiff was left to bring his Action of Covenant at Law. 1 Vern. 271, 272.

The above principal Cause being afterwards again reheard before the Lord Chancellor Jefferies, he reversed Lord Guildford's Decree, and confirmed the Decree of Lord Nottingham; declaring he took H.'s Purchase to be an unrighteous Bargain in the Beginning, and nothing that happened afterwards could help it. 1 Vern. 168. 2 Vern. 27. 2 Chan. Ca. 137.

(K) *Whether Livery or Attornment is necessary in Bargains and Sales of Land.*

THERE needs no Livery of Seisin or Attornment where there is a Bargain and Sale of Lands.

And therefore if one bargains and sells a Reversion by Deed indented and inrolled for good Consideration, the Reversion will pass without any Attornment of the Tenant.

And if it be only a Lease for Years of a Reversion that is granted, there needs no Attornment nor Inrolment.

And in Case of a Bargain and Sale, the Bargainee is in actual Possession before any Entry, so that the Lessee may attorn to the Grant of the Reversion, as has been ruled in *Mitton's Case*, Mic. 18 Jac. in Cur. Ward. by the two Chief Justices and the whole Court.

And it seems he has not such Possession as to bring any possessory Action for Trespasses, or the like, until an actual Entry, for where the Statute 27 H. 8. of Uses provides, that the actual Possession shall be adjudged according to the Use, yet it ought to have a Circumstance which is requisite by the Common Law, viz. an actual Entry in Deed. 5 Co. 112. 7 Co. 40. 8 Co. 94.

(L) *Of inrolling Bargains and Sales of Land.*

First, *In the Courts at Westminster, or before the Custos Rotulorum, &c.*

THERE must be an Inrolment of a Deed of Bargain and Sale where any Freehold passes.

For it is enacted by the said Stat. 27 H. 8. c. 16. That no Lands (except in some Corporations only) shall pass from one to another by any Deed, whereby any Estate of Inheritance or Freehold (*vide infra*) shall be made or take Effect in any Person or Persons, or any Uses thereof be made, by Reason only (*vide infra*) of any Bargain and Sale thereof, except the same be made and done by Writing indented, sealed and inrolled in one of the King's Courts of Record at Westminster, [in the Chancery, King's Bench, Common Pleas or Exchequer] or else within the same County or Counties where the Lands so bargained and sold lie, before the Custos Rotulorum, and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at the least, whereof the Clerk of the Peace to be one. And the same Inrolment to be within six Months next after the same Writing or Deed is dated.

This Statute of Inrolments extends to Bargains and Sales of Inheritances and Freeholds only; and not to Bargains and Sales for Years, for they are good without Inrolment; and the Possession passes by the Statute of Uses. 2 Co. 36. a. 54. 8 Co. 93, 94. 2 Inst. 671. Dyer 309. 1 Roll. Abr. 204.

Houses and Lands in London, and any City, &c. are exempted out of the said Statute. 2 Inst. 676. 1 Nel. Abr. 342. Dyer 229. Telv. 124.

To

To a Bargain and Sale of a Chattel there needs no Inrolment. 2 Co. 35. a. b. 36. a. 8 Co. 94. a. 2 Inst. 672.

If a Man for Money bargains and sells, and before Inrolment levies a Fine, or makes a Feoffment to the Bargainee in Fee, and afterwards, within six Months, the Deed is inrolled; the Bargainee shall be in by the Fine or Feoffment, both by Reason of the Word *only* in the Statute, and also for that the Estate vested by the Common Law shall be preferred. 2 Inst. 672. 4 Co. 71. b. 72. a. 2 And. 3, 162, 203. 4 Leon. 4. Popb. 49. Hob. 222.

This Statute was made in the same Parliament wherein the Law of *Transferring of Uses into Possession* was made, to the End that Mens Lands might not suddenly and privately pass upon Payment of a little Money in an Alehouse, or the like.

And herein observe these Things:

1. The Inrolment upon such a Deed as to make this Estate to pass must be in Parchment, for an Inrolment in Paper is not good. 2 Inst. 672, 673.

2. The Deed inrolled must be indented, for if it be but Poll, the Estate will not pass. 2 Inst. 672, 673.

3. It must be inrolled within six Months of the Purchase or Sale.

And this Account must be,

1. From the Date, and not from the Time of the Delivery of the Deed.

2. After twenty-eight Days to the Month, and no more.

3. The Day of the Date to be taken exclusive, and for none of the Days of the six Months.

And yet if a Deed be inrolled the same Day it bears Date, it has been held good: But the surest way is to inrol it some Day after within the six Months. 2 Inst. 674.

Hob. 140, 740. 6 Co. 62. 1 Co. 6. Dyer 282. 3 Lev. 438. Salk. 413. 6 Mod. 260.

If it be inrolled any Part of the last Day of the six Months, it is sufficient.

And thus the Deed may be inrolled within the six Months, altho' either of the Parties die within the Time.

And if the Deed be not thus inrolled, it is of no Force at all.

So that if one bargains and sells his Land to me, and the Trees upon it; in this Case altho' the Trees might have been sold alone by Deed without Inrolment, yet now being not inrolled, because the Sale is not good for the Land, it shall not be good for the Trees also.

And no subsequent Act will help in this Case; for if one by Words of *bargain and sell* only, without any other Words in the Deed, grants a Reversion, and the Deed be not inrolled, and after the Tenant attorns; hereby nothing passes, neither shall it enure as a Confirmation.

But yet observe, that in some Cases where a Deed will not enure by way of Bargain and Sale for some of the Causes aforesaid, it may enure to some other Purposes.

5 Co. 1. Dyer 218. Franklin and Garter's Case, Mic. 37 & 38 Eliz. 11 Co. 48.

By the said Statute of 27 H. 8. c. 16. of Inrolments, the *Custos Rotulorum*, or Justices of the Peace and Clerk, to take for the Inrolment before them, where the Lands exceed not the yearly Value of 40 s. 2 s. viz. 1 s. to the Justices, and 1 s. to the Clerk. And where the Lands exceed the yearly Value of 40 s. 5 s. viz. 2 s. 6 d. to the Justices, and 2 s. 6 d. to the Clerk.

And the Clerk of the Peace shall inrol and ingross the Deed in Parchment, and deliver the Rolls thereof at the End of the Year to the *Custos Rotulorum*, to remain in his Custody, to the Intent that every Party who has to do therewith, may resort and see the Effect and Tenor of every such Writing so inrolled.

The Makers of the Statute of Inrolments thought that very little Land would pass by Bargain and Sale; for such Bargainee shall never vouch by Virtue of any Warranty annexed to the Estate of the Land: And there is no Saving in the Act for *Cestuy que Use*, nor of any Use; nor does it give any Benefit of Warranty to *Cestuy que Use*, unless the Use was executed before the Time therein limited. 1 Co. 125. a.

What is paid for Inrolment,

Where Inrolment to be kept for Inspection,

Secondly, How to inrol Deeds in the King's Bench.

The Deed must be acknowledged by any one of the Grantors, either in the Court, (on the Plea Side, Salk. 389.) or before a Judge of the Court, at his Chambers; and if it is acknowledged in Court, the Secondary asks the Party, *Whether he acknowledges the Deed to be his Deed?* And if he says he does, then he asks him, *Whether he desires*

fires that it be inrolled? If he says he does, then the Secondary writes the Caption upon some Part of the Deed in this Manner :

Acknowledged in the Court of our Sovereign Lord George the Second, now King of England, &c. before the King himself at Westminster, on the ——— Day of ——— in the ——— Year of his Reign, by the abovesaid A. B. By the Court.

A Baron and Feme came to acknowledge a Deed in Court, but the Court ordered the Acknowledgment of the Husband only to be entered. *Mod. Ca. 263.*

Thirdly, Of inrolling Bargains and Sales in Lancashire, Cheshire and Durham.

By Stat. 5 Eliz. c. 26. All Inrolments of such Writings indented (*viz.* as are mentioned 27 H. 8. 16.) of any Bargain and Sale, of Manors, Lands, Tenements or Hereditaments in the above mentioned Counties, made and inrolled in six Months after the Date thereof;

In the Chancery at *Lancaster*, or before the Justices of Assise at *Lancaster*, concerning Manors, &c. in the said County;

Or in the Exchequer at *Chester*, or before the Justices of Assise at *Chester*, concerning Manors, &c. in the said County;

Or in the Court of Chancery at *Durham*, or before the Justices of Assise at *Durham*, concerning any Manors, &c. in the said County,

Shall be deemed as good in Law as if the same Writings indented had been made and inrolled in any of the Courts at *Westminster*.

But the said Act does not extend to any Manors, &c. in any City, Borough or Town Corporate, in any of the said Counties wherein the Mayors, Recorders, Bailiffs, or other Officer or Officers having Authority, and have lawfully used to inrol any Evidences, Deeds or other Writings within their Precincts or Limits.

Fourthly, In Yorkshire.

See the Statutes concerning Registering and Inrolling Deeds and Wills in the East, West and North Ridings of *Yorkshire* before, from p. 495 to 519.

(M) *What Deed shall enure as and be deemed a Bargain and Sale, or not.*

A Man in Consideration of *natural Love and Affection* to his Daughter, and for her Preferment, did give, grant, bargain and sell, alien, infeoff and confirm to her and her Heirs; and about a Month after the Deed was acknowledged and inrolled. This not being in Consideration of *Money*, shall not enure as a Bargain and Sale, but as a *Covenant to stand seised to Uses*; and the Inrolment shall not hurt it, because the Uses vested immediately upon the Sealing of the Deed, and the Acknowledgment and Inrolment was afterwards. 7 Co. 40. 2 Co. 24. Cro. Eliz. 394. 1 Vent. 137. 1 Lev. 56.

If a Deed be acknowledged to be inrolled, and before Inrolment *Livery* is made this will make it a *Feoffment*, and not a Bargain and Sale. 2 Inst. 672.

So if a Man for a valuable Consideration makes a Deed, and a *Letter of Attorney* for *Livery*, and after the Deed is acknowledged and inrolled; this shall then be a Bargain and Sale, no *Livery* being made. 2 Roll. 787. 2 Inst. 671, 672.

No after Act in any Case shall make a good Deed void. *Ibid.*

A Man, in Consideration of *Money*, made a Deed of Gift, Grant, Bargain and Sale of his Lands to another and his Heirs, with a *Letter of Attorney* to make *Livery*, if *Livery* be thereupon made before Inrolment, there it has been adjudged to pass by the *Livery*, and not by the Inrolment. Popb. 49. 2 Inst. 672.

(N) *Et*

(N) *How a Bargain and Sale shall be taken.*First, *Of Lands.*

IF one bargains and sells his Land to me for Money; *To have and to hold* to me generally, and does not say to me and my Heirs; by this I have but an Estate for Life, and no more. 1 Co. 87. Co. Lit. 10. Dyer 169.

If one, in Consideration of 10*l.* paid by me, bargains and sells his Land to me and my Heirs; *To have and to hold* to me to the Use of the Bargainor for Life, the Remainder in Tail to me, the Remainder to the right Heirs of the Bargainor; the *Habendum* in this Case is void, and I and my Heirs shall have the Land for ever. Dyer 155.

If one in Consideration of 10*l.* sells me Land for the Term of twenty Years, and does not say when this Term shall begin; in this Case it shall begin presently. 6 Co. 33.

Secondly, *Of Goods.*

If one sells me any Thing by the Tod, Pound, Bushel, Yard or Ell; it shall be accounted me assured, and reckoned according to the Custom of the Country and Place, and not according to the Statutes or the Measures of other Countries. *Kelw.* 87. *Plow.* 140, 41.

If one sells me twenty Barrels of Ale, or ten Pottles or Cups of Wine; by these Bargains I shall not have the Barrels, Pottles or Cups, with the Ale or Wine. But if one sells me a Hogshead or a Firkin of Wine, it seems by this Bargain I shall have the Hogshead and Firkin with the Wine. *Plow.* 86. 27 *H.* 8. 27. *Bro. Contract* 4.

If one sells me all his Trees in such a Wood, and that I shall not cut them until Michaelmas, and in the interim Hawks do breed in the Trees; it seems in this Case that the Vendor shall have them, and that I may not meddle with them. 27 *Aff.* 29. And yet see 11 Co. 58. which seems to be the contrary.

Where I make a Bargain and Sale to *A.* and before Inrolment I make another Bargain and Sale to *B.* of the same Land, and the Deed to *B.* is first inrolled: If the Deed to *A.* is not inrolled within six Months, then the Bargain and Sale to *B.* (whose Deed is inrolled) is good: But if the Deed to *A.* is inrolled within the six Months, then the Deed to *B.* is void. *Hob.* 165. *Moor* 41. *Cro. Car.* 217, 218, 284.

A. bargains and sells to *B.* and before Inrolment they grant a Rent-charge to *C.* and afterwards the Deed is inrolled; here the Grant is good, and after the Inrolment, by the Operation of the Statute, it shall be the *Grant of B. and Confirmation of A.* But if the Deed had not been inrolled, then it had been the *Grant of A. and Confirmation of B.* Co. Lit. 147. *b.*

(O) *How and to what Purposes a Deed of Bargain and Sale of Lands, and the Inrolment thereupon, shall relate.*

THE Inrolment of a Deed of Bargain and Sale, when it is done within the six Months, shall to most Purposes relate to the Time of the Delivery, or of the Date of the Deed.

And it is given as a Rule, that it shall have Relation to the Time of the Delivery of the Deed, *viz.* to avoid all mean Estates and Charges made to a Stranger by the Bargainor after the Delivery of the Deed before the Inrolment, but not to divest any Estate lawfully settled in the interim in the Bargainee himself.

And therefore if one bargains and sells his Land by Deed indented to one, and after before the Deed is inrolled, he enters into a Statute, or grants a Rent-charge out of his Land, or makes a Lease of the Land to another, and then the Deed is inrolled within the Time; in this Case the Relation shall avoid all the mean Charges and Estates.

And if *A.* bargains and sells his Land by Deed indented to *B.* and afterwards sells the same Land by Deed indented to *C.* and the Deed made to *C.* is first inrolled, and then the Deed made to *B.* is inrolled also within six Months; in this Case *B.* shall have

have the Land, and the Relation of his Inrolment shall make the Inrolment of the other Deed void.

So if *A.* levies a *Fine* of the Land to *C.* yet *B.* shall have the Land.

But if the first Deed made to *B.* be not inrolled within the six Months, and the Deed to *C.* be inrolled within the six Months, *contra.* 4 Co. 71. *Bro. Fait Inrol.* 9. *Dyer* 218.

If *A.* bargains and sells Land to *B.* and after levies a *Fine* to *B.* of the same Land, and after within the six Months the Deed is inrolled; in this Case *B.* shall take by the *Fine*, and not by the Bargain and Sale. 4 Co. 71.

If one Jointenant aliens all his Lands in *Dale* to *A.* and before the Inrolment the other Jointenant dies, and after the Deed is inrolled; in this Case but a *Moiety* and not the whole Land doth pass. *Bro. Fait Inrol* 9.

If *A.* bargains and sells his Land to *B.* and after this *A.* becomes *Bankrupt*, and the Commissioners sell the Land to *C.* and after the Deed is inrolled within six Months; in this Case *B.* and not *C.* the Purchaser, shall have the Land. *So held* 4 Car. B. R.

If Commissioners of *Bankrupt* assign over the Land to the Use of the Creditors, no Estate passes until Inrolment. *Jones* C. J. 196, 197. 1 Vent. 206. 2 Show. 156. *Carth.* 178. 1 Show. 207.

If *A.* bargains and sells his Land held *in capite* to *B.* in Fee, and *B.* dies before Inrolment, and then the Deed is inrolled; in this Case the Heir of *B.* shall be in Ward. And so was it held by all the Justices in *Sir Walter Earl's Case*, Pasch. 15 Jac. Cur. Ward.

And yet in this Case the Wife of the Bargainee shall not have *Dower*, as was held by *Anderson* Chief Justice, and Justice *Walmsly*, 3 Jac. C. B. and again in *Sir Robert Barker's Case*, 6 Jac.

And if one bargains and sells his Land to *J. S.* and after this the Rent incurs, and then the Deed is inrolled; the Bargainee and not the Bargainor shall have the Rent. *Per Curiam* B. R. Hil. 11 Car.

If *A.* bargains and sells his Land to *B.* in Fee, and then marries *C.* and dies, and *C.* is endowed, and after the Deed is inrolled; in this Case the *Dower* of the Woman shall be taken away by Relation, as was held in *Baron Frevil's Case*, 22 Eliz. C. B.

If *A.* bargains and sells Land to *B.* and *C.* in Fee, and *B.* releases to *G.* before the Inrolment; this Release is void. 8 Jac. C. B.

If *A.* Disseisor bargains and sells the Land disseised to *B.* in Fee, and the Disseisee releases to the Bargainor, and after the Deed is inrolled; in this Case this Release shall avail *B.* *So held* in *Mocket's Case*, 10 Eliz.

If *A.* bargains and sells his Land to *B.* and *B.* before Inrolment bargains and sells the Land to *C.* the first Deed is inrolled, and then the second Deed is inrolled; in this Case the last Bargain and Sale is void, and shall not be made good by Relation, as was held by the Court in *Sir Robert Barker's Case*, 6 Jac.

If a Lease be made rendring Rent on Condition to re-enter for Non-payment, and the Lessor bargains and sells the Reversion by Deed indented, and after the Deed made the Rent is in Arrear, and then the Deed is inrolled; in this Case it shall not relate to give a Re-entry for the Condition broken. *So held* in *Sir Christopher Hatton's Case*.

If *A.* bargains and sells Land to *B.* in Tail, and *B.* before Inrolment of the Deed, makes a Lease according to the Statute of 32 H. 8. and after the Deed is inrolled; this is a good Lease. *So it has been adjudged.*

Neither the Death of the Bargainor nor Bargainee before Inrolment shall hinder the passing of the Estate. 2 Inst. 674. *Hob.* 136. 1 And. 219, 337.

A Release by a Stranger to the Bargainee before Inrolment shall be good. 2 Inst. 674, 675.

Where the Bargainee before Inrolment sells the Land, and after the Deed is inrolled, it is good. Co. Lit. 147. b. 2 Inst. 674, 675. *sed vide* *Hob.* 136. *Cro. Jac.* 52. 1 Vent. 360.

A Bargainee shall have Rent which incurs after Bargain and Sale, and before the Inrolment. *Sid.* 310. *Owen* 150. *Godb.* 209.

(P) Of Bargains and Sales of Goods and Chattels.

A Bargain and Sale may be made of Goods and Chattels, without any such Solemnity, as before; for it may be by *Word* as well as by *Writing*, with or without any Words of *bargain* and *sell*, as well as by those Words; by a *Deed Poll*, as well as by a *Deed indented*, and that without any *Inrolment* at all, and without any *Delivery* of any Part of the Things sold, or of any Piece of *Money* (as the Manner is) in the Name of *Seisin*. *Shep. Touch.* 224.

But in this Case also some Respect is to be had unto the *Cause* and *Consideration* of the Bargain, as well as in the Case of the Bargain and Sale of Lands.

For perhaps in the Case of a *Grant*, or *Bargain* and *Sale* of Goods or Chattels by Deed in Writing, the Consideration is not material. *Plow.* 308.

And if a Man by his Deed under his Hand and Seal bargains and sells Timber, Trees, or any other Thing, without any Consideration at all, the same may pass well enough; yet if the Contract be by *Word*, or by *Writing*, sealed and not delivered, if there be no Consideration, or no good Consideration of it, it is of no Effect at all.

And therefore if a Man by Word of Mouth sells me his Horse, or any other Thing, and I give him or promise him nothing for it; this is void, and will not alter the Property of the Thing sold.

But if one sells me a Horse, or any other Thing for Money, or any other valuable Consideration, and the same Thing is to be delivered to me at a Day certain, and by our Agreement a Day is set for the Payment of the Money, or all or part of the Money is paid in Hand, or I give Earnest-Money (altho' it be but a Penny) to the Seller, or I take the Thing bought by Agreement into my Possession where no Money is paid, Earnest given, or Day set for the Payment; in all these Cases there is a good Bargain and Sale of the Thing to alter the Property thereof; and in the *first* Case I may have an Action for the Thing, and the Seller for his Money; and in the *second* Case I may sue for and recover the Thing bought; in the *third* I may sue for the Thing bought, and the Seller for the Residue of the Money; in the *fourth* Case where Earnest is given we may have reciprocal Remedies one against another; and in the *last* Case the Seller may sue for his Money.

If A. sells Cloth to B. for 10 s. and B. takes away the Cloth against the Will of A. in this Case A. shall have an Action of Trespass against B.

And if A. sells Cloth to B. for 10 s. in his Election to make it a Bargain or not, and if he will he may keep his Cloth until the other pay him; and if A. says nothing, but suffers B. to take it away, he may make it a Bargain if he will, and bring an Action of Debt for his Money.

If I offer Money for a Thing in a Market or Fair, and the Seller agrees to take my Offer, and whilst I am telling the Money as fast as I can, he sells the Thing to another: Or when I have bought it, we agree that he shall keep it until I can go home to my House to fetch the Money; in both these Cases, especially in the first, the Bargains are good, so as the Seller may not sell them afterwards to another, and upon the Payment, Tender and Refusal of the Money agreed upon, I may take or recover the Things. *Dyer* 29, 30. 14 H. 7. 11. 21 H. 8. 19. 9 H. 7. 6. 10 H. 7. 6. *Plow.* 432.

See before (p. 126, &c.) concerning the Sale of Goods and Chattels.

S E C T. IX.

Of Deeds of Gift.

THE Word *Gift* imports no more than the Transferring of the Property of a Thing from one to another without a valuable Consideration.

A Gift is of a larger Extent than a Feoffment, which is always applied to corporeal and immoveable Things. For a Gift is applied to Things movable or immovable, as Trees, Cattle, Household-Stuff, &c. the Property whereof is and may be altered as well by Gift as by Sale or Grant.

And in this Sense a Gift is sometimes by the *Act* of the Party, as when one Man gives a Thing to another.

And this is or may be either by *Word* or by *Writing*.

And sometimes it is by *Act of Law*, as when a Woman is *married* to a Husband, or one is made *Executor* to another; in these Cases by the Marriage only, or taking of the Executorship, the Law gives all the Goods of the Woman to the Husband, and of the Testator to his Executor.

So where one takes my Goods as a Trespasser, and I recover Damages for them upon a Suit in Law; in this Case the Law gives him the Property of the Goods, because he has paid for them.

But the Word *Gift* is sometimes taken more strictly, and applied to a Conveyance or Passing of an Estate of Lands or Tenements to another (*only*) in Tail, wherein the Word *Dedi* is most commonly used.

And then he who gives the Land is called the *Donor*, and he to whom it is given the *Donee*.

And this by the Common Law was for the most part by *Deed*, tho' it might be by *Parol*. But see the *Stat. 29 Car. 2. c. 3.* before at p. 126.

By the *Stat. 3 H. 7. c. 4.* (reciting that oftentimes Deeds of Gift of Goods and Chattels had been made, to the Intent to defraud Creditors) it is enacted, That all Deeds of Gift of Goods and Chattels made or to be made of Trust, to the Use of that Person or Persons that made the same Deed of Gift, be void and of none Effect. See the *Stat. 29 Car. 2. c. 3.* & 13 *Eliz. c. 5.* before, at p. 126, 127.

By giving all one's Goods there seems to be a secret Trust and Confidence, that the Donee shall deal favourably with the Donor in respect of his Poverty, or permit him, or some other for his Benefit or Use, to be in Possession, &c.

And therefore when any Gift shall be made in Satisfaction of a Debt, let it be made,

1. In a publick Manner before Neighbours, and not in private.

Dona Claudeflina sunt semper suspiciosa. 3 Co. 80.

Clausulae inconstutae semper inducunt suspicionem. Ibid.

2. Let the Goods and Chattels be appraised to the full Value, and the Gift made in Satisfaction of the Debt.

3. After the Gift, let the Donee take Possession of them; for the Continuance of the Possession in the Donor is a sign of a Trust. *Wood's Inst. B. 2. c. 6.*

For more concerning these Deeds of Gift of immovable or movable Things, see *Deed and Grant in toto*, wherein all the Learning touching this Matter is involved.

For the Words *Gift* and *Grant* are often confounded.

And see before, *Concerning the Acquisition or Conveying personal Estates by Gift*, Page 126.

S E C T. X.

Of Grants.

(A) *Grant what, and Grantor and Grantee who.*

THE Word *Grant* taken largely, is where any Thing is granted or passed from one to another.

And in this Sense it comprehends Feoffments, Bargains and Sales, Gifts, Leases, Charges, and the like; for he that gives or sells grants also. In this Case it is sometimes in Writing or by *Deed*, and sometimes by *Word* without Writing.

But a Grant in a stricter Sense and properly is a Conveyance in Writing of such an incorporeal Thing as lies in *Grant*, and not in *Livery*, and which cannot pass by Word only without Deed.

Or it is the Grant of such Persons as cannot pass any Thing from them but by Deed, as the King, Bodies Corporate, &c.

And altho' it may be made by other Words, yet it is most commonly made by the Word *Grant*, as being most proper to the Purpose. *Co. Lit. 172, 332. a. Finch's Law 29.*

Therefore amongst Hereditaments, some are such as are said to lie in *Livery*, *i. e.* such as whereof *Livery of Seisin* may be made, as Manors, Houses, Lands, &c. And some are such as do not lie in *Livery*, *i. e.* whereof no *Livery of Seisin* can nor needs to be made, but they pass by the Delivery of the Deed without any more; and of this

this Sort are Rents, Reversions, Services, Advowsons in Gross, and the like; which Things cannot pass from Man to Man without Deed or Matter of Record, which is of a higher Nature than a Deed. *Co. Lit.* 49.

He who makes a Grant is called the *Grantor*, and he to whom it is made is called the *Grantee*.

(B) *Kinds of Grants.*

SOME Grants are of the Land or Soil itself, and some are of some Profit to be taken out of or from the Soil, as Rent, Common, &c.

And some are of Goods and Chattels, and some are of other Things, as Authorities, Elections, &c.

And they are made sometimes by Matter of Record, and sometimes by *Deed* or Writing in the Country, and sometimes by *Word* without either.

Some Grants also tend to charge the Grantor with something he was not charged with before, and some to pass something out of him to the Grantee; and some tend to discharge the Grantee of something wherewith he was charged or chargeable before, and whereof he is now hereby discharged.

(C) *What Grants must (or may not) be by Deed in Writing.*

BY the *Stat. 29 Car. 2. c. 3.* No Leases, Estates or Interests, either of Freehold or Terms of Years, or any uncertain Interest, not being Copyhold or Customary Interest, of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall at any Time be assured, granted or surrendered, unless it be by Deed or Note in Writing, signed by the Grantor, &c. or their Agents, lawfully authorized by Writing, or by Act and Operation of Law.

Before this Statute the Common Law stood thus as to what Grants should be by Deed, or might be by Word; and the same Laws, as far as they are not within the same Statute, still remain in Force.

By the Common Law Corporations, as Dean and Chapter, Mayor and Commonalty, and such like, regularly can neither grant Lands, Goods or Chattels, but it must be by Deed. Corporations;

But the Grantees of such Persons, and all other common Persons, might (before the *Stat. 29 Car. 2. c. 3.*) grant or give any Thing which lies in Livery, as Manors, Houses, Lands, and such like Things, in Fee-simple, Fee-tail, for Life, for Years, or at Will, by Word without Deed.

And if a Lease was made of any such Thing for Life or Years, with a Remainder over in Fee-simple, Fee-tail or for Life; it was good altho' it were by Word without any Deed in Writing. *Perk. §. 64. 4 H. 7. 17. Plow. 150. 16 H. 7. 3. Lit. §. 60.*

And such Things as are said to lie in Grant and not in Livery, could not be granted or given, had or taken without Deed, unless it was in some special Cases.

And therefore Rents and Services, and such Things which are in Gross, and not incident to some other Thing, may not be granted without a Deed; and therefore if a Rent-charge be granted unto me for Years, I may not grant this Rent over without Deed. And if there be Lord and Tenant of Arable Land by Fealty, and the Service of yielding the tenth Sheaf of Corn before it be sowed; the Lord cannot grant this Service for Years without Deed. Rents, Services, &c.

But if a Rent, or any Service be Parcel of or incident to a Manor, or any other Thing which is grantable without Deed; in this Case by the Grant of the Principal by Word this Thing might pass as belonging thereunto without any Deed.

Also Rents or Services might be granted upon a Partition by one Coparcenor to another without Deed. *Co. Lit. 49. Dyer 439. Perk. §. 60, 61, 63. Bro. Grant 59.*

A Reversion could not be granted in Fee-simple, Fee-tail for Life or Years without Deed, unless it be in Case where it is Parcel of a Manor. Reversion or Remainder.

But a Reversion might be granted upon a Partition by one Coparcenor to another without any Deed. And the same Law was of a Remainder. And therefore if one made a Lease for Life or Years to one, the Remainder in Fee-simple, Fee-tail or for Life to another without Deed; howsoever this was a good Remainder in the first Creation without Deed, yet this Remainder could not be granted over without Deed.

Perk. §. 61. Dyer 174. Plow. 433. Bro. Grant 104.

Advowson,
Tithes, &c.

A Parsonage or Rectory, altho' it consisted of nothing but Tithes, and the like, besides the Church and Church-yard, and had no House nor Glebe belonging to it, yet it might be granted *without* Deed in Fee-simple for Life or Years, and then the Tithes and Offerings would pass as incident.

But the Tithes alone, or a Portion of Tithes, Oblations, Mortuaries or Obventions, were not grantable by themselves without Deed. 15 H. 7. 8. 16 H. 7. 2. 19 H. 8. 12. 21 H. 6. 43.

And therefore a Lease Parol of Tithes, altho' it was but for Years, was not good.

And if the Parson agreed with one of his Parishioners, that he should have his own Tithes; this was not a good Grant of the Tithes, neither might it be pleaded or used so, but perhaps by way of Agreement a Parishioner might retain his Tithes. 36 El. B. R.

And if a Lessee for Years of Tithes will grant it over to another at Will only, it could not be done without Deed, as was held by Baron Denham, 2 Car. at Sarum Assises.

And yet it was held, that a Parson might grant his Tithes from Year to Year to him that was to pay them without any Deed; but this was by way of Retainer. Mic. 8 Jac. Dr. Longworth's Case.

But this Grant or Agreement might be made to and with the Party himself that was to pay the Tithes, and not with another: Neither could this Interest be assigned, or a Stranger take Advantage of it, as hath been agreed in the Case of Hawkes and Brafield, Pasch. 3 Jac. B. R.

An Advowson in Gross could not be granted without Deed; even the Grantee of the Grantee of an Advowson is to shew both the Deeds.

But an Advowson was grantable upon a Partition between Coparceners without Deed.

And an Advowson incident to a Manor or Piece of Land was grantable with the Manor or Land without any Deed.

The next Avoidance to a Church was not grantable without Deed. 21 Ed. 3. 38. 11 H. 4. 3. Dyer 29, 10. 1 Co. 1. Plow. 150. 9 Ed. 4. 47.

Common of
Pasture, &c.

Common of Pasture, Estovers, Turbary, Fishing, &c. could not be granted in Fee-simple, Fee-tail for Life or Years, unless it be in Case of Partition, or of Appendancy, as incident to some corporeal Thing without Deed.

And therefore if a Man granted by Word of Mouth to me Common for twenty Beasts in this Manor; this would not be good.

Neither if it was granted to me by Deed, might I grant this over to another without Deed.

But if a Man had Common of Pasture Appendant or Appurtenant to his Land; in this Case he might grant his Land with the Common Appendant by Word only without any Deed. Perk. §. 61.

Franchises,
&c.

Franchises, as Fairs, Markets, Courts, Warrens, and the like, or the Profits thereof, were not grantable without Deed.

Hundred.

But a Hundred was grantable without Deed, for that is *Liberum Tenementum*.

The Profits of a Mill, Country, Ferry, Corody, or the like, were not grantable without Deed. 15 H. 7. 8.

Things in
Action, &c.

Things in Action, as a Right or Title of Action that only depends in Action, and Things of that Nature, as Rights and Titles of Entry to any real or personal Thing, are not grantable at all but by way of Release to the Tenant of the Land, &c. by which Means it may be extinguished: But this neither may not be without Deed.

And therefore if a Man takes my Goods as a Trespasser, or I deliver him my Goods to keep, and after I will give these Goods to him, I cannot do this without Deed. 6 H. 7. 9. Dyer 91, 126. Do. & Stud. 16.

An Election, Condition, Covenant, Assent, Licence or Liberty, cannot be created and annexed to an Estate of Inheritance or Freehold without Deed. Dyer 281.

A Privilege to hold Land for Life without Impeachment of Waste, is not grantable without Deed.

Offices.

Offices for the most part are not grantable without Deed.

And yet some inferior Offices, as Stewards, Bailiffs, and the like, are, for such Officers a Lord of a Manor may retain by Word without Deed. 9 Co. 9.

Chattels.

Most Chattels real and personal might be given and granted without Deed.

And therefore if a Man by Word of Mouth granted, gave or sold me his Lease for Years, the Wardship of Body and Land, or the Wardship of Land that he had by Reason of a Tenure by Knight's Service, or by Grant from the King, or granted or sold

fold me the Trees standing upon his Ground, the Corn growing upon his Land, his Horse, Sword, Plate, or other Household-Stuff; this is a good Grant or Gift. But the Wardship of the Body of an Heir only, cannot be granted without Deed.

So a next Presentation cannot be granted without Deed. *Perk.* §. 57, 60. *Bro. Donne* 1. *Dyer* 10. 5 *H.* 7. 35, 36. *Plow.* 150.

(D) *Things necessary to every good Grant.*

Regularly these Things are requisite in every good Grant or Gift:

1. That there be a *Grantor*, Donor, &c. and that he be a Person able to grant, and not disabled by any legal or natural Impediment.

2. That there be a *Grantee*, Donee, &c. and that he be a Person capable of the Thing granted, and not disabled to receive it.

3. That there be a *Thing* granted, and that the Thing be such a Thing as is grantable.

4. That it be granted in that Order and Manner that Law requires: As where the Thing is not grantable without Deed, that it be done by Deed.

And if it be done by Deed, that the Deed have apt Words to describe and set forth the Person of the Grantor and Grantee, and Thing granted, &c. and that all necessary Circumstances, as Sealing and Delivery, and Livery of Seisin, and Attornment, where it is needful, be observed.

5. That there be an Agreement to and Acceptance of the Grant or Thing granted by him to whom it is made, and for Default in either of these Particulars a Grant may be void. *In acquirendo rerum dominio, scilicet quod donationes non valent, licet sint inceptæ, nisi sint perfectæ.*

But if Grants be very antient, and Things granted have been enjoyed according to the Grant ever since the Making of it; in this Case the Grant may be good notwithstanding some legal Defect in some of these Particulars. 1 *Co.* 73. *Plow.* 555. *Perk.* §. 1. *Bro. Grant* 89.

See concerning Things necessarily incident to every good Deed, before p. 176.

(E) *Who may be a Grantor.*

TWO Things are requisite relative to the Grantor:

First, That the Grantor be a Person able to grant.

Secondly, That if the Grant be by Deed, that he be sufficiently described and set forth, either by his proper Names, or else by some other Matter of Distinction.

Note therefore, that whosoever may be a Feoffor, may be a Grantor.

And any *Natural, Politick or Corporate Body* (not prohibited by Law, as Monk, Frier, Woman Covert, Infant, and such like) may be a Grantor, Donor, &c. and the Grants of such Persons will be good. *Perk.* §. 3. Natural or Politick Bodies.

An Alien may and is able to grant or give any Thing that he is capable to have or take by Grant or Gift. Alien.

A Person attainted of Treason or Felony may give or grant his Land; and this is good against all others besides the King and the Lord of whom his Land is held. Person attainted or outlawed.

And he may grant or give his Goods to relieve himself in Prison; and this will be good against all others, and the King and Lord also.

A Person outlawed in a personal Action, may give or grant his Goods or Chattels, and the Gift or Grant will be good against all others but the King. *Perk.* §. 26.

The Queen may, without the Agreement of the King, make Grants, Gifts, &c. of her Lands or Goods; but another Woman that has a Husband cannot give or grant her Lands or Goods without her Husband's Consent, unless it be in some special Cases. Feme Covert.

And altho' she recites by the Deed that she is Sole and not Covert, yet this will not help.

And if the Case be so, that by Agreement between her and her Husband there be a certain Portion of her Husband's Lands or Goods allotted unto her to dispose of and manage at her Pleasure, yet she alone without her Husband can make no good Grant or Gift of any Part of these Lands or Goods.

But if she grants any Thing by Fine, and the Husband does not avoid it during the Coverture; this Grant will bind her after his Death.

And if she makes a Gift or Grant of her Husband's Goods, it is thought this is not good until her Husband agrees to it. *Co. Lit. 3. Perk. §. 8, 20, 41.*

Infant.

An Infant cannot make any Gift or Grant, &c. that is good but in special Cases: For if he makes any Grant or Gift that takes Effect by the Delivery of the Deed only; as if he grants a Rent-charge out of his Land, or makes a Feoffment with a Letter of Attorney, or gives Livery of Seisin, or gives or sells his Horse, and the Buyer or Donee takes him himself; these are void *ab initio*.

And if the Grant or Gift takes Effect by the Delivery of his own Hand; as if he makes a Feoffment, and gives Livery of Seisin himself, or sells a Horse and delivers him with his own Hands; this is voidable by the Infant himself, or others that shall have his Right, &c.

But if an Infant grants any Thing by Fine; this must be avoided during his Minority, or else it cannot be avoided at all. *9 H. 7. 24. 26 H. 8. 2. Perk. §. 12, 13, 14, 19. 7 H. 4. 5.*

Durefs.

All Grants that are made by Durefs, are voidable by the Parties themselves that make it, or others that have their Estates, &c.

But if it be done by Fine, it is good and unavoidable. *Perk. §. 16.*

Non sane memorie.

All Gifts, Grants, &c. made by Deed in the Country, by those that are *de non sane memorie*, are good against themselves, but voidable by those that are their Heirs, Executors, or have their Estates; but if it be by Fine, it is good and unavoidable.

4 Co. 123, 124.

Born dumb, &c.

A Man that is born dumb, or dumb and deaf, if he has Understanding, may by Delivery of the Deed and making of Signs, make a good Grant, Gift, &c.

But a Man that is born deaf, dumb and blind cannot. *Perk. §. 25.*

Bastard.

A Bastard may give or grant as well as any other Man, after he has got a Name by Reputation. *Perk. §. 20.*

Parson.

A Parson may grant any Thing belonging to his Parsonage for no longer Time than for his own Life, and therein likewise but during his Residence, altho' he has the Consent of the Patron and Ordinary.

Corporation.

Neither the Head without the Members of a Corporation, nor the Members without the Head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the Lands belonging to their Corporation. *Perk. §. 31, 32, 33.*

Executors.

One Executor or Administrator may give or sell any of the Goods of the Deceased, and this is good to bind all the Rest.

For more concerning who may grant, &c. see before, p. 177.

(F) Of naming the Grantor.

THE Name of the Persons in Grants is set down only to distinguish Persons, and to make the Person intended certain: And therefore notwithstanding it is best and most safe to describe the Person by his true and proper Name of Baptism, and also by his Surname; and if it be a Corporation, by the true Name whereby the Corporation is made; yet Mistakes in this Case, unless they are very gross, will not make void the Grant; *Nil facit error nominis cum de corpore constat.*

And therefore if one that is a Bastard has got a Name by Reputation in the Place where he lives, or another Man has got another Name by common Esteem than his own right Name, or is usually called by another Name than his true Name in the Place where he lives; in these Cases they may grant by this Name, and the Grant is good.

And if a Man be baptized by one Name, and after be confirmed by another; some have said he may grant by either of these Names. *Sed quære.*

And if *John at Stile* grants by the Name of *William at Stile*; this Grant is good. *Et sic de similibus. 6 Co. 63. Co. Lit. 3. Perk. §. 41, 39.*

And these Grants are good, especially when there is some other Addition to make it more certain; as when a Duke, Marquis, Earl or Bishop, grants by their Names of Honour or Dignity, and grant without any Name, or with a false Name of Baptism, as when the Duke of *Suffolk* by the Name of the Duke of *Suffolk*, without any more Words; or by the Name of *William Duke of Suffolk*, when his Name is *John*;

John; or the Bishop of *Norwich* grants so: These are good Grants, because there is but one such Duke and one such Bishop within the Kingdom.

So if a Dean and Chapter, Mayor and Commonalty, grant by the Name of their Corporation without any Addition of Christian or Surname; it is good. *Fitz. Grant* 67. *Perk.* §. 42.

And especially these Grants are good when the true Name appears in some other Part of the Deed; as when *John at Stile* recites by his Deed that his Name is *John at Stile*, and by the same Deed grants by the Name of *Thomas at Stile*. Or *Alice at Stile*, reciting by her Deed that she is a Feme Covert when in Truth she is Sole. *Perk.* §. 40.

But if an ordinary Man grants by his Surname only without any Name of Baptism, or by his Name of Baptism without any Surname at all: In these and such like Cases for the most part the Grant will be void for Uncertainty, unless there be some other Matter in the Deed to help it, or some Matter done *ex post facto* to supply it; for in some Cases where the Thing granted lies in Livery, such a Mistake or Incertainty in the Grant may be helped by the Livery of Seisin upon the Deed afterwards. 3 *H.* 6. 26. *Perk.* §. 38, 42.

And so also it is in the Names of Corporations; for if the Variance and Mistake by Omission or Alteration be only in some small Matter, so as it is literal and verbal only, the Grant will not be hurt by it. But if the Mistake or Omission be in the Substance of the Name, the Grant may be void by it. And therefore if *Decanus & capitulum Ecclesie Cathed. Sancte & individ. Trin. Caerlil.* grants by the Name of *Decanus Ecclesie Cathed. Sancte Trin. in Caerlil. & totum capitulum Ecclesie predict.* this is good: *Et sic de similibus*: For if the Sense still remains either expressly or by necessary Implication, and the Description be such as imports a sufficient and certain Demonstration of the true Name of the Corporation according to the Foundation thereof, it suffices. But if any of the Substance or Essence of the Name be omitted, *contra*. And therefore if a Corporation, incorporated by the Name of *Præpositi, &c. Collegii Regalis Coll. beatæ Mariæ de Eaton, juxta Windsor*, grant by the Name of *Per. & sociorum Colleg. Regalis de Eaton, &c.* leaving out *Collegium & beatæ Mariæ*; this Grant is void. 6 *Co.* 65. 10 *Co.* 122, 124. 11 *Co.* 19. *Dyer* 110.

For more concerning naming the Grantor, see before, p. 218.

(G) Who may be a Grantee.

AS to a Grantee three Things are requisite:

1. That the Grantee be a Person capable, *i. e.* that he be a Person in Being at the Time of the Grant made, and not disabled by any legal Impediment to take by the Grant.

2. That if the Grant be by Deed, the Grantee be sufficiently named, or at the least set forth and distinguished by some circumstantial Matter, and that he be so named or described as that he may be capable to take by the Name or Description.

3. That he himself, and not a Stranger, takes by the same Grant.

All Natural, Politick or Corporate Bodies that are not disabled by Law, may be Grantees: And all Persons that may be Grantors may be Grantees; and some others that cannot grant or give, yet may take or receive. And a Grant made to one, two, three or twenty such Persons, is good. *Co. Lit.* 2, 3. *Perk.* §. 42.

A Grant of Land, or Rent in Possession to the right Heirs of *J. S.* *J. S.* being then living, is void; for there neither is nor can be any such Person in *Rerum natura*, for no Man can be an Heir to another that is living: But such a Grant to one in Remainder is good, if so be that *J. S.* dies before the particular Estate ends, and before the Remainder happens. So if a Grant be to him or her that shall be the first Child of *J. S.* and he has no Child at the Time of the Grant, this is void. So if a Grant be made to the Wife or Child of *J. S.* when there is none such, it is void: As if a Grant be to *J. S.* and to his first born Son, or to *J. S.* and her that shall be his Wife, and he has at the Time of the Grant neither Wife nor Son; in these Cases the Grant is void as to the Wife and Son, and *J. S.* shall have all by the Grant. 1 *Co.* 101. 2 *Co.* 31. *Perk.* §. 52, 54.

An Alien may be a Grantee, but if any Thing be granted to him whereof he is incapable; as an Estate of Lands in Fee-simple for Life or Years, he cannot hold it, but the King will have it from him. An Alien.

- Persons attainted.** A Person attainted of Treason or Felony before or after Attainder may be a Grantee, but he cannot hold the Thing granted; for if the King or Lord will, he may have it from him. So also Persons outlawed in personal Actions may be Grantees of Lands or Goods, but the King will have the Profits of the Lands and Property of the Goods. *Co. Lit. 2. Perk. §. 48.*
- Outlawed.**
- Feme Covert.** A Woman Covert may be a Grantee, but her Husband may by his Disagreement avoid the Grant; and yet if he does not avoid it in his Life-time, the Grant will be good: And he that will have the Grant to be void, must shew the Husband did disagree to it. *Perk. §. 43. Co. Lit. 2.*
- Infant.** An Infant may be a Grantee, for this is presumed to be his Advantage; and yet at his full Age he may agree to it and perfect it, or disagree to it, and avoid it without any Cause shewed. *Perk. §. 4. Co. Lit. 2.*
- Men de non sane memorie.** A Man *de non sane memorie* may be a Grantee as well as any other Man, and it seems these Grants cannot be afterwards avoided. But such Men may not be Grantees of Offices of Trust, and such like Things. *Co. Lit. 2.*
- Bastard, Persons deformed, &c.** A Bastard, Persons deformed having human Shape, Leapers, and such like, may be Grantees of Lands or Goods, &c. as other Men may be. *Ibid.*
- Hermaphrodite.** An Hermaphrodite may be a Grantee according to the most prevailing Sex. *Ibid.*
- Clerk convicted.** A Clerk convicted, and a Man imprisoned, may be a Grantee as well as another; and so also might a Villain of the King, or of a common Person; but he could not retain the Thing granted, for the King or Lord might have it from him if he would; neither could Monks, Friars, and such like Persons, be Grantees, for they were utterly disabled. *Co. Lit. 3. Perk. §. 48, 51.*
- Villain.**
- For more as to this Head, see before, p. 222.*

(H) Of naming the Grantee.

Regularly it is requisite that the Grantee be named by his Names of Baptism and Surname; and so it is most safe, and special heed must be taken to the Name of Baptism, for that a Man cannot have two or more Names of Baptism, as he may of Surnames. *Co. Lit. 3.*

And yet in some Cases, tho' the Name be mistaken the Grant is good; as if a Grant be to *J. S.* and *Em* his Wife, and her Name is *Emelin*, (*Bro. Nofne 9.*); or a Grant is made to *Afrid Fitz-James*, by the Name of *Etheldred Fitz-James*, (*Bro. Confirmation 30.*); or a Grant be to *Robert Earl of Pembroke*, where his Name is *Henry*; or to *George Bishop of Norwich*, where his Name is *John*, (*6 Co. 65. 27 Ed. 3. 85.*); or a Grant be to a Mayor and Commonalty, or a Dean and Chapter, and Mayor or Dean is not named by his proper Name, (*Co. Lit. 3.*); or a Grant be to *J. S. Wife of W. S.* where she is Sole: All these and such like Grants are good; for in this Case the Rule doth hold *utile per inutile non vitiatur*. (*Dyer 119.*) And if one be baptized by one Name and after confirmed by another, yet a Grant to him by his first is good; and so also some think of a Grant to him by his second Name; *sed Quære* of this. Also when a Bastard has got a Name by Reputation, a Grant may be made to him by that Name, and it is good. *Co. Lit. 3.*

If a Grant be made to *W. at Stile*, by the Name of *W. at Gappe*; this is a good Grant notwithstanding this Mistake.

But where a Grant intends to describe the Person of the Grantee by his proper Name, and omits or mistakes his Christian Name or Surname; in this Case for the most part the Grant is void unless there be some special Matter to help it, as in the Case before. And yet if the Grant does not intend to describe the Grantee by his known Name, but by some other Matter, there it may be good by a certain Description of the Person, without either Surname or Name of Baptism. And therefore a Grant to the Wife of *J. S. primogenito filio*, or the second Son, or to the youngest Son, or *seniori puero*, or *omnibus filiis*, or *filiabus J. S.* or *omnibus liberis J. S.* or *omnibus exitibus J. S.* or to the right Heirs of *J. S.* or to the next of Blood of *J. S.* In these Cases Grants made to these Persons in these Words are good, for the Person is certainly enough described. And if a Lease be made to *J. S.* for Life, the Remainder to him that shall come first to *Paul's* such a Day, or to him that *J. S.* shall name in three Days; if in these Cases any one comes to *Paul's* that Day, or be

named by J. S. within three Days, and the particular Estate so long continues, this is a good Grant of the Remainder. *Id certum est quod certum reddi potest.* But if a Grant be made in these Words, viz. To four of the Parishioners of Dale; or Deo & Ecclesie de D. or to two of the Sons of J. S. and he has many Sons; or to J. S. or W. S. in the Disjunctive: These and such like Grants as these are utterly void for Incertainty. And if a Gift or Grant of Goods be to the Parishioners of Dale in these Words, it seems this is good: But if a Grant or Gift of Land be made to them by these Words, it seems this is void. And also it is of a Grant of Goods to the Church-wardens of the Parish; this is held to be good, but otherwise it is of a Grant of Lands to them. A Bastard is capable by that Name whereby he is usually called, and therefore a Grant to him by that Name is good. And a right Heir, or one that shall be the first Issue of J. S. that has no Child, is capable of a Remainder by that Name, but of Land in Possession he is not capable by that Name. And a Bastard, as the reputed Son of J. S. may take by a Grant to J. S. and his Issue. A Bishop may take by the Name of a Bishop without any other Name; but if a Grant be made to the Parishioners or Inhabitants of Dale, or *probis hominibus de Dale*, or to the Commoners of such a Wasse, or to the Lord and his Tenants bond and free; these are not good Grants, for altho' these Persons are capable, yet they are not capable by these Names. 9 Ed. 4. 43. Fitz. Grant 23. Co. Lit. 3. Perk. §. 52, 54, 55, 56. Bro. Grant 65. Done 17, 31. Dyer 337.

If there be two Grantees, and one of them takes by the Deed, it is sufficient; but if the Grant be to one that is no Party to the Deed, and not to the Grantee himself, in this Case altho' the Grantee and he to whom the Grant is made be capable, and never so well described by their Names, yet is the Grant void; for no Grant can be made but to him that is Party to the Deed, except it be by way of Remainder: And therefore if a Man makes a Lease for Term of Life, and after the Lessor grants to a Stranger, that the Tenant for Life shall have the Land to him and his Heirs; this Grant is void. *Et sic de similibus.* And yet it seems in some Cases, that if one of the Grantees be Party to the Deed, that another Grantee that is no Party to the Deed may take with him; and therefore the Case was, Robert gave the Reversion of Lands which Agnes his Wife held for her Life to Stephen de la Moore, *Habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*: In this Case it was adjudged, that altho' Joan was not named before the *Habendum*, yet that she should take in Tail with her Husband. Doct. & Stud. 94. 1 Co. 15. Co. Lit. 21, 231. 5 E. 3. 17.

For more concerning naming the Grantee, see before p. 228.

(I) Of the Power of Grantees where the Grant is for the Benefit of others.

ON a Grant made to the Warden and Assistants of S. for the Benefit of the Inhabitants, for Ease of Taxes and Relief of the Poor, it was decreed, that they should not let or make any Leases of the Land without the Consent of the major Part of the Inhabitants of the Place, it being for their Benefit in general. 1 Chan. Ca. 269, 270,

(K) Of the Things granted.

AS to Things granted observe these Things:

First, That the Thing whereof the Grant is made be grantable, and that both in Respect of the Nature of the Thing itself, and also of his Estate that grants it; or in some Cases altho' the Thing for the Quality of it be grantable, yet in Respect of the Estate and Property that the Owner has in it, it is not grantable.

Secondly, That if it be by Deed, it be sufficiently distinguished and named.

Amongst Things that are grantable, some are grantable *de novo*, and in their first Creation, but not transmissible nor assignable afterwards.

And some are grantable at first in their original Creation, and assignable over afterwards from Man to Man *in infinitum*.

All Things that may be granted by Fine, and whereof a Fine may be levied, may be granted over from Man to Man.

Things in
Livery.

All Things that are before observed to be grantable by or without Deed, are grantable over from Man to Man: And therefore all corporal and immovable Things that lie in Livery, as Manors, Messuages, Cottages, Lands, Meadows, Pastures, Woods, and the like, are grantable in Fee-simple for Life or Years at first, and assignable over again at the Pleasure of the Grantee.

Also Trees and Emblements are grantable. And a Man may grant the Vesture or Herbage, *i. e.* the Grass of his Ground, and not the Ground itself.

And a Man that is seised in Fee of a House, may give or sell the Timber, Stone, &c. of the House, and the Donee or Grantee may take after the Death of the Donor. *Bro. Done* 10.

In Grant.
Rents, Ser-
vices.

Also all incorporeal Things that lie in Grant, as Rents, Services, and the like, are grantable over in Fee-simple for Life or Years; and therefore Rents or Services reserved upon any Estate, and Rents granted out of Land, are grantable over *in infinitum*. And if a Man has a Rent reserved on a particular Estate, he may grant over Parcel of it.

But a Rent or Service suspended cannot be granted. Neither can a Man grant a Rent issuing out of a Rent. If a Rent be granted to me, I may grant it over to a Stranger before I be seised of it, and this Grant is void. But an Annuity it seems is not grantable over after the first Creation of it. And yet if an Annuity be granted to *J. S.* and his Assigns *pro consilio*, it seems this Annuity is grantable over. *Perk.* §. 91, 87, 101, 103. *Bro. Grant* 3. 3 *H.* 6. 20. 9 *H.* 6. 12. *Fitz. Grant* 145. *Co. Lit.* 144.

Advowsons,
&c.

Advowsons are grantable in Fee-simple for Life or Years from Man to Man *in infinitum*.

Also the Presentation to a Church before the Church is void, is grantable: But when the Church is void, that Turn is not grantable, for then it is in the Nature of a Thing in Action.

Also Rectories and Tithes, and Portions of Tithes and Pensions, are grantable from Man to Man *in infinitum*. *Stat.* 32 *H.* 8. c. 7. *Perk.* §. 90.

Reversions
and Re-
mainders.

Reversions and Remainders are grantable from Man to Man in Fee-simple, Fee-tail, for Life or Years.

And if I have a Tenant for Life of three Houses, I may grant the Reversion of two of them.

And if I have the Reversion of three Houses and four Acres of Land, I may grant the Reversion of two Houses and of two Acres of Land.

And if a Tenant in Tail be of an Acre of Land, the Remainder to his right Heirs, he may grant over this Remainder by itself; and yet it is such a Thing as the Tenant in Tail himself may bar by a Common Recovery.

But if a Grant be of Land to *J. S.* for Years, the Remainder to the right Heirs of *J. D.* and *J. D.* is living; this Remainder is not grantable so long as *J. D.* lives. *Perk.* §. 73, 87, 88.

Common.

Common of Pasture of Turbary, of Fishing, or of Estovers, are grantable in Fee for Life or Years from Man to Man *in infinitum*. *Perk.* §. 103.

And yet if a Common in Gros and without Number be granted to a Man and his Heirs, this is not grantable over to another Man; but if Common for a certain Number of Beasts be so granted, the Law is otherwise; and that this is grantable over in Case where the first Grant is to the Grantee only, and not the Grantee and his Assigns. *Per* two Judges against one, *H.* 16 *Jac.* B. R.

Offices.

Offices are grantable at first; but the great judicial Offices of the Kingdom, as the Offices of the Lord Keeper, Chief Justices or Chief Baron, or of other of the Justices and Barons, and such like, are not grantable over to others, neither may they be executed by Deputies. But the Sheriff's Office, altho' it be not grantable over, yet it may be executed by Deputy. *Perk.* §. 101. The Reversion of an Office is not grantable by a Subject as it is by the King, yet a Subject may grant an Office *habendum* after the Death of the present Officer; and this is good. *Per* Lord Keeper and two Chief Justices, *M.* 5 *Car.* in *Canc.* The inferior Offices also that are Offices of Trust, especially if they concern the Person of the Grantor, howsoever they are grantable at first, yet are they not grantable over by the Officer to any other, unless they be granted to them and their Assigns; and of this Sort are Offices of Steward, Bailiff, Receiver, Sewer, Chamberlain, Carver, and the like; neither may these be executed by Deputy but where the Grant is so. *Co. Lit.* 233. *Perk.* §. 101.

Licences and Authorities are grantable at first for the Lives of the Parties or for Years; but the Grantees of them cannot assign them over. And therefore if Power be given to me to make an Award or Livery of Seisin, I may not grant over this Power to another. And if Licence be granted to me to walk in another Man's Garden, or to go through another Man's Ground, I may not give or grant this to another. 12 Hen. 7. 25. 13 H. 7. 13. Licences, Authorities, &c.

A bare Possibility of an Interest which is incertain, is not grantable; and therefore if one has a Term of Years in Land, and by his Will devises it to *J. S.* for his Life, and afterwards to me for the Residue of the Years; or devises it to *J. S.* if he lives so long as the Term shall last, and if he dies before the Term ends, the Remainder to me: In these Cases so long as *J. S.* lives, I cannot grant over this Possibility. So if a Lease be made to me and my Wife for Life, the Remainder to the Survivor of us, I may not grant this Remainder over to another Man; but such a Possibility being coupled with some present Interest, is grantable over; and therefore if *A.* has four Houses in Execution upon a Statute, and by Course of Time it will endure thirteen Years, and after two of the Houses are evicted by *Elegit* for fifteen Years; in this Case he that has this Execution upon the Statute may assign over his Interest in these two Houses: For after the Execution by the *Elegit* is satisfied, *A.* shall have the two Houses again until he be satisfied. The Lord cannot grant the Wardship of the Heir if his Tenant is living. 4 Co. 66. 5 Co. 24. 10 Co. 51. Dyer 244. Perk. §. 90. Possibilities.

These Things that are inseparably incident to others, are not grantable without the Thing to which they are so incident and belonging; and therefore a Court Baron, which is evermore incident to a Manor, is not grantable without the Manor itself; Common appendant to Land is not grantable without the Land itself to which it belongs; and Common of Estovers appendant to a House is not grantable without the House itself to which it belongs. 1 Ed. 4. 10. 5 H. 7. 7. Perk. §. 104. Incidents.

A Rent-Service, or other Thing, whilst it is wholly in suspense, is not grantable; and therefore if the Lord disseises the Tenant, or the Tenant infeoffs the Lord upon Condition, the Lord cannot grant over the Seigniorship during this Suspension. But if one has a Rent in Fee out of my Land, and he purchases the same Land for Life or Years; in this Case the Rent is grantable even whilst the Estate of the Land continues. So if the Tenant makes a Lease for Years or Life of the Tenancy to the Lord; in this Case the Lord may grant the Seigniorship notwithstanding. And yet if the Tenant makes a Lease to another Man for Life, and the Lord grants the Seigniorship to his Tenant for Life in Fee; in this Case the Grantee of the Seigniorship cannot grant it over, because it was never *in esse*. 16 H. 7. 4. Co. Lit. 314. Bro. Grant 173. Perk. §. 83, 89. Suspended Things.

Franchises, as Views of Frankpledge, Perquisites of Courts Leet, Conuſance of Pleas, Fairs, Markets, Goods of Felons, Waifs, Estrays, Hundreds, Ferries, or Passages, Warrens, and the like, are grantable over from Man to Man in Fee for Life or Years *in infinitum*. Franchises.

Things in Action, and Things of that Nature, as Causes of Suit, Rights and Titles of Entry, are not grantable over to Strangers but in special Cases; and therefore if a Man has disseised me of my Land, or taken away my Goods, I may not grant over this Land or these Goods until I have Seisin of them again. Neither can I grant the Suit which the Law gives to me for my Relief in these Cases to another Man. So if I make a Feoffment to another Man, on Condition that if I do such a Thing I shall have the Land again; in this Case I may not before or after the Time of Performance of the Condition grant over the Condition to another. But all these Things I may release to the Parties themselves: For it is a Maxim in Law, That every Right, Title or Interest *in presenti* or *in futuro*, by the joint Act of all them that may claim any such Right, Title or Interest, may be barred or extinguished. 5 Co. 24. 6 Co. 50. 10 Co. 48. Co. Lit. 214. Dyer 241. Perk. §. 86, 87, 85. Bro. Done 27, 24, 48. Things in Action.

And in some Cases a Grantee of a Reversion may take Advantage of a Condition annexed to an Estate for Life or Years. If a Man owes me Money on an Obligation, or the like, I cannot grant this Debt to another: But I may grant a Letter of Attorney to another Man to sue for it and receive it, or I may grant the Writing itself to another, and he may cancel it, or give it to the Obligor. Co. Lit. 232. Perk. §. 86.

A Presentation to a Church after the Church is become void, is not grantable; for it is in the Nature of a Thing in Action. Dyer 283.

And if a Man takes my Goods from me, or from another Man in whose Hands they are; or I buy Goods of another Man, and suffer them in his Possession, and a Stranger

- Stranger takes them from him; in these Cases I may give the Goods to the Trespassor, because the Property of them is still in me. *Perk. §. 92. Fitz. Done 3, 7.*
- Personal Things.** Trusts and Confidences, which are personal Things for the most part, are not grantable over to others. And hence it is also that Offices of Trust and Confidence are not grantable over but in some special Cases where they are granted to a Man and his Assigns, or where they are granted to a Man and his Heirs. *Perk. §. 99. Plow. 379.*
- Intire Things.** Some Things are so intire that they cannot be severed by Grant; and therefore if a Man holds three Acres of Land of me at twelve Pence Rent, and I grant the Services of the third Acre; this is void, and he shall have all or none, for I cannot sever the Tenure. But if a Man holds Land of me by Homage, Fealty, Escuage, and a certain Rent; in this Case I may grant the Rent, and keep the Seignior. *Fitz. Grant 19, 79.*
- Chattels real and personal.** All Chattels real and personal regularly are grantable from Man to Man *in infinitum*, as Leases for Years, be they present or future, Trees, Oxen, Horses, Plate, Household-Stuff, and the like. Also Trees, Grass, and Corn growing and standing upon the Ground, Fruit upon the Trees, Wool upon the Sheep's Back, is grantable. *Dyer 58, 305. Plow. 142, 147. Perk. §. 90, 91.*
- If a Man sells me ten Loads of Wood, in his Wood to be taken by his Assignment; or sells me three Acres of Wood towards the North Side of the Wood; by this Grant in these Words I have such an Interest as is grantable over. *5 Co. 24.*
- If I make a Lease by Deed of a House to another, and therein it is agreed between us, that if the Rent be not paid me by such a Time, I shall enter into the House, and take and sell the Goods there as my own to pay the Rent; it seems this is a good Grant of the Goods, and that I may do according to the Agreement.
- And if one that holds Land of me grants to me by Deed indented, that I shall distrain for my Service in all his Land; this is a good Grant. *Fitz. Bar. 280.*
- Money.** A Man may give or grant Money; as if I deliver one Money, on Condition that if he assures me of such Land he shall have it, otherwise that he shall deliver it to me again; in this Case if he makes the Assurance he shall have the Money, if not, I may have an Account for it. *Fitz. Grant 6. Fitz. Done 11.*
- Feræ naturæ.** Such Things as are *Feræ naturæ*; as Conies, Hares, Deer, and such like, are not grantable at all. *Bro. Done 34.*
- Tithes, Deeds.** A Parson of a Church may grant his Tithes for Years, and yet they are not in him. *Perk. §. 90.*
- A Man may give or grant his Deeds, *i. e.* the Parchment, Paper and Wax to another at his Pleasure, and the Grantee may keep or cancel them; and therefore if a Man has an Obligation, he may give or grant it away, and so sever the Debt and it. So Tenant in Fee-simple may give or grant away the Deeds of his Land, and the Executor in the first Case, and the Heir in the last Case, has no Remedy. But a Tenant in Tail of Land cannot give or grant any of the Deeds belonging to the Land intailed, no more than the Land itself. *Co. Lit. 232. Trin. 38 Eliz. B. R. 25 H. 8. 5. 1 H. 7. Dove's Case. 1 H. 4. 31. Fitz. Bar 179.*
- Apparel.** One may give or grant Apparel; and it is said if one makes Apparel for another, and put it upon him to use and wear, this is a Gift or Grant of the Apparel itself.
- Wool.** If one grants to another all the Wool of his Sheep for seven Years; this is a good Grant. *Perk. §. 90.*
- If one being a Parson gives to another all the Wool he shall have for Tithes the next Year; this is a good Grant. *Fitz. Grant 40.*
- Horse, Cow.** If one grants to another his Horse or his Cow in the Disjunctive; this is a good Grant notwithstanding this Incertainty, and the Donee shall have Election, and by that make the Grant good. *Bro. Done 19.*
- A Term.** A Man possessed of Land for a Term of two thousand Years, granted the Land to D. without mentioning any Term, to the Use of another for Life, &c. The Grant and Limitation is void for Uncertainty, it not saying, what Estate or Term was granted to D. *2 Vern. 684.*
- Guardianship.** The Plaintiff's Father was indebted to the Defendant, and by Deed granted him the Guardianship of his Children, with a Covenant not to revoke the Grant: And now the Plaintiff an Infant brought his Bill to revoke it; but in Regard there was just Debt owing to the Defendant the Guardian from the Father, the Court declared they would not restrain him from receiving the Rents and Profits of the Estate, but only from abusing the Infant's Person. *1 Vern. 442.*

The Statute 12 Car. 2. c. 24. is, That the Father may by Deed grant the Guardianship of his Children from Time to Time.

For more concerning Things granted, see before, p. 231.

(L) Of the Estate, Property and Possession of the Grantor.

ANY Estate that a Man has in Fee-simple, Fee-tail, for Life or Years, in any Lands, &c. or any Rent or Profit Appreder out of the same, is grantable from Man to Man *in infinitum*. And he that has any such Estate of any Lands, may charge it with any Rent or Profit to be taken out of it as long as the Estate of the Land does last; but an Estate at Will is not grantable over.

And if an Estate be made to a Man and his Heirs without the Word *Assigns*, yet he may assign it at his Pleasure, for Assigns is included within Heirs.

An *Interesse Termini*, i. e. a Lease for Years to commence *in futuro*, is grantable before the Term begins, whether it be a Lease of the Land itself, or any Rent or other Profit out of it. 22 Ed. 4. 37. Perk. §. 91.

The Interest or Estate that a Man has by Extent is assignable from Man to Man at Pleasure. 4 Co. 64.

The Reversion upon an Estate-tail is grantable; and yet the Tenant in Tail in Possession, by the suffering of a Common Recovery, may bar him in Reversion of any Fruit of it. 6 Co. Curson's Case. 1 Co. Attonwoods Case.

If an Estate be made of Land upon Condition; as if A. makes a Feoffment to B. on Condition that if A. pays 20 l. he shall have the Land again: In this Case A. and B. together may at any Time before the Performance of the Condition join together and grant this Land, or charge it with any Rent, &c. and this will be good; for it is a Maxim in Law, Fee-simple Land may be charged one way or other. And in this Case B. may grant over his Estate alone, but it will be subject to the Condition. And if B. grants a Rent out of the Land to a Stranger, and after the Condition is performed, and the Feoffor enters; in this Case he shall avoid the Rent. But in this Case A. cannot grant, for he has nothing but a Possibility. 1 Co. 147. 10 Co. 48, 49. Lit. Chap. Confirmation.

If one infeoffs divers to the Use of his Son and Heir upon Condition, and before the Time of Performance of the Condition the Father and Son join to grant or charge the Land; this is a good Grant or Charge. 1 Co. 14.

If the Tenant in Tail, and he that is next in Remainder in Fee join in the Grant of a Rent-charge in Fee, and after the Tenant in Tail dies without Issue; in this Case this is a good Grant and Charge against him in Remainder. And if A. bargains and sells Land to B. by Indenture, and before Inrolment they join to grant a Rent-charge to C. by Deed; this is a good Charge and Grant, whether there be any Inrolment or not. And so if a Donor and Donee in Tail grant a Rent-charge out of the Land, and then the Donee dies without Issue; in this Case the Grant is good to bind the Donor. Co. Lit. 45. 10 Co. 48, 49.

If Land be granted to two Men, and to the Heirs of their two Bodies begotten; in this Case altho' they have several Inheritances after their Death, yet neither of them can grant away his Estate after his Life, for they are divided only in Supposition of Law. Co. Lit. 182.

One Coparcener of a Seigniorship may grant his Part to a Stranger. Perk. §. 73.

If two Jointenants be of a Plough Land, and one of them grants to a Stranger Common of Pasture for Beasts without Number to be taken in the same Land; this is void. Perk. §. 103.

If two Jointenants be of a Reversion, and one of them grants the Whole; this is void for a Moiety. If a Man grants or charges that which is none of his, and that wherein he has no Property, it being in the Grantee or a Stranger; the Grant is void. And therefore if a Man grants a Rent-charge out of the Manor of Dale, or grants a Reversion of Land, and in Truth the Grantor has nothing in the Manor of Dale, or in the Land; in this Case the Grant is void. And altho' the Grantor afterwards purchases the Manor, or the Land, yet this will not make the Grant good. But if the Grant be by Fine, or by Indenture, there in some Cases it shall be good by way of Estoppel. And altho' the Party recites that it is his own, yet this will not mend the Case: And therefore if a Man recites that he has a Rent of 10 l. a Year, and

and then 5 l. a Year, Parcel of it; in this Case, if he has no such Rent, the Grant is void. *Perk.* §. 80, 65. *Dyer* 10, 33.

A *Shepherd*, *Bailiff* or *Parker*, cannot give or grant away the Goods of his Master without Authority. And yet it seems the Servant of a *Taverner* or *Mercer* may give or grant his Master's Wine or Wares. And if a Wife gives or grants the Goods of her Husband; this is a good Grant or Gift until the Husband disagrees to it, and by his Agreement it is made good for ever. *Bro. Done* 56. 4.

If a Man has a Lease for Years of Land, and makes a Lease for Life of it, or charges it for longer Time than the Lease for Years does last; in this the Grant is good for so long as the Lease for Years does last, and no longer. But if he makes a Lease for Life and gives Livery of Seisin, he forfeits his Estate. *Plow.* 524, 525.

Regularly a Man cannot grant or charge that which is not in his own Possession, altho' he has a Right to it: And therefore if a Man be disseised of his Land, and before he has entered into or recovered the Land, he grants or gives the Land, or his Right to the Land, to a Stranger, or grants a Rent-charge out of the Land to a Stranger; in these Cases the Grants are not good. And yet such Grants by Fine may be good by way of Estoppel; and by a Release also the Right may be extinct. *Co. Lit.* 214. *Perk.* §. 65, 86.

But if one that has a Reversion upon an Estate for Life grants a Rent issuing out of this Land; the Grant is good, and the Charge shall fasten upon the Land after the Estate of the Tenant for Life is ended. And if a Man grants *Common*, or *Rent*, notwithstanding that a Stranger take the Rent, or use the Common at the Time of the Grant, yet this Grant is good, for a Man cannot be out of Possession of these Things but at his Pleasure. *Perk.* §. 92, 98. *Co. Lit.* 46.

And if a Lease for Years be made to me, I may grant away my Estate before my Entry; and if the Lease be to begin at a Day to come, I may assign over my Interest before the Day comes; for in this Case the Interest is in me from the Time of making the Lease. *Hil.* 18 *Jac. B. R.* per two Justices.

Also I may give or sell my Goods that I have not in Possession; and therefore if a Man takes my Goods out of mine or another Man's Possession, I may afterwards give or grant these Goods to him or another Man; and this Grant or Gift is good. *Perk.* §. 92, 93. *Fitz. Done* 3. *Bro. Done* 13. *Dyer* 30, 90. 4 *Co.* 62, 63.

A Lessor cannot give or grant the Trees growing on the Ground of his Lessee for Life or Years without the Licence of the Lessee, except they be first cut down by the Lessee, or some other, for then he may. And if there be Lessee for Life, and the Lessor gives the Trees growing on the Ground, and after the Lessee for Life dies; in this Case the Donee cannot take them, because at the Time of the Gift a Property of them was in the Lessee. But if a Tenant in Fee-simple gives or grants the Houses standing, or Trees growing on the Ground he has in Possession; in this Case the Grantee or Donee may take them after the Death of the Grantor, and that altho' they be not cut or taken down before his Death. And yet if the Tenant in Tail gives or grants the Trees growing upon his intailed Land, and the Donor dies before the Trees be cut; in this Case the Donee or Grantee cannot cut them afterwards. However if such a Tenant in Tail gives or grants his Emblements of Corn growing on the Ground, the Donee may cut and take them after the Death of the Tenant in Tail. And if the Tenant in Tail gives or grants his Trees, and dies before they be cut, and afterwards before the Issue in Tail enters into the Land, the Donee or Grantee cuts them and takes them away; in this Case the Issue in Tail can bring no Action of Trespass against the Donee or Grantee for the Trees. But perhaps if the Trees be not removed off the Ground, he may take them. *Dyer* 305. 20 *H.* 6. 22. *Perk.* §. 59. 11 *Co.* 50.

If two *Coparceners* be of an Advowson, and the one presents, and then he grants the next Presentation; this is a good Grant, but by this Grant passes the next he has to grant, for his Companion must have the next: So if one be seised in Fee of an Advowson, and he has a Wife, and he grants the third Presentation; this is a good Grant, but it shall be taken for the third he may grant, which is the fourth, for the Wife is to have the third for her Dower. *Dyer* 35. 15 *H.* 7.

(M) *The Words of a Grant.*

DEDI & *Concessi* are the most apt Words for all Kinds of Grants, yet it may be by other Words, and the Grant as good as by those Words.

The best way in Grants is to grant by Words of present Time in the present Tense, as well as in the preterperfect Tense.

But a Grant by Words of the preterperfect Tense only, as by *Dedi & Concessi* only without Words of the present Tense, is good. 35 H. 6. 11.

The Words *give* and *grant* in a Deed of Things which lie in Grant, amount to a Grant, a Feoffment, a Gift, a Release, a Confirmation or Surrender at the Election of the Party, and may be pleaded as a Grant, as a Release, or a Confirmation, at his Election. Co. Lit. 301. b. 2 Saund. 96, 7.

For more concerning this Head, see before, p. 242.

A Question, with Sir Jeffery Palmer's Opinion.

S I R,

I conceive that Care ought to be taken in a Conveyance, of what Nature soever it be, that there be not therein (given and granted) for they imply a general Warranty, and shall not be qualified by the special Warranty following, as hath of late been thrice adjudged.

H. T.

Give implies a personal Warranty, and so is not always used. The Word *Grant* in a Lease for Years is a Covenant in Law, or (as you may call it) a general Warranty, if not qualified by a Covenant or Warranty in *Fait*; but if there be a Covenant or Warranty in *Fait*, then it is restrained to the Words of the Covenant subsequent.

But in an Estate of Inheritance where the Fee passeth, there the Word *Grant* is neither a Covenant in Law nor Warranty; for if it should be a Covenant in Law or Warranty in itself, it would be there restrained and qualified by the Warranty or Covenant in *Fait*.

And a Deed to pass an Inheritance where Common is, cannot be without it; for if it be Common in Gross it cannot pass by the Livery, but must pass by the Word *Grant*; and I never yet saw a Feoffment without it.

Jeffery Palmer.

(N) *Of naming and describing the Thing granted; and therein of Election.*

BY the Grant of an Acre of Land, or of any other Thing by the Name whereby it is called, the Reversion of that Thing, if the Grantor have no more than a Reversion, will pass, and this Mistake will not hurt. But it is not so *e converso*. 4 Co. 122. Perk. §. 114, 116. 10 Co. 106, 107. 11 Co. 47.

And yet some have said, if one grants a Thing in *Possession* by the Name of the Reversion of the Thing, this is good to pass the Possession. *Quod non est lex*. Plow. 190. For if one makes a Lease for Years, and before the Lessee enters, the Lessor grants the Land by the Name of the Reversion or the Land; this Grant is void. If one makes a Lease for Life of the Demesnes of a Manor, rendring Rent, and after he grants the Manor by the Name of the Manor; this is a good Grant for the Reversion of the Demesnes as well as for the Residue of the Manor. But if one grants Common by the Name of the Reversion of the Common, it seems this is not good. And yet if one has Common, and grants it for Life, and during that Estate he grants the Common by the Name of *totam illam communiam*, &c. Some hold this Grant to be good. Co. Lit. 46. vide 2 Co. Lane's Case.

Any Thing may be granted by the Name whereby it is and has been usually called of latter Times within nine or ten Years, or thereabouts, altho' it be an improper Name, and not the antient Name of the Thing, but a Name newly gotten. And so a Manor may pass by the Name of a Messuage or Farm, or a Farm or Manor by the Name of a Messuage, if it be so usually called and reputed: So the great Houses in London called *Exeter* and *Dorset* Houses may be granted by those Names. 6 Co. 65. 45 E. 3. 6. Bro. Grant 7. Perk. §. 116.

And

And if a Man grants a Pasture Ground by the Name of a Wood, or a Wood by the Name of a Pasture Ground, and the Things are called by those Names; these are good Grants of those Things. And if one grants by the Name of a *Great Field*, that which indeed is but a *little Close*, but it is usually called by the Name of a *Great Field*; this is a good Grant of this Thing. So if one grants by the Name of a *Plough Land* that which in Truth is but an *Acre* of Land, or grants by the Name of a *Manor* that which is but a *Plough Land*; these Grants are good. And so it seems to be *converso*. But if a Man grants a House or a Messuage; by this Grant an Acre of Land will not pass. 14 H. 8. 1. 27 H. 8. 2.

By the Grant of Services a Rent reserved upon an Estate-tail will pass. Co. Lit. 150.

If a Man makes a Lease of a House to another for Years, and the Lessee divides it and makes two Houses of it, and after the Lessor grants the Reversion of it by the Name of one House; this is a good Grant to pass it. And if one leases three Houses to three several Men at several Times, and they divide them into twenty-nine Tenements and Households in them all; and the first Lessor grants them by the Name of three Messuages; this is a good Grant to pass them all. But if he grants by the Name of fifteen Messuages or Tenements only, this is good for no more but for fifteen of the subdivided Tenements. *Per Cur' B. R. M. 7 Jac.*

If one recites that he has a Rent-charge issuing out of *Blackacre* and *Whiteacre*, and then grants the same Rent, and in Truth it issues out of *Blackacre* only; or if he recites that it issues out of one Acre when in Truth it issues out of both; in both these Cases the Grant is good notwithstanding these Mistakes. *Perk. §. 72.*

If one be Patron of the Church of *St. Peter* and *Paul* in *D.* and he grants the next Presentation of the Church of *St. Peter*, or of the Church of *St. Paul*; these are void Grants to pass the Presentation. *Bro. Grant 12.*

If one grants a Rent out of *Whiteacre* by the Name of a Rent out of *Blackacre*; this Grant is void as to charge *Whiteacre*. *Perk. §. 79.*

If one has a Manor called *Steeple Lavington*, and he grants it by the Name of *West Lavington*, alias *Steeple Lavington*, by the *Alias*, especially if the Grant says lying in *Lavington*, and the Manor of *Steeple Lavington* lies in that Parish, and the Grantor hath no other Land there, it may be good. *Per C. J. Hutton and Telvorton, M. 3 Car. C. B. in Edward Crew's Case.*

If one grants all his Lands which he has in *D.* in this Manner, *All my Lands in D. which I had of the Grant of J. S.* this is a good Grant of all his Lands in *D.* altho' he had them not of the Grant of *J. S.* but of the Grant of another: But if the Words be, *All my Lands which I had by the Grant of J. S. in D.* in this Case the Grant is not good to carry any other Lands in *D.* but such as he had of the Grant of *J. S.* *Agreed Mic. 2 Jac. in Brown's Case.*

So if one grants in this Manner, *All my Manor of Sale in Dale which I had by Descent*; and in Truth he had it not by Descent but by Purchase; this is a good Grant of the Manor. So if one grant all his Lands in *Dale*, and says no more; this is a good Grant to pass all his Lands there. But if one grants in this Manner, *All my Lands in Dale which I had by Descent from my Father*; and in Truth I had them not by Descent but by Purchase; this Grant is void, and will not pass those Lands *Plow. 169, 395.* So was the Opinion of *C. J. Popham, 2 Jac. B. R.*

So if I grant in this Manner, *All my Lands that I had by the Attainder of J. S.* and in Truth I had no Land by that Means; this Grant is void. *Dyer 87.*

And if I grant after this Manner, *All my Lands in B. in the Tenure of D. which I had of the Gift of J. S.* and in Truth it lies in *B.* and is the Tenure of *D.* but it was not purchased of *J. S.* this is a good Grant to pass the Land. *Adjudged Mic. 2 Jac. Brown's Case.*

If a Parish lies in two Counties, viz. *Berks* and *Wilts*, and one grants in this Manner, *All his Close called Callis in the Parish of Hurst in the County of Berks*; and in Truth the Close lies in the County of *Wilts*; this is a good Grant to pass the Close. But if one grants in this Manner, *All his Houses in the Parish of St. Buttolph's extra Aldgate, late in the Tenure of R.* where in Truth he has no Houses there, but he has some Houses in *St. Buttolph's extra Aldersgate*; this is a void Grant. And yet if the Grant be in this Manner, *All that my House in the Occupation of J. S. in St. Andrew's Parish*; whereas in Truth it is the Parish of *K.* but in the Occupation of *J. S.* this Grant is good to pass the House. But if it be thus, *All that my House in St. Andrew's Parish*

Parish in Holborn, in the Occupation of J. S. and in Truth it is in another Parish, but in his Occupation; this Grant is not good to pass the House. Dyer 299. 3 Co. 10.

A. by Deed granted his Hundred and Manor of Odyham in Hampshire, and his Manor of Working in Surry, and all his Manors, Lands and Premises in Odyham and Working aforesaid; whereupon the Question was, Whether the Grantor's Manor of Hartlerow, which was within the Hundred of Odyham, but not within the Manor of Odyham or Working, should pass by this Deed. And per Lord Chancellor King, An Hundred is only a Franchise consisting of a Court called the Hundred Court, and probably has the Return of Writs, and by such Grant the Franchise passes, but not all the Grantor's Lands; wherefore by the Word (Hundred) the Manor of Hartlerow not being named in the Grant, does not pass. 2 Williams 399, 400.

If one grants in this Manner, My Manor of Dale which appeareth by Office found to be of the Value of 10 l. per Ann. and in Truth in the Office it is found at 20 l. per Ann. this Grant is good notwithstanding this Misprision. Per Tanfield, Hil. 2 Jac. B. R.

If one grants in this Manner, All my Manor of W. late Parcel of the Possession of the Abbot of S. and late in the Possession of K. and in Truth it was never in the Possession of K. this Grant is good notwithstanding. But if the Grant be thus, Omnia illa terras, &c. in tenura J. S. jacen' in W. nuper prioratui de S. spectan'; and in Truth the Land lies in S. and not in W. this is no good Grant to pass the Lands in S. And if the Lands do lie in W. but are in the Tenure of J. D. and not in the Tenure of J. S. the Grant is void to pass the Lands in the Occupation of J. S. Pasch. 7 Jac. B. R. 2 Co. 32.

If one purchases Land of J. S. in T. and has no other Land there, and he grants his Land in T. late the Land of R. S. or late the Land of S. and mistakes or omits the Christian Name; this Grant is good notwithstanding this Mistake. And so also it is where there is a Blank left for the Christian Name. And if in this Case he grants all his Land in T. and says no more; this is a good Grant to pass the Land. And if one grants all his Lands in D. called N. which were the Lands of J. S. this is a good Grant to pass the Lands called N. tho' they were never the Lands of J. S. But if the Grant be of all his Lands in D. which were the Lands of J. S. by this none but those Lands that were the Lands of J. S. will pass. Dyer 376. Bro. Grant 92.

If one grants in this Manner, All my Meadow in D. containing ten Acres; whereas in Truth his Meadow there contains twenty Acres; this is a good Grant for the whole twenty Acres. So if one grants thus, All those forty-seven Acres of Land by the Sleight, whereof fifteen lie in D. twenty in E. and twenty-five in F. and in Truth all of them lie in F. and none of them in D. or E. this is a good Grant to carry the whole forty-seven Acres. Dyer 80.

If one grants twenty Loads of Wood, and says in this Grant, for which twenty Loads of Wood he had sixteen Loads by the Grant of his Father J. S. and in Truth J. S. did not grant any Wood to him at all, or did not grant unto him sixteen Loads only; this is a good Grant of the twenty Loads of Wood notwithstanding this false Recital. Bro. Grant 69.

If one grants his Manor of D. and does not say in what Town or Towns it lies; this is a good Grant. But it is best to say in what Towns the Manor does lie; for if it lies in divers Places (as it may) and any of the Places into which it goes be omitted, and the Rest are set down, no Part of the Manor lying in the Town that is not expressed will pass. Bro. Grant 53. 7 H. 4. 14.

If one grants a Manor, and that which is but one Manor, by the Name of the Manor of A. and B. this is a good Grant of the Manor. And so also it is if it be two Manors; as if a Man be seised of the Manors of Ryton and Conder in the County of Salop, and he grants in this Manner, Totum illud manerium de Ryton & Conder cum pertinentiis in Com. Salopie; this is a good Grant of both the Manors; otherwise it is in Case of the King. 1 Co. 46.

If one has a Farm of Land, Meadow, &c. by Lease called Hodges, lying within the Parishes of St. Stephen and St. Peter in St. Albans; and he reciting the said Lease, grants to C. his Term and Interest in the House, Lands, &c. called Hodges in the Parish of St. Peter in St. Albans; this Grant is good only for so much as lies in the Parish of St. Peter, and not for that which lies in St. Stephen's. But if he grants the Farm, and does not say in what Parish it lies; this is a good Grant of the whole Farm; as in the Case before of a Manor that lies in divers Parishes. And if in the Case here the Farm lies within the Parish of St. Peter only, the Grant is good for the whole Farm. If one recites that whereas he hath such Lands by Forfeiture, or whereas

such a one has an Estate of his Land, or whereas the Grantee hath paid him 10l. or done him such Service, or the like, and these Things are not true, and afterwards he grants the Land by apt Words; this Mistake in these Cases will not hurt the Grant. But otherwise it is in Case of the King in some of these Cases. *Per Cur. C. B. Int. Plat and Sleep, Pas. 9 Jac. Bro. Grant 53.*

If one has a Manor in which he has Parks and Fish-ponds, and he grants the Manor for Life, except the Game and Fish, and after grants the Reversion of the Manor; this is a good Grant of the Game and Fish also. *11 Co. 50.*

If a Grant be of *Centum libratas terræ*, or *50 libratas terræ*, or of *Centum solidat. terræ*; these are good Grants, and hereby passes Land of that Value, and so of more or less. *Co. Lit. 5.*

If a Grant be of an Acre of Land covered with Water, it is good. *Co. Lit. 4.*

If a Grant be of a certain Portion of Land or Tithes, or of the fourth Part of Land or Tithes, and there be a sufficient Certainty in the Description of it; this Grant is good. And therefore if the Grant be of the fourth Part of the Tithes and of the Offerings of the Church of *St. Peter*; this is a good Grant. *Dyer 84. 34 Ed. 3.*

If one seised of an *Advowson* in Fee, grants to *J. S.* that as often as the Church is void he shall name the Clerk to the Grantor, and he shall present him to the Ordinary; this is a good Grant of the *Advowson*. *Bro. Grant 101, 121.*

A *Reversion* may be granted by the Name of a Remainder, or a Remainder by the Name of a Reversion, and such a Grant is good; as if one grants Land to *J. S.* the Reversion to *J. D.* this is a good Grant of the Remainder. *Dyer 46. Plow. in Hill and Grange's Case.*

If one makes a Lease of Land to Husband and Wife for their Lives, and after grants the Reversion of this by the Name of the Reversion of the Land which the Wife holds for Life; this Grant is void. So if one grants to two for Life, and after grants the Reversion of one of them; this is void. *Fitz. Grant 63.*

Incertainly.

A Fulling or Grist Mill may be granted by the Name of a Mill only. *21 Aff. pl. 23.*

If one grants in this Manner, *All that his Messuage, &c. and all the Lands, Meadows and Pastures thereunto belonging*; this is a good Grant, and certain enough to pass all the Lands, Meadows and Pastures usually occupied therewith. *27 H. 6. 2. Plow. 164. Bro. Lease 55.*

If the Lord grants his Manor, by the Name of *his Manor with the Reversion of all his Tenants*, or by the Name of *the Reversion of all his Tenants bond and free which hold for Life or Years*, and does not name them by their particular Names; these Grants are good in these Cases, and certain enough. *Fitz. Grant 68. Perk. §. 68.*

Place.

If one grants Land, and says not in what Parish, County or Village it lies; yet if there be any other Matter to describe it, it seems the Grant is good enough, and it may be averred where it lies. But if there be no circumstantial Matter in the Grant to denote and decipher out where it lies, the Grant is void for Incertainly. And therefore if one grants his Manor of *Dale*, or his Lands in the Occupation of *J. S.* or his Lands that descended to *J. S.* or his Lands that belonged to the Priory of *S.* or the like; these are good Grants, and certain enough. *Id certum est quod certum reddi potest. Bro. Grant 53. 9 Co. 47.*

If there be a Tenant for Life of three Houses and four Acres of Land, and he in Reversion grant the Reversion of two Houses and of two Acres of this Land; this is a good Grant, and has sufficient Certainty in it. *Perk. §. 73.*

If a Grant be incertain altogether, and has not sufficient Certainty in it, and cannot be made certain by some Matter *ex post facto*, it is void. And therefore if there be Lord and Tenant of three Acres of Land by Fealty, and 12 *d.* Rent, and the Lord grants *the Services of the third Acre* to a Stranger; this Grant is merely void. *Perk. §. 67.*

So if Husband and Wife hold an Acre of Land jointly of *J. S.* for their Lives, and *J. S.* grants the Reversion of the Acre of Land which the Husband alone holds for Life; this Grant is void. So if there be Lord and three Jointenants, and the Lord grants the Services of one of them to a Stranger; this Grant is void. *Perk. §. 68, 69.*

So if one has twenty Tenants that pays him 12 *d.* a-piece Rent, and he grants 5 *s.* yearly out of these Rents, and does not say of which Tenants; this Grant is void for Incertainly. *9 H. 6. 12.*

So if Conuſance of Pleas be granted, and it is not said before whom; this is utterly void. So if one has two Tenements, and grants the Reversion of one of them, and does not say which; this is void for Incertainly. *44 Ed. 3. 17. Bro. Grant 52.*

So if one grants *Eftovers* to another, and says not what nor how; this is void. So if one grants me so many of his *Trees*, or of his *Horses*, as may be reasonably spared; this Grant is void. And yet if one grants me so many of his *Trees* as *J. S.* shall think fit; it seems this Grant is good. *Dyer* 91.

And if one grants me one hundred Loads of Wood to be taken by the Assignment of the Grantor, or to be taken by the Assignment of *J. S.* these are good Grants. So if one grants me three Acres of *Wood* towards the North Side of the Wood; this is a good Grant, and certain enough. *5 Co.* 24.

If one grants to one of the Children of *J. S.* and *J. S.* has more than one, and he does not describe which he intends; this Grant is void for Incertainty. *Bro. Done* 311.

If one grants to me a *Rent* or a *Robe*, twenty *Shillings* or forty *Shillings*, or *Common of Pasture* or *Rent*, in the Disjunctive, which is at first very incertain; yet this Grant may become good; for if I make my *Election*, or be paid the *Rent*, or perform the Grant in either Part; the Grant is now become good. *9 Ed.* 4. 36. *Perk.* §. 74.

So if one be seised of two Acres of Land, and he leases them for Life, the Remainder of one of them, and does not say of which, to *J. S.* in this Case if *J. S.* makes his *Election* which Acre he will have, the Grant of the Remainder to him will be good. So it is when a Man has six *Horses* in his Stable, and he grants to me one of his *Horses*, but does not say which of them; in this Case I may chuse which I will have; and in these Cases when I have made my *Election*, and not before, the Grant is good. And if in these Cases the Grantee does not make his *Election* during his Life, the Grant will never be good. *Perk.* §. 76.

If one be seised of Land, and leases it for Years, rendring 10 s. *Rent*, and after he grants a *Rent* of 10 s. out of this Land to a Stranger; in this Case altho' there be some Incertainty in the Grant, yet this is a good Grant of a *Rent* of 10 s. but it shall be taken as a Grant of a new, and not of the old *Rent*, and therefore shall not take Effect until the particular Estate be ended. *Bro. Grant* 77.

See before, p. 242.

(O) Of the Commencement and Limitation of the Estate granted.

IN some Cases, altho' there be in a Grant a good Grantor and a good Grantee, and a Thing granted, and all these are duly and certainly described, yet the Grant may be void for some Fault in some other Thing touching the Grant; as,

First, In the Commencement of the Estate granted.

For if a Man be possessed of a Term of Years, altho' it be an hundred Years or upwards, and grants to another all the Residue of this Term of Years that shall be to come at the Time of his Death; this Grant is void for Incertainty. And yet if a Man possessed of such a Term in Land, grants the Land to another, To have and to hold to him after the Death of the Grantor for fifty Years, or for two hundred Years; these are good Grants; and in the first Case the Grantee shall have fifty Years, if there be so many to come of the Term of one hundred Years at the Death of the Grantor; and in the last Case the Grantee shall have the Land for the whole one hundred Years, or so many of them as are to come at the Death of the Grantor. *Bro. Grant* 154. *1 Co.* 155. *Plow.* 520.

So if one grants any Thing that lies in Livery or in Grant, and that is *in esse* at the Time of the Grant in Fee-simple, Fee-tail or for Life, and the Estate is to begin at a Day to come; this for the most part is void. However in some Cases the Livery of Seisin will help it. But a Lease for Years to begin *in futuro* is good enough. *Dyer* 58. *5 Co.* 1.

And if a Lease be made to one for Years, or for Years determinable upon Lives; and after a Lease is made to another of the same Thing, To have and to hold from the End of the former Lease; this is a good Lease, and the Commencement certain enough. So if a Lease be made of Land to one for Life, and after the Reversion thereof is granted to another for Life, *cum post mortem vel alio modo vacare contigerit*; this is good. *Pas.* 7 *Jac. Dennis's Case*.

So

So if a Lease be made to one for twenty Years, if he lives so long, and after a Lease is made to another, *Habendum* after the End of the Term granted to the Lessee for twenty Years, to be accounted from the Date of the Deed last made; this is a good Grant for twenty Years after the first Lease ended, and the Words, *to be accounted, &c.* shall be rejected. 7 Jac. C. B. *Craddock's Case*.

And if one grants a Rent to me, *Habendum* from the Time of my full Age for my Life, and I am at full Age at the Time of the Grant; this Grant is good for my Life.

If a Feme Sole has a Lease for Years, and takes a Husband, and then he in Reversion grants the Land to another, *Habendum* after the Term granted to the Husband, &c. where in Truth it was never granted to the Husband but by an Act of Law, *viz.* the Marriage; yet this is a good Lease. *Plow.* 192. 6 Co. 36.

Secondly, *In the Limitation of the Estate, or in the Habendum of the Grant.*

If a Grant be to two *& hæredibus*, without *suis*; this is void for Incertainty. And yet a Grant to one *& hæredibus*, is good. 22 H. 6. 15. *Plow.* 28.

And if a Man grants two Acres, To have and to hold, the one in Fee-simple, the other in Fee-tail, or the one in Fee-simple, and the other for Life, and does not set down which in Fee-simple, &c. in certain; yet this Grant is good, and the Grantee has the *Election*. And yet if one grants two Acres to two Men, *Habendum* the one to the one and the other to the other, and says not which either of them shall have; this is void for Incertainty. *Perk.* §. 75, 77. *Plow.* 152.

And if one has a Reversion of Land after a Lease for Years, and grants the Land, *Habendum* the Reversion, or grants the Reversion, *Habendum* the Land; this is good. 10 Co. 107. *Plow.* 147.

(P) *What may or may not be granted by the same Deed.*

IF one grants his Reversion of Land to one, and by the same Deed grants a Rent out of the same Land to another, and delivers the Deed to both of them at one Time; this is good, and shall enure first as a Grant of the Rent to one, and then as a Grant of the Reversion to the other. *Plow.* 540.

If one conveys Land to another, and the Grantee by the same Deed doth grant a Rent or Common to the Grantor out of the same Land conveyed; this is as good as if it were by another Deed. *Dyer* 6.

(Q) *Of several Grants of the same Thing.*

IF a Man has granted a Thing once, he cannot afterwards grant it again; and therefore if a Man gives or grants me a Horse, first by Word of Mouth, and after grants him to me by Deed; this second Grant is void, and therefore if there be any Fault in this Grant in Writing, it is not material. And if a Man grants to me Common of Pasture without Number in his Ground, and after makes the like Grant to another; this second Grant is void as to me, altho' it be good against the Grantor. And if one grants the next Presentation to a Church after the Death of the present Incumbent, and after grants the same to another; or makes a Lease of Land to one for ten Years, and after makes a Lease of the same Land to another for the same ten Years; or gives a Horse to one, or after gives the same Horse to another; in all these Cases the second Grant is void. But if the first Grant or Gift be only of Part of the Thing granted afterwards, or of Part of the Time only, the second Grant will be good for the Overplus. And therefore if one be seised of a Manor, and demises ten Acres of the Demesne for ten Years, and after demises the whole Manor to another for twenty Years; this is a good Grant for the Overplus of the Manor besides the ten Acres presently, and for the whole Manor for the last ten Years. So if the second Grant be to begin after the first is determined, it is good. And if the second be such as may be satisfied and not impeach the former, both shall stand good. And therefore if one that has an Advowson grants the next Presentation to one, and after he grants the next Presentation to another, and does not say *after the Death of the Incumbent*; in this Case the second Grant is good, and the Grantee thereby

thereby shall have the second Avoidance after the Death of the present Incumbent. *Dyer* 35, 350. *Perk.* §. 102. *Lit.* §. 298.

(R) *Of Omissions of Ceremonies, &c. required in Grants.*

IN some Cases altho' there be no Fault in the Grant, yet it may become void for want of some other Matter that ought to be done, as *Inrolment*, *Livery of Seisin*, *Attornment*, &c. for where any of these Things is requisite, the Grant is not good until it be had, neither for that Thing which will not pass without that Ceremony, nor yet for that which otherwise would pass by the Deed. And therefore if a Feoffment be made of a Manor to which an Advowson is appendant, and no Livery is made, so that the Manor does not pass, the Advowson will not pass neither. 21 H. 7. 5.

(S) *What shall be said a good Grant in the Nature of a Release or Discharge, or not.*

IF one makes a Feoffment with Warranty, and after the Feoffee grants to the Feoffor, that neither he nor his Heirs shall vouch the Warrantor or his Heirs upon the Warranty; this is a good Discharge of the Benefit of Voucher, and bars the Feoffee of it; and yet he may bring a *Warrantia Chartæ* still. So if one grants to me a Rent-charge, and afterwards I grant to him that he shall not be sued for the Rent; this is a good Grant to bar me of bringing an Annuity for the Rent; and yet I may distrain for the Rent still: And so *e converso* if I grant to the Grantor, he shall not be distrained for the Rent; by this I am barred of a Distress, but not of bringing an Annuity for the Rent. So if the Lord grants to his Tenant holding by Knight's Service, that his Heirs shall not be in Ward, &c. or a Man grants to his Debtor that he will not sue him for the Debt at all, or until such a Time; or one grants to his Lessee for Life or Years that he shall not be impeached for Waste; all these are good Discharges, and may be pleaded by way of Bar to avoid Circuity of Action. 7 H. 6. 14. 21 H. 7. 23. *Perk.* §. 69. *Bro. Grant* 175. *Kew.* 88.

(T) *Of void Grants.*

IN some Cases a Grant or Gift may be void, at least to some Persons and Purposes, when there are none of the Defects aforesaid in it; as when it is made upon a corrupt Contract, or to the End to defraud Creditors of their Debts, or Purchasers of their Lands bought, or the like; *whereof see in the next Chapter.*

(U) *How Grants shall be construed.*

EVERY Grant and Covenant shall be taken most strongly against him who makes it, because he is presumed to receive a valuable Consideration for what he parts with. 2 *Roll. Abr.* 56.

And if it cannot take Effect as to the Parties, it shall take Effect as it may, rather than the Deed or Grant shall be void. *T. Raym.* 142. Or by another way than what the Parties designed. *Lucas* 35.

And if the Words have a double Signification, this shall extend to the Disadvantage of him who speaks them, and shall be construed most to the Advantage of the other. *T. Raym.* 142.

Grants must be construed in this Manner:

First, They must be beneficial to the Taker.

Secondly, They are never void where the Words may be applied to some Intent.

Thirdly, The Words must be construed according to the Intent of the Parties, and not otherwise. *Plotw.* 160. b.

The Law will never make any Construction against the Purport of a Grant to the Prejudice of any, or against the Meaning of the Parties. *Co. Lit.* 313. a.

Where the Grant is impossible to have Effect according to the Letter, there the Law makes such a Construction as the Grant by Possibility may take Effect. *Co. Lit.* 183. b.

(W) Of Attornments.

First, Attornment what.

AN Attornment (from *turning* from one to another) is the Agreement of the Tenant to the Grant of the Seignior, or of a Rent, or the Agreement of the Donee in Tail, or Tenant for Life or Years, to a Grant of a Reversion or of a Remainder made to another. *Co. Lit. 309. a.*

Secondly, Kinds of Attornments.

An Attornment is either *expressed* or *implied*.

I. An *expressed* Attornment is either by *Words* or *Writing*.

1. By *Words* only; as by saying, *I attorn to you by Force of the said Grant; or, I acknowledge myself your Tenant.*

2. By *Writing* indorsed on the Deed, or set down in any other Writing, which is the safest way.

In both these Cases, the Tenant may moreover deliver to the Grantee a Penny, &c. by way of Acknowledgment, that the Witnesses may better remember it.

II. An *implied* Attornment, or *in Law*; as if a Reversion (*before the Stat. 4 & 5 A. c. 16. hereafter mentioned*) was granted to two by Deed, and the Tenant attorned to one of them according to the Grant; this Attornment was good to vest the Reversion in both the Grantees. *Lit. §. 551, &c. Co. Lit. 309. b. 310. a. &c.*

Thirdly, The Effect of Attornment.

The End, Effect or Fruit of this Agreement, is to perfect a Grant and to make a good Conveyance of an Estate, and therefore cannot be made upon Condition, or for a Time.

And where it was needful by the Common Law no Rent nor Reversion would pass without it; neither could the Grantee of the Seignior, Rent or Reversion, bring any Action of Waste for Waste done in the Land, nor distrain for any Rent or Service upon the Land before Attornment.

But now by *Stat. 4 & 5 A. c. 16.* there is no need of Attornment in passing Manors, Rents, Reversions or Remainders.

An Attornment is but a bare Assent, and therefore it shall not nor will enure or work to pass any Interest, to make a bad Grant good, nor to give a Man a Tenancy by Disseisin, Intrusion or Abatement; neither shall it work by way of Estoppel; and therefore if a Man gains a Rent issuing out of Land by Coercion of Distress or otherwise, and the Tenant of the Land attorns to him; this will not amend his Estate. But otherwise a Grant and the Attornment of the Tenant does as effectually pass the Freehold and Inheritance of the Reversion of Land, (*but now no Attornment is necessary to pass a Reversion*) as a Feoffment and Livery of Seisin of Land passes the Possession thereof.

Fourthly, In what Cases the Attornment of Tenants is necessary or not, and void or not.

By the *Stat. 4 & 5 Ann. c. 16. (for the Amendment of the Law, and the better Advancement of Justice)* §. 9. it is enacted, That from and after the first Day of Trinity Term 1706. all Grants or Conveyances thereafter to be made, by Fine or otherwise, of any Manors or Rents, or of the Reversion or Remainder of any Messuages or Lands, shall be good and effectual to all Intents and Purposes, without any Attornment of the Tenants of any such Manors, or of the Land out of which such Rent shall be issuing, or of the particular Tenants, upon whose particular Estates any such Reversions or Remainders shall and may be expectant or depending, as if their Attornment had been had and made. And by the said Statute, §. 10. it is provided, That no such Tenant shall be prejudiced or damaged by Payment of any Rent to any such Grantor or Conusor, or by Breach of any Condition for Non-payment of Rent, before Notice shall be given to him of such Grant by the Conusor or Grantee. And by the

the Stat. 11 Geo. 2. c. 19. (for the more effectual securing the Payment of Rents, and preventing Frauds by Tenants) §. 11. it is recited, That **whereas** the Possession of Estates in Lands, Tenements and Hereditaments, is rendered very precarious by the frequent and fraudulent Practice of Tenants, in attorning to Strangers who claim Title to the Estates of their respective Landlord or Landlords, Lessor or Lessors, who by that Means are turned out of Possession of their respective Estates, and put to the Difficulty and Expence of recovering the Possession thereof by Actions or Suits at Law: For Remedy thereof it is enacted, That from and after the 24th Day of June 1738. all and every such Attornment and Attornments of any Tenant or Tenants of any Messuages, Lands, Tenements or Hereditaments within that Part of Great Britain called England, Dominion of Wales, or Town of Berwick upon Tweed, shall be absolutely null and void to all Intents and Purposes whatsoever; and the Possession of their respective Landlord or Landlords, Lessor or Lessors, shall not be deemed or construed to be any wise changed, altered or affected by any such Attornment or Attornments; provided always that nothing herein contained shall extend to vacate or affect any Attornment made pursuant to and in Consequence of some Judgment at Law, or Decree or Order of a Court of Equity, or made with the Privity and Consent of the Landlord or Landlords, Lessor or Lessors, or to any Mortgagee after the Mortgage is become forfeited.

By the Common Law, in most Cases where the Grantee had Means to compel the Tenant to attorn, there the Attornment of the Tenant was at least to some Purposes needful; for altho' a Seignior, Rent, Services, Reversion or Remainder were granted by Fine, the Rent, Seignior, &c. passed, so as the Grantee might enter for a Forfeiture upon the Alienation of the Tenant, being Tenant for Life, Years, by Statute or *Elegit*, or upon an Escheat of the Tenant, or seise a Ward or Heriot, if it happened before any Attornment was made: And if the Reversion of a Lease for Years was granted by Fine, and the Lessee was ousted, and the Lessor disfeised, the Conusee might have an Assise; and therefore as to all these Purposes the Attornment of the Tenant was not needful: But the Grantee, his Heir or Assignee, could not distrain the Tenant for Rent, nor bring any Action that lay in Privity between him and the Tenant, as Waste upon a Waste done by the Tenant, Writ of Entry *ad communem legem*, or *in casu proviso*, or *in consimili casu* upon the Alienation of the Tenant's Escheat upon the dying of the Tenant without Heirs, or Ward, upon the Death of the Tenant's Heir within Age, or Writ of Customs and Services, until he had the Attornment of the Tenant; and therefore as to all these Purposes the Attornment of the Tenant was necessary. And hence it was that the Conusee of a Fine had Means appointed him by the Law to compel the Tenant to attorn; for where the Lord granted the *Seignior* to another, and the Tenant would not attorn, the Conusee before the Fine ingrossed might have a Writ called a *Per quæ servitia*, to compel him to attorn. And where a Man granted a *Rent* to another, and the Tenant of the Land out of which the Rent issued would not attorn, the Conusee of the Rent might have a Writ called a *Quem redditum reddit*, to compel him to attorn. And where a Man granted a *Reversion* or a *Remainder* of his Tenant for Life to another, and the Tenant would not attorn, the Conusee of the Reversion or Remainder might have a *Quid juris clamat*, to compel the Tenant for Life to attorn. But now the before-mentioned Statutes of the 4th and 5th of Ann. c. 16. and the 11 Geo. 2. c. 19. has rendered the antient Learning concerning Attornments almost usefess, therefore I shall be as brief upon this Head as I can, so as to omit nothing which may be necessary to the Knowledge of the Nature, Use and Effect of Grants.

Fifthly, By whom an Attornment may and must be made, or not.

By the Stat. 4 & 5 A. c. 16. the Tenants of Manors, or of Lands out of which any Rents shall be issuing, or the particular Tenants upon whose particular Estates any Reversions or Remainders shall and may be expectant or depending, needs not make any Attornment upon any Grant or Conveyance, by any Fine or otherwise, of any Manors or Rents, or of the Reversion or Remainder of any Messuages or Lands; for such Grant or Conveyance is as good and effectual without their Attornment as with.

And further by the Stat. 11 Geo. 2. c. 19. all Attornments of the Tenants of any Messuages, Lands, Tenements or Hereditaments, are void, unless made in Pursuance or Consequence of some Judgment at Law, or Decree or Order in Equity, or made

made with the Privy and Consent of the Landlord, Lessor, or to any Mortgagee after the Mortgage is forfeited.

If a Woman that hath a Husband be to attorn, the Husband may and must do it for her, and the Attornment of the Husband for the Wife, whether it be expressed or implied, will bind the Wife. *Co. Lit.* 312. *Lit.* §. 558.

A voluntary Attornment, where it is needful, may be made by an *Infant*, or one that is *deaf and dumb*, (who may do it by Signs); but one that is *Non compos mentis* cannot make an Attornment. *Co. Lit.* 315.

Sixthly, *To whom an Attornment may and must be made, or not.*

Where an Attornment is necessary, it must always be made to the Grantee according to the Grant, whether the Attornment be expressed or implied. But if divers take by Grant, the Attornment may be made to one of them, and this shall avail the Rest. *Co. Lit.* 310, 312.

By *Stat. 11 Geo. 2. c. 19.* Attornments of Tenants may be made to any Mortgagee after the Mortgage is forfeited. *See more of this Statute before.*

Seventhly, *At what Time an Attornment must be made.*

In all Cases regularly where Attornment is necessary, it must be made in the Life-time of the Parties Grantor and Grantee, or Exchangor or Exchangee: For if either of them die before the Attornment be made, (*where it is requisite*) the Grant or Exchange is void. And therefore (*before the Stat. 4 & 5 Ann. c. 16.*) if a Manor was granted, and Livery of Seisin given upon the Demesnes thereof, and one of the Tenants died before Attornment was made by him, his Tenement would not pass; and the Grant as to that Part was void; for in such Case all the Tenants but Tenant at Will were obliged to attorn. And altho' the Grant of the Reversion was to begin at a Day to come, and after the Death of either of the Parties, yet the Attornment was to be made in the Life-time of the Parties, or otherwise the Grant would not be good. And yet an Attornment might be made after the Death of the Tenant by his Heir, and after the Conveyance of the Tenant by his Assignee. *Co. Lit.* 310, 315. *Lit.* §. 551. *Perk.* §. 263, 231. 1 *Co.* 151. 2 *Co.* 35.

And if a Lease was made of a Reversion to begin at a Day to come, the Attornment might be made before or after the Day, so it was made in the Life-time of the Parties. 2 *Co.* 35.

And if one granted his Reversion of *Whiteacre* or *Blackacre*, and the Tenant attorned to the Grant before the Grantee had made his Election, which Acre he would have; this was a good Attornment. *Co. Lit.* 310.

Eighthly, *How to make an Attornment, and what shall be said a good Attornment, or not.*

To the making of a good Attornment where it is needful, divers Things are required:

1. It must be made by the Person who ought to make it.
2. It must be made to the Person who ought to take it.
3. It must be made in convenient Time.
4. If it was an express Attornment, the Tenant was first to have Notice of the Grant of the Reversion, Rent, &c. to which he was to attorn: But otherwise it was of an Attornment in Law, for there Notice in all Cases was not necessary.

See the Statutes concerning Attornments before.

5. And it must be done in the Manner the Law prescribes.

It may be made by *Words* or *Deeds* without any Writing; or by *Deed* or *Writing* (which is the safest way). And any Words written or spoken by the Tenant, that import an Assent and Agreement to the Grant in such Manner as the same is made after Notice given to him of the Grant, whether it be in the Presence or the Absence of the Grantee, will make a good Attornment in Deed. And therefore if the Tenant after Knowledge of the Grant uses the Words following, or any others to the like Effect to the Grantee, *viz.* *I do attorn, or turn Tenant to you according to the Grant; or I become your Tenant; or I agree to the Grant; or I am well content with the Grant;*

Grant; or God send you Joy of it: These are good exprefs Attornments. And if the Tenant, after Knowledge of the Grant, pays, does or delivers all, or any Part of the Rent or Service before or at the Time when the same is due to the Grantee, or gives a Penny, or Farthing, an Ox, or a Knife, or any such Thing, or any other valuable Thing in the Name of Attornment, or in the Name of Seisin of the Rent; this is a good exprefs Attornment; and that Attornment which is made by Words and Deed, is best to be signed, for that leaves a more deep Impression in the Mind of the Witnesses. But by the Common Law, if *A.* had a Rent-charge issuing out of his Land, and he granted it to a Stranger, and *A.* gave him an Ox to put him in Possession of the Rent; this was no good Attornment. *Co. Lit.* 309, 310, 315.

49 *Ed.* 3. 15. *Lit.* §. 551, 563, 513. *Plow.* 344.

If a Reversion (*before the said Statutes*) was granted of two Acres, or for forty Years; or if Services were granted, and the Tenant attorned for one Acre, or for Part of the forty Years, or for Part of the Services; this extended to all, and was a good Attornment for both the Acres, all the forty Years and all the Services; and that, altho' the Tenant said expressly it should be good but for a Part, and not for the Whole. And so also it was of an Attornment in Law. And therefore if the Grantee by Fine of Services sued out a *Scire Facias* to have Execution of any Part of the Services, and had Judgment to recover any Part; or a Lessee of three Acres surrendered one of them to the Grantee of the Reversion of all the three Acres; this was a good Attornment of the Whole. But if one attorned for Part of the Land, or for Part of the Services in Case of the Grant of a Reversion of Land, or the Grant of Services, and had no Notice of the Grant of any more; this Attornment was not good for any Part, but void for all. 2 *Co.* 68. *Lit.* §. 564. *Co. Lit.* 297, 309, 314.

Attornment of Part of the Grant good for the Whole.

If a Seignior, Reversion, or the like, (*before the said Statutes*) were granted to two or more, and the Tenant after Notice thereof attorned to one of them; this was a good Attornment to perfect the Grant to both, or all of them. But if one died before Attornment, and the Tenant attorned to the Survivor or Survivors; this would not avail the Heir of him that was dead, but it was good to perfect the Grant to the Survivor or Survivors, to whom it was made. *Co. Lit.* 297. 2 *Co.* 67, 68.

Attornment to one good to others.

And if a Reversion was granted to Husband and Wife, and the Tenant attorned to his Wife in the Absence of the Husband; this was a good Attornment to perfect the Grant to them both. But if a Reversion was granted to two Men, and the Tenant had Notice only of a Grant made to one of them, and he attorned to him only; this Attornment was void, and not good to perfect the Grant to either of them. *Calvin's Case, Pasch. 7 Jac. B. R.* 2 *Co.* 68.

If two Jointenants was for Life or Years, and the Reversion of their Estate was granted (*before the said Statutes*) to a Stranger, and one of them attorned to the Grant of the Reversion; this was a good Attornment for both of them. The like Law was for Tenants in Common. But if *A. B. C.* and *D.* were Lessees for Years, and *C.* and *D.* were outlawed, so as they forfeited their Parts to the King, and the King became Tenant in Common with *A.* and *B.* and after the Reversion was granted to a Stranger, and *A. B. C.* and *D.* attorned; this was no good Attornment to perfect the Grant of the Reversion, for *C.* and *D.* could not attorn, and the Attornment of *A.* and *B.* for the King and themselves was not good. 2 *Co.* 66, 67. *Lit.* §. 566. 6 *Car.* in *Lord Brook's Case in Cur' Ward'.*

Attornment by one good for others.

Ninthly, *Who shall be compelled to attorn, or not, and where.*

In all Cases for the most part where Attornment is needful, the Tenant, whether he be Tenant in Fee-simple, for Life, Years, by Statute, *Elegit*, or as Executor until Debts be paid, shall be compelled to attorn. And altho' the Tenant be an Infant, and comes to the Land by Purchase or Descent, yet he may be compelled to attorn; but then in this Case his Attornment shall not prejudice him, for when he is of full Age he may disclaim, or say he holds by less Services. 6 *Co.* 68. 9 *Co.* 84. *Co. Lit.* 315.

In all Cases for the most part where an Attornment is not needful, there is no Means to compel the Tenant to attorn; and therefore the Tenant cannot be compelled to attorn to him that comes to a Reversion or Remainder by Escheat, Forfeiture, &c. 6 *Co.* 68. *Co. Lit.* 318.

If one (*by the Common Law*) grants his Reversion of Land in Mortmain without a Licence, the Tenant may not be compelled to attorn until there be a Licence had from the King. *Co. Lit.* 318. 3 *Co.* 86.

Also it is a general Rule, that when the Grant by Fine is defeasible, there the Tenant shall not be compelled to attorn: As if an Infant levies a Fine, this is defeasible by Writ of Error during his Minority, and therefore the Tenant shall not be compelled to attorn. So if the Land was held in Antient Demefne, and he in the Reversion levied a Fine of the Reversion at the Common Law; the Tenant could not be compelled to attorn, because the Estate that passed was reversable by Writ of Disceit. *Co. Lit.* 318. 3 *Co.* 86.

Tenthly, How an Attornment shall enure and be taken.

If the Grant be absolute, and the Attornment be on Condition, yet this shall enure according to the Grant. So if the Attornment be but to Part of the Things, or Part of the Time granted; this shall enure to perfect the Grant for all. So if the Attornment be made but to one of the Grantees, it shall enure to the Rest. So if the Attornment be made to the particular Tenant, it shall enure to him in the Remainder to perfect his Estate also. *Co. Lit.* 309, 310, 297.

If the Estate of the Tenant be with a Privilege annexed, as without Impeachment of Waste, or the like, and the Tenant attorns generally without any Saving of his Privilege; if the Attornment be *gratis* and voluntary, whether it be an Attornment in Law or in Deed, this shall not enure to extinguish his Privilege: But if the Attornment be made by the Compulsion of a Writ in this Manner, and without this Saying, he has lost his Privilege for ever. *Co. Lit.* 320.

If a Reversion, &c. (*before the said Statutes*) was granted to two several Men one after another, and he that had the latter Grant got the Attornment of the Tenant to his Grant before the other; this would enure to perfect the latter, and the first Grant afterwards could not be made good. *Co. Lit.* 310.

And if a Reversion was granted to a Man and Woman unmarried, and before Attornment they intermarried, and then the Tenant attorned; they were to have the Estate by Moieties. *Co. Lit.* 310.

Eleventhly, How an Attornment shall relate.

An Attornment as to the Party Grantor, shall have Relation to the Time of the Grant, to make the Thing to pass out of the Grantor *ab initio*, altho' it be made many Years after the Grant; and therefore all Acts done by him after the Time of the Grant, and before the Attornment, to the Prejudice of his own Grant, as granting of Rents, entering into Statutes, or the like, are void, as to the Land to charge it: And hence it is, that (*before the said Statutes*) if a Reversion was granted to an Alien, and before Attornment of the Tenant he was made Denizen; the King upon Office found should have the Land, and yet it should not so relate as to make the Tenants chargeable to the Grantee for any mean Arrearages, or for any Waste in the Lands from the Time of the Grant to the Time of the Attornment. But in respect of a Stranger it should not relate at all. And therefore if two Deeds were made of a Reversion at several Times, and he whose Deed was made last got Attornment first, the Reversion did pass to him; and tho' the other got Attornment afterwards, yet this would not help him by Relation; and altho' the former Grant of the Reversion was in Fee, and the latter for Life only, yet the Law was all one in both Cases. *Co. Lit.* 310.

S E C T. XI.

Of Leases.

(A) *A Lease what, and Lessor and Lessee who.*

A Lease (from *Laiffer*, *Dimittere*, to part with) is a Demise or Letting of Lands, Rent, Common, or any Hereditament, to another for a lesser Time than he who lets it has in it, (for when a Lessee for Life or Years grants over all his Estate or Time to another, this is more properly called an Assignment than a Lease) and is most commonly and aptly made by the Words *Demise*, *Grant* and *Let*, altho' it may be made and done by *other Words*.

He who lets is called the *Lessor*, and he to whom it is let the *Lessee*.

The Word *Lease* is also sometimes (altho' improperly) applied to the Estate, *i. e.* the Title, Time or Interest the Lessee has to the Thing demised, and then it is rather referred to the Thing taken or had, and the Interest of the Taker therein: But in this Place it is applied rather to the Manner or Means of attaining or coming to the Thing letten.

(B) *Kinds of Leases.*

A Lease in this Sense is sometimes made and done by *Record*, as a *Fine*, *Recovery*, &c. and sometimes and most frequently by *Writing* called a Lease by *Indenture*, altho' it may be made by *Deed Poll*.

And sometimes it is by *Parol*, without any *Writing*, as by the Common Law it might be of Land or such like Thing grantable without Deed for Life, and never so many Years. But now by the *Stat. 29 Car. 2. c. 3.* All Estates, Interests of *Freehold*, or Term of *Years*, or any *uncertain* Interest in or out of Lands, &c. not put in Writing, and signed by the Parties making them, or their Agents, authorized by Writing, shall have no greater Effect than as Leases at *Will*; *except* Leases not exceeding three Years, whereof the Rent reserved shall be two Thirds of the full Value of the Thing demised. And no such Estates or Interests (not being Copyhold or Customary Interests) shall be assigned, granted or surrendered, unless it be either by Deed or Note in Writing, signed as before, or by Act and Operation of Law.

A Lease may be made either,

1. *For Life*, (*i. e.* for the Life of the Lessee, or another, or both) or,
2. *For Years*, (*i. e.* for a certain Number of Years, as ten, a hundred, a thousand or ten thousand Years) *Months*, *Weeks* or *Days*, as the Lessor and Lessee agree; and then the Estate is properly called a *Term of Years*; for the Word *Term* not only signifies the Limits and Limitation of Time, but also the Estate and Interest that passes for that Time: Some of these Leases also for Years commence *in presenti*, and some *in futuro*, at a Day to come; and the Lease that is to begin *in futuro* is called an *Interest Terminum*, or future Interest. Or,
3. *At Will*, when a Lease is made of Land to be held at the Will and Pleasure of the Lessor, or at the Will and Pleasure of the Lessor and Lessee together; and such a Lease may be made by Word of Mouth as well as the former.

And there is a common way of conveying by *mutual Leases*, or by Lease on each Side, which is called a Conveyance by *Demise and Re-demise*, and is proper upon the Grant of a Rent-charge.

(C) *Things necessarily required in every good Lease.*

Regularly these Things must concur to the making of every good Lease:

1. There must be a *Lessor*, (as in other Grants) and he must be a Person able, and not restrained to make a Lease.
2. There must be a *Lessee*, and he must be capable of the Thing demised, and not disabled to receive it.
3. There must be a *Thing demised*, and such a Thing as is demisable.

4. If

4. If the Thing demised be not grantable without a Deed, or the Party demising not able to grant without a Deed, the Lease must be made by Deed; and if so, then there must be a sufficient Description and setting forth of the Person of the Lessor, Lessee, and the Thing leased, and all necessary Circumstances, as Sealing, Delivery, &c. required in other Grants must be observed.

5. If it be a Lease for Years, it must have a certain Commencement, at least when it comes to take Effect in Interest or Possession, and a certain Determination either by an express Enumeration of Years, or by Reference to a Certainty that is expressed, or by reducing it to a Certainty upon some contingent Precedent by Matter *ex post facto*, and then the Contingent must happen before the Death of the Lessor or Lessee.

6. There must be all needful Ceremonies, as Livery of Seisin, Attornment, and the like, in Cases where they are requisite.

7. There must be an Acceptance of the Thing demised, and the Estate by the Lessee. But whether any Rent be reserved upon a Lease for Life, Years, or at Will, or not, is not material, except only in the Cases of Leases made by Tenant in Tail, Husband and Wife, and Ecclesiastical Persons; of which see hereafter.

(D) *What is a good Lease for Life or Years with respect to the Lessor and Lessee, the Thing leased, and the Estate, Property or Possession of the Lessor, &c. therein.*

Leases for Life, Years, or at Will, may be made of any Thing corporeal or incorporeal, that lies in Livery or Grant. Also Leases for Years may be made of any Goods or Chattels. *Bro. Leases 23.*

A Man seised of an Estate in Fee-simple in his own Right of any Lands or Tenements, may by Deed or Writing in the Country, (or before the *Stat. 29 Car. 2. c. 3.* might without Writing by Word of Mouth) make a Lease of it for what Lives or Years he will or would. And he that is seised of an Estate in Tail of any Lands or Tenements, may make any Lease out of it for his own Life, but no longer, unless it be by Fine or Recovery, or it be such a Lease as is warranted by the Statute of *32 H. 8.* And he who is seised of Lands or Tenements of any Estate for his own or another's Life, may make what Lease for Years he will of it, and it will be good as long as the Lease for Life does last. And he who is possessed of Lands or Tenements for Years, may make a Lease of it for all or part of the Years, and these are good Leases. The Tenants for Life or Years may also assign over all their Estates if they please. And if such Tenants make Leases for longer Time, as if Lessee for Years make a Lease for Life; by this the Land will pass for Life, if the Term of Years last so long. But if he gives Livery of Seisin upon it, (as he must to make the Lease for Life good) this is a Forfeiture of the Estate for Years. *1 Co. 44. 7 Co. 12. Plow. 524.*

Infant.

If an Infant be seised of Land in Fee-simple, and he makes a Lease for Years of it, rendring no Rent; this Lease is void. But if there be a Rent reserved upon the Lease, then the Lease is but voidable, and may by the Acceptance of the Rent by the Infant after his full Age be made good. *9 H. 7. 24. 18 Ed. 4. 2. Plow. 545.*

Jointenants,
Tenants in
Common,
Parceners.

Jointenants, Tenants in Common and Parceners, may make Leases for Life or Years of their own Parts and Purparties at their Pleasure; and these Leases will bind their Companions. And one Coparcener or Tenant in Common may make a Lease of his Part to his Companion, if he will. *Lit. Chap. Tenant in Common. F. N. B. 62. G.*

If a Feoffment be made upon Condition, and before the Time of Performance of the Condition the Feoffor and Feoffee join to make a Lease for Life or Years of the Land; this is a good Lease.

Baron and
Feme.

A Man that has an Estate in Land to him and his Wife and his Heirs, may make what Lease he will of the Land, and this will be good against all Men but his Wife only, and that for her Time. *Bro. Leases 58.*

Lessor in Fee
and Lessee for
Years.

If there be Lessor in Fee, and Lessee for ten Years; in this Case they two may join together, and make a Lease for Lives, or for any Term of Years, and this is good. *10 Co. 49.*

Disseisee.

A Disseisee cannot make a Lease of that Land whereof he is disseised, until he makes his Entry, or recovers the Possession of the Land again. *Plow. 133.*

So neither can a *Woman* that has recovered the third Part of her Husband's Dower. Lands in a Writ of Dower, make any Lease of it before she be in Possession by Execution. *Bro. Sci. Fa.* 36.

And yet if a Lease be made to me for Years, I may make a Lease of part, or an Assignment of all the Term before I have made my Entry into the Land demised. *Co. Lit.* 46.

So if the Father dies, and the Son makes a Lease to a Stranger of the Land descended to him before his Entry, this is a good Lease: But if a Stranger had entered and abated into the Land, and then the Son had made the Lease, *contra. Plotw.* 137, 142.

In some Cases such Persons as are not seised in Fee-simple, &c. nor able to derive such Estates for Life or Years out of their own Estates, may lawfully notwithstanding make such Leases for Life, &c. And this is sometimes by a special Act of Parliament enabling them so to do. And hence it is also that a Tenant in Tail may make Leases for three Lives, or twenty-one Years. And sometimes it is by special Power or Authority given or reserved by and to the Party himself that had the Fee-simple in him, or given to some other to do it in his Name; and Leases thus made may be good. And therefore if any Act of Parliament enable a Tenant in Tail or a Tenant for Life to make Leases for three Lives, or twenty-one Years, Leases that are so made in Pursuit of that Authority are good. And if a Man be seised of Land in Fee, and conveys it to the Use of himself for Life, or in Tail, with divers Remainders over, with a Proviso that it shall be lawful for him, or any such Tenant in Tail, to make Leases for twenty-one Years; in this Case he or they may make such Leases, and they will be good. But in both these Cases Care must be had to pursue the Authority strictly, that the Leases made be according to the Power and Direction given by the Statute or Proviso; for if it differs and varies ever so little from the Sense and Meaning of the same, the Lease will not be good. And therefore in the Case before of a Power to make Leases for twenty-one Years, if the Party makes more Leases for twenty-one Years at one Time than one, they are all void except the first, because it is against the Intent of the Parties, tho' it be not against the Words. And so if the Power be to make Leases for three Lives, he cannot make a Lease for ninety-nine Years, if three Lives so long live. But if the Power be thus: *Provided, &c. that he may make any Lease in Possession or Reversion, so as it does not exceed the Number of three Lives, or twenty-one Years;* in this Case a Lease may be made for ninety-nine Years, if three Lives live so long. But where Uses are raised by way of Covenant, and in the Deed there is a Proviso, *that the Covenantor for divers good Considerations may make Leases for Years;* this Power is void, and no Lease can be made hereupon, neither will any Averment help in this Case. And if a Man has a Letter of Attorney, or other Authority to make Leases for another, and makes them accordingly; such Leases are good. *5 Co. 5. Dyer 357. 6 Co. 2, 8, 70. 1 Co. 175.*

By special Power or Proviso to make Leases.

But herein observe three Things:

First, That the Authority be good.

Secondly, That he who is *Deputy* or *Attorney* pursues the Authority strictly.

Thirdly, That he does it in the Name of his Master, and not in his own Name.

9 Co. 76.

A Lease for a greater Number of Years than the Lessor had Power to grant, shall be good in Equity for so many Years as he had Power therein: So that where a Person hath Power to lease for ten Years, and he leaseth for twenty Years, the Lease shall be good for ten Years of the twenty. *3 Chan. Rep. 11. 1 Chan. Ca. 23.*

A Lease for Years mortgaged and near expiring, was renewed by the Mortgagor's Executors; it was decreed that the new Lease, allowing the Charges, should be assigned to the Plaintiff, and made subject to the Payment of the Mortgage Money and Interest. *Finch's Rep. 393, 394.*

If a Lease for Years be limited in Trust for Heirs Male, &c. the Limitation is void in Law, and the Term shall go to the Executors or Administrators: But an Assignment of a Lease, with Limitations in Tail, Remainder over in Trust; tho' it be void in Law, it has been held good in Equity by the Intent. *1 Chan. Rep. 16. 2 Chan. Rep. 58.*

The Heir shall have a Lease assigned to attend the Inheritance, and not the Executor: And a Lease waiting on the Inheritance, where it is not Assets in Law, is not Assets in Equity. *2 Chan. Ca. 156, 49.*

Leases devised by Will are Assets to pay the Testator's Debts notwithstanding the Assent of the Executors to the Devise of them. 1 Chan. Ca. 257.

The Question was, whether the Inheritance of the Land being gone and made void, the Lease which was to attend it should go according to Uses declared by Covenant to stand seised. Decreed in this Case, that it being a Settlement on Marriage, and so on a Consideration, it should go to the Wife for so many Years as she lived. 1 Chan. Ca. 47.

A. seised in Fee of an Estate, demised to B. his Executors, &c. for ninety-nine Years, in Trust for himself and his Wife for their Lives, and the Life of the Survivor, and after the Death of the Survivor, in Trust for the Heirs of their two Bodies; and in Default of such Issue, in Trust for the Heirs of the Body of A. and in Default of such Issue, in Trust for the Heirs of the Survivor of Husband and Wife: A. his Wife had Issue a Son, A. dies, and afterwards the Son dies without Issue; the Wife administered to her Husband and Son, and assigns the Term to C. The Question was, who was intitled to the Trust of this Term, whether it was attendant on the Reversion, and so belonged to the Plaintiff as the Heir at Law of A. who was intitled to the Reversion in Fee expectant on this Term, or to the Defendant C. as Assignee of the Wife? The Master of the Rolls decreed the Title to belong to the Assignee of the Wife, and that this Term should not be attendant on the Inheritance; for that the Party who raised the Term, and had Power to sever it from the Inheritance, shewed his Intention so to do, by limiting the Trust of the Survivor of him and his Wife, and the Heirs of the Survivor, which tho' it was a void Limitation, yet sufficed to shew his Intent to sever such Term from the Reversion. 1 Will. 360.

(E) *What Leases (or other Acts) may be made (or done) by a Tenant in Tail, and what Leases made by such a Tenant shall be good to bind the Issue, or him in Remainder, or others after the Death of the Tenant in Tail; and how they shall bind.*

ANY Person whatsoever of full Age that has any Estate of Inheritance in Fee-tail in his own Right of any Lands, Tenements or Hereditaments, may at this Day without Fine or Recovery make Leases of such Lands for Lives or Years, and such Leases shall be good, so as these Conditions and Incidents following be therein observed and kept. Stat. 32 H. 8. c. 28. Co. Lit. 44.

First, Such Leases must be by Deed indented, and not by Deed Poll or by Parol.

Secondly, They must be made to begin from the Day of the Making thereof, or from the Making thereof; and therefore a Lease made to begin from Michaelmas, which shall be three Years after, for twenty-one Years, or a Lease made to begin after the Death of the Tenant in Tail for twenty-one Years, is not good. But if a Lease be made for twenty-one Years to begin at Michaelmas next; this is a good Lease. 5 Co. 6. Dyer 246.

Thirdly, If there be an old Lease in Being of the Land, the same must be surrendered, or expired and ended within a Year of the Time of the Making of the new Lease; and this Surrender must be absolute and not conditional; also it must be real, and not illusory, or in Shew only; for *factum non dicitur quod non perseverat*. 5 Co. 2.

Fourthly, There must not be a double or concurrent Lease in Being at one Time; as if a Lease for Years be made according to the Statute, he in the Reversion cannot afterwards expulse the Lessee, and make a Lease for Life or Lives, or another Lease for Years according to the Statute, nor *e converso*. 5 Co. 2. But if a Lease for Years be made to one, and afterwards a Lease for Life is made to another, and a Letter of Attorney is made to give Livery of Seisin upon the Lease for Life, and before the Livery made the first Lease is surrendered; in this Case the second Lease is good. Spark's Case, Trin. 4 Jac. B. R.

Fifthly, These Leases must not exceed three Lives, or twenty-one Years, from the Time of the Making of them; and therefore if a Tenant in Tail makes a Lease for twenty-two or for forty Years, or for four Lives; this Lease is void, and that not only for the Overplus of Time more than three Lives or twenty-one Years, but for that Time of three Lives or twenty-one Years also. And it has been resolved, that if a Tenant in Tail makes a Lease for ninety-nine Years determinable upon three Lives;

Lives; this is not a good Lease. But if a Lease be made by a Tenant in Tail for a lesser Time, as for two Lives, or for twenty Years; this is a good Lease. And if a Lease be made for four Lives, and it happens that one of the Lives dies before the Tenant in Tail dies, yet this Accident will not make the Lease good, but it remains voidable notwithstanding. 5 Co. 6. Dyer 246.

Sixthly, These Leases must be of Lands, Tenements or Hereditaments manurable or corporeal, which are necessary to be letten, and whereout a Rent by Law may be issuing and reserved. 5 Co. 2. And therefore if a Tenant in Tail makes a Lease of such a Thing as lies in Grant, as an Advowson, Fair, Market, Franchise, or the like, out of which a Rent cannot be reserved, especially if it be a Lease for Life; this Lease is void, and that altho' the Thing have been antiently and accustomably letten; and a Grant of a Rent-charge therefore out of such Lands is void. *Tallen-tine's Case*, Pas. 3 Jac. B. R. 11 Co. 60.

And if Tenant in Tail makes a Lease for three Lives of a Portion of Tithes rendering Rent, this Lease is unquestionably void. And so also it seems it is if it be a Lease for twenty-one Years. *Trin. 2 Jac. B. R.* adjudged, *Dodington's Case*.

Seventhly, They must be of such Lands or Tenements which have been most commonly letten to Farm, or occupied by the Farmers thereof by the Space of twenty Years next before the Lease made, so as if it has been letten for eleven Years at one or several Times within twenty Years before the new Lease made, it is sufficient. And altho' the Letting have been by Copy of Court-Roll only, yet such a Letting in Fee for Life or Years is a sufficient Letting, and so also is a Letting at Will by the Common Law. But these Lettings to Farm must be made by such as are seised of an Estate of Inheritance; for if it has been only by Guardian in Chivalry, Tenant by the Curtesy, in Dower, or the like; this will not serve to be a Letting within the Intent of the Statute. 6 Co. 37. Dyer 271.

Eighthly, There must be reserved upon such Leases yearly during the same Leases, due and payable to the Lessor and his Heirs, to whom the Reversion shall appertain, so much yearly Farm or Rent, or more, as has been most accustomably yielded or paid for the Lands, &c. within twenty Years next before such Lease made; and therefore if the Rent be reserved but for Part of the Time of the new Lease, this Lease is void. And if the Tenant in Tail has twenty Acres of Land that has been accustomably letten, and he makes a Lease of these twenty Acres, and of one Acre more which has not been accustomably letten, reserving the usual yearly Rent, and so much more as to exceed the Value of the other Acre; this is not a good Lease by the Statute. So if the Tenant in Tail of two Farms, the one at twenty Pounds Rent, the other at ten Pounds Rent, and he makes a Lease of both these Farms together at thirty Pounds Rent; this is not a good Lease within the Statute. 5 Co. 8. 6 Co. 6, 37, 38.

But if besides the annual Rent there have been formerly reserved Things not annual, as Heriots, Fines, or other Profits upon the Death of the Farmers, or Profit out of another's Soil, as Pasturage for a Colt, &c. if upon the new Lease the yearly Rent be reserved, altho' these collateral Observations be omitted, yet the Leases are good. *Trin. 3 Jac. B. R.* adjudged *Trin. 18 Jac. B. R.*

And so also if there be more Rent reserved upon the new Lease than the Rent that has been antiently paid, the Lease is good notwithstanding: And yet if Tenant in Tail of Land lets a Part of it that has been accustomably letten, and reserves the Rent *pro rata*, or more than after the Rate; this is not a good Lease. 5 Co. 6.

And yet if two Coparceners have twenty Acres of Land of equal Value between them in Tail, and these have been usually letten, and they make Partition of these Lands, so as each of them has ten Acres; in this Case they may make Leases of their several Parts, reserving the Half of the accustomable Rent. 5 Co. 5. And yet *Co. Lit.* 44. b. is *contra*.

And if upon the old Lease the Rent were payable at four Days in the Year, and by the new Lease it is reserved to be paid at one Day; this is not a good Lease. But if the Rent upon the old Lease be payable in Gold, and the new Rent be payable in Silver; the Lease is not good. And if a Tenant in Tail be of a Manor that has been usually demised for ten Pounds Rent, and after a Tenancy Escheat, and then he makes a Lease of the Manor, rendering ten Pounds Rent by the Year; this is a good Lease; but if the Lessor purchases a Tenancy, then it seems otherwise. *Trin. 3 Jac. B. R.* *Cornwal's Case*. 5 Co. 5, 6.

Ninthly,

Ninthly, Such Leases must not be without Impeachment of Waste; and therefore if Tenant in Tail makes a Lease of his Land intailed without Impeachment of Waste, this Lease is void. And if a Lease be made for Life, the Remainder for Life, &c. this is not a good Lease, for in this Case during the Remainders the Tenant for Life cannot be punished for Waste done. But if such a Tenant of Land makes a Lease of it to *J. S.* for the Lives of three others; this is a good Lease, altho' it may afterwards become an Occupancy. 6 Co. 37. and *Meer's Case*, adjudged.

Tenthly, Such Leases must not be against any special Act of Parliament; and therefore if a Woman that is Tenant in Tail of the Gift of her deceased Husband, or any of his Ancestors whilst she is Sole, or after with another Husband, makes any such Lease warranted by this Statute; yet this Lease is not good. Stat. 11 H. 7. 20. 3 Co. 51.

Eleventhly, They must have all due Ceremonies and Circumstances for the Perfection of them, as other such like Leases have, as Livery of Seisin, and the like, where they are needful. And then only when Leases have these Conditions, and are made according to these Provisions, are they said to be within the Statute of 32 H. 8. and such only as do bind the Tenant in Tail himself, and Issue in Tail, for otherwise if it be not warranted by this Statute, altho' it will bind the Tenant in Tail himself that made it, yet it will not bind his Issue, but as to him it will be void or voidable at the least; for if Tenant in Tail of Land makes a Lease of it for a hundred Years, without any Rent reserved thereupon; this Lease as to the Issue in Tail is void: But if he makes a Lease of his Land for 100 Years, rendring Rent, and has Issue, and dies; in this Case the Lease is only voidable by the Issue at his Pleasure; and therefore if the Issue accepts the Rent after the Death of the Tenant in Tail, by this Means the Lease is affirmed and become good. But howsoever the Lease be made, it will not bind him that comes in of a Remainder over, nor him that is the Donor; and therefore if a Tenant in Tail makes a Lease warranted by the Statute, and after dies without Issue, so that the Land remains over to another, or reverts to the Donor; in these Cases neither he in the Remainder, nor the Donor, shall be bound by this Lease, for as to them the Lease is void. And yet by a Common Recovery the Tenant in Tail may make Leases of or lay Charges upon the Land to bind the Donor and him in Remainder also. But otherwise it is of a Fine; for if Tenant in Tail makes a Lease for Years by Fine, this will not bar the Donor, nor the Remainder, in any Case where it is in a Stranger. And yet if the Remainder be in the Tenant in Tail himself, and he makes a Lease for Years by Deed according to the Statute, or by Fine; this Lease is good, and shall bind his own Remainder. 7 Co. 7. 8 Co. 54. *Dyer* 7, 8. *Woman's Lawyer* 73. *Plow.* 435, 436.

(F) *What Leases (or other Acts) may be made (or done) by the Husband with the Lands he has in Fee-simple or Fee-tail in the Right of his Wife, or jointly with her; and what Leases made by him of such Lands are good, or not, and how.*

THE Husband may at this Day without Fine or Recovery make Leases of the Land, Tenements or Hereditaments, whereof he has any Estate of Inheritance in Fee-simple or Fee-tail in the Right of his Wife, or jointly with his Wife, made before or after the Coverture, so as there be in such Leases observed the eleven Conditions or Limitations before required in the Leases made by Tenant in Tail, and so that the Wife do join in the same Deed, and be made Party thereunto, and do seal and deliver the same Deed herself in Person. Stat. 32 H. 8. c. 28. Co. Lit. 44.

For if a Man and his Wife make a Letter of Attorney to another to deliver the Lease upon the Land, this Lease is not a good Lease from the Wife warranted by the Statute. And yet then, as in other like Cases of Leases not warranted by this Statute, it is a good Lease against the Husband. And when the Lease is such a Lease as is warranted by the Statute, it binds the Husband and Wife both, and the Heirs of the Wife: But if it be an Estate-tail, it does not bind the Donor nor him in Remainder. *Paf.* 7 *Jac. B. R.*

If the Husband and Wife at the Common Law had joined in a Lease of her Land without rendring of Rent; this Lease had been void as against the Wife, and so is the Law still. 26 H. 8. 2.

If the Husband at the Common Law had been seised of Land in the Right of his Wife, and he had made a Lease for Years rendring Rent, and died; this Lease had been void, and so is the Law still. 26 H. 8. 2. 2 Co. 77.

If the Husband and Wife at the Common Law had made a Lease by Word, rendring Rent; this Lease had been void as against the Wife, and so is the Law still. Dyer 91.

The Husband and Wife together may by Fine or Recovery make what Leases they will of her Land, or charge it for what Time they will; and such Leases and Charges will be good against the Husband and Wife both, and their Heirs also. But if the Husband alone levies any Fine of his Wife's Land, and thereby makes any Estate whatsoever; this will not bind the Wife after the Husband's Death, but she may avoid it. And if the Husband and Wife make a Lease of her Land, rendring Rent to them and the Heirs of the Wife (as in such Leases it ought to be); in this Case the Husband cannot by Fine or otherwise grant or discharge this Rent longer than during Coverture, unless the Wife join in the Fine, but the Rent shall descend, remain or revert in such Sort and Manner as the Land should have done. Stat. 32 H. 8. c. 28. Vide Woman's Lawyer 163.

If a Woman seised of an Estate for Life, with a Power to make a Lease for three Lives or twenty-one Years, marries, and she and her Husband join in making the Lease, and both die before the Lease is expired; here, tho' the Husband in Right of his Wife, and she in her own Right, are possessed of an Estate for Life, and therefore can, as Owners, make a Lease, and there appears no Intention of the Parties, (imagining perhaps they should have out-lived the Lease) that this Lease should be made by Virtue of the Power; yet because the Lease, supposing it made by them as Owners, cannot have all the Effect the Parties intended, for some it would have, (it would be a good Lease during the Lives of the Husband and Wife) yet because it cannot have all, it shall be esteemed made by Virtue of the Power. Lucas 36.

(G) *What Leases (or other Acts) Bishops, or other Spiritual or Ecclesiastical Persons and Colleges may make (or do) with the Lands they have in the Right of their Churches or Houses, &c. and what Leases made by such Persons will bind their Successors and others, or not.*

Bishops, with the Confirmation of the Dean and Chapter, Parsons or Vicars, with the Consent of their Patrons and Ordinaries, Archdeacons, Prebends, and such as are in the Nature of Prebends, as Precentors, Chaunters, Treasurers, Chancellors, and such like; also Masters and Governors, and Fellows of any Colleges or Houses, (by what Name soever called) Deans and Chapters, Masters or Guardians of any Hospital, and their Brethren, or any other Body Politick, Spiritual and Ecclesiastical, (*Concurrentibus hiis quæ in jure requiruntur*) might by the antient Common Law have made Leases for Lives or Years, or any other Estates of their Spiritual or Ecclesiastical Living for any Time without Stint or Limitation. Co. Lit. 44. 5 Co. 14. 11 Co. 66.

And at this Day the Bishops, and the Rest of the said Spiritual Persons, except Parsons and Vicars, may make Leases of their Spiritual Livings for three Lives or twenty-one Years, and such Leases will be good both against themselves and their Successors. But such Persons may not make Leases or Estates for any longer Time than for three Lives or twenty-one Years; and if they do, altho' it be by Fine or Recovery, or it be confirmed by the Dean and Chapter, &c. yet it is void against the Successor. Neither will the Leases made by such Persons for three Lives or twenty-one Years be good, unless they have certain Conditions and Properties required in them. Stat. 32 H. 8. c. 28. 13 Eliz. c. 10. 1 Jac. c. 3. 1 Eliz. c. 19. 14 Eliz. c. 11. 18 Eliz. c. 10, 20.

These Things therefore are necessarily required to be observed in the Making of such Leases:

First, That they have the Effect of all the Qualities or Properties before mentioned and required by the Statute of 32 H. 8. in the Lease made by the Tenant in Tail, and be made after that Manner, viz. that they be by Deed indented.

Secondly, That they being from the Time of the Making of them.

Thirdly and Fourthly, That the old Lease be surrendered, and there be not a concurrent Lease (save in Case of a Bishop); and therefore if any such Person makes a

Lease for twenty-one Years to one, and then makes a Lease for three Lives to another; this second Lease is void. And yet if a Bishop makes a Lease for twenty-one Years to one Man, and then within a Year after makes another Lease to another for twenty-one Years, to begin from the Making of it; this, if it be confirmed by Dean and Chapter, is a good Lease.

Fifthly, That they do not exceed three Lives or twenty-one Years, but they may be for a less Time.

Sixthly, That they be of Lands or Tenements manurable or corporeal.

Seventhly, That they be made of Lands that have been commonly let to Farm by the Space of twenty Years before.

Eighthly, That there be reserved upon them the antient and accustomed Rent payable to the Lessor of his Successors during the Time.

Ninthly, That they be not made without Impeachment of Waste.

Tenthly, That there be Livery of Seisin upon them, &c. where it is requisite. *Co. Lit. 44. 11 Co. 66. 5 Co. 3, 15.*

Eleventhly, If the Lease be made according to the Exception of the Statute of 1 *Eliz.* and 13 *Eliz.* and not warranted by the Statute of 32 *H. 8.* as in the Case of a concurrent Lease, and it be made by a Bishop or any Sole Corporation, it must be confirmed by the Deans and Chapters, or others that have Interest. And if a Parson or Vicar makes a Lease, it is not good but during the Parson or Vicar's Residence, according to the Statute of 13 *Eliz. c. 20.* and in this Case there needs no Confirmation at all. *11 Co. 66. 5 Co. 3.*

Twelfthly, Some of the Leases that are made by the Colleges and Houses of the University, &c. must have some Rent-Corn reserved upon them. *Stat. 18 Eliz. c. 20.*

But Bishops, Deans, Parsons, and such like Spiritual Persons, cannot grant the next Advowsons of Churches, neither can they grant Rents out of their Spiritual Livings, but the same Charges will be void after their Death. And if a Bishop suffers an Annuity to be recovered against him by a Pretence of Title of Prescription on a Judgment after a Verdict or Confession, or a Parson in such a Case prays in Aid of the Patron, and so suffers an Annuity to be recovered; this will not bind the Successor. And yet a Bishop, or any such Spiritual Person, may grant antient Offices of Trust of Necessity or Conveniency, as the Offices of Chancellor, Register, Bailiff, or the like, with the antient Fees incident thereunto, for the Life or Lives of the Grantees; and such Grants are good altho' they be made by the Bishops of the new erected Bishopricks, and that there be not in them the Conditions and Properties required in the Leases before mentioned, so as they be confirmed by the Dean and Chapter. But they may not grant any new Office, nor yet add any new Fee to the old Offices; and therefore if a Bishop grants any Annuity *pro consilio impenso & impendendo*, where none was before; this will not bind the Successor. And yet if there be an old Fee, and there is a new Fee added to it; in this Case it seems it is good for the old Fee, altho' it be void for the new Fee. Neither may they grant their Offices otherwise than they have been granted: And therefore where the antient Grant of the Office has been to one, it cannot be now granted to two; and where the antient Grants have been to two jointly, they may not be now granted in Remainder one after another. Neither may the Grants of these Offices be longer than for the Life or Lives of the Grantees. And in Case where the Grant is void, the Confirmation of the Dean and Chapter will not make it good. *5 Co. 15. 11 Co. 66. 10 Co. 58. Dyer 370.* And most of these Points were agreed by Justice *Jones* and Justice *Whitlock*, at *Lent Assises at Gloucester, 6 Car.*

But here observe, that altho' in all these Cases of Leases and Grants not warranted by the Statutes aforesaid, the Statutes say the Leases shall be void; yet this is to be understood as against the Successors, and not against the Lessors themselves, for the Leases are good so long as the Lessors live, or at least so long as they continue in the Place: And therefore if such a Lease be made by a Dean and Chapter, or other Corporation Aggregate; it is good as against the Dean or others, Head of the Corporations, so long as he continues in his Place. And if a Bishop makes any Lease or other Grant not warranted by the Statute of 1 *Eliz.* or a Dean and Chapter, Master and Fellows of a College, or the like, make Leases not warranted by the Statute of 13 *Eliz. c. 10.* these Leases are good against themselves altho' they are void against their Successors. So as if a private Act of Parliament intails Land upon a Man, and appoints him what Estates he shall make, and that if he makes any other Estates they shall

shall be void; in this Case they shall not be void as to the Tenant in Tail himself that makes them. *Co. Lit.* 45, 329. 3 *Co.* 59. 10 *Co.* 59. 11 *Co.* 73, 78. 5 *Co.* 5.

Leases of Benefices with Cure are no longer good than the Parson is Resident. *Stat.* 13 *Eliz.* c. 20.

Leases made by Colleges must have reserved upon them the third Part of the Rent in Corn. See the Statute of 18 *Eliz.* c. 20.

A College was seised in Fee of Lands in Right of the College, and the Statutes relating to the Constitution of it restrain from making Leases of the Lands, other than for twenty-one Years at the Rack Rent. The College made a Lease to J. S. for twenty-one Years at the Rack-Rent; the Lessee improved the Premises; and at the College Audit an Entry was made in the Register, by which, in Consideration that J. S. had built two Houses, and thereby had improved the Premises, therefore it was recommended, that at the End of the Lease the College should make him a new Lease for twenty-one Years, at the antient Rent, without raising it; and this Entry was signed by the Master, Warden, and most of the Fellows: Afterwards, upon J. S.'s applying for a new Lease, the College, at the Audit held about half a Year before the Expiration of the old Lease, made an Order, that J. S. should have a new Lease at the old Rent, and under the same Covenants as the former; and this Order was signed by the Master, Warden, and most of the Fellows: J. S. died Intestate about the Time of the next Audit, which was three Weeks before the Lease expired; whereupon the Widow, as Administrator, applied at the Audit following after for a new Lease, but being refused brought her Bill for that Purpose. And Lord Chancellor said, the Master-Warden betrayed his Trust in Relation to the College, and had acted inconsistently with the Oath he had taken; that he did not like the Recommendation made by the Master, Warden and Fellows, to make a new Lease to the Intestate at the old Rent, it being no less than a Recommendation to their Successors to wrong the College, and break their Statutes, which say, that no Lease should be made but at Rack Rents: And as to the Signing of the Master, Warden and Fellows, that could not be such a Contract as bound the College; for a Contract to bind that must be under its common Seal; wherefore the Bill was dismissed with Costs. 1 *Will.* 655.

(H) Of the Manner of the Agreement in a Lease, and the Words whereby the same is set down; and what Words will make an Estate for Life or Years.

A Lease made for a thousand Days, Months or Weeks, is as good for so long as it endureth, as a Lease for an hundred or a thousand Years. So a Lease for half a Year, or a whole Year, is good. 6 *Co.* 72. 14 *H.* 8. 13.

So if a Lease be made from Day to Day, or from Week to Week, for four Years; this is a good Lease for four Years. *Et sic de similibus.* *Plow.* 422.

So if one makes a Lease for ten Years, and so from ten Years to ten Years, during an hundred Years, or until an hundred Years incurred; this is a good Lease for one hundred Years. *Plow.* 272. *Bro. Leases* 49.

So if one makes a Lease from three Years to three Years during the Life of J. S. in this Case if Livery of Seisin be not given, this is a good Lease for six Years, but if Livery be given it is a good Lease for the Life of J. S. And if a Lease be made from my Death until *Anno Domini* 1650. this is a good Lease. *Dyer* 24.

If I say to J. S. being in my House, *Here J. S. I demise to you my House and Land* Livery of *so long as I live*; this is a good Lease for Life to him if Livery of Seisin be made. Seisin. 6 *Co.* 26.

If one makes me a Lease of Land until a hundred Pounds be paid me, and makes Livery of Seisin upon it; this is a good Lease for Life determinable upon the Payment of the hundred Pounds. But if no Livery be made it is no good Lease. 21 *Aff.*

If one makes a Lease to me for my Life, and for four, ten or twenty Years after; Executors. this is a good Lease for Life; first if Livery of Seisin be made, and then a good Lease for Years, for so many Years as are agreed upon afterwards, which my Executors shall have. And if no Livery of Seisin be made, yet it seems it is a good Lease for so many Years after my Death. *Bro. Leases* 27, 51.

If an Indenture of Lease be made between A. of the one Part, and B. C. and D. of the other Part, and therein A. demises Land to B. To have and to hold to him for eighty

eighty Years, if B. shall live so long, and if he dies, or aliens the Premises within the Term, then that his Estate shall cease; and then the Lessor grants the Land to C. for so many Years of the said Term as shall be then to come after the Death or Alienation of B. if he lives so long; this is a good Lease to B. for so many Years as he shall live of the eighty Years, but the Lease to C. after is not good, for the Term is ended by the Death of B. But if the Words of the second Demise be, To have and to hold during the Residue of the eighty Years, and not during the Residue of the Term; the second Demise is good to C. also. 1 Co. 153. Dyer 253.

If one makes me a Lease for sixty Years if I live so long, provided that if I die within the Term, that my Executors shall have it during the Residue of the sixty Years; in this Case this is a good Lease for the sixty Years determinable upon my Death, but not a good Lease for the Residue of the sixty Years after my Death: And yet it may amount to a good Covenant for that Time. 1 Co. 145. Dyer 150, 253.

A Lease for Years cannot by the Agreement of the Parties be made to the Heirs of the Lessee, nor intailed to the Heirs of his Body; and therefore if a Lease be made to J. S. and his Heirs, or to J. S. and the Heirs Male of his Body, yet the Executors of J. S. and not his Heirs, shall have it; and the Executors may sell the Term. 2 Co. 24. 10 Co. 87.

Covenant.

If A. covenants to levy a Fine to B. and his Heirs, provided that if he pays B. and his Heirs 10 l. at the End of thirteen Years, that then the Fine shall be to the Use of A. and his Heirs; and A. covenants with B. by the same Deed, that B. his Heirs, Executors and Assigns, shall quietly hold the Premises from Michaelmas next for thirteen Years, and yearly from thenceforth for ever, if the 10 l. be not paid according to the Intent; this Covenant does not make a good Lease for the thirteen Years, and it is but a Covenant. *Evan's Case, Trin. 5 Jac. B. R.*

If one makes a Lease for a certain Number of Years, and it is further agreed that upon some Contingent the Lessee shall have the Fee-simple, and Livery of Seisin is given hereupon; the Lessee for Years continues good for the Time agreed upon. *Plow. 272.*

If two agree by Word that one of them shall have such a Piece of Land for twenty Years; this is a good and perfect Lease that is made by this Agreement, altho' they agree to have a Writing made of it afterwards; for the Writing is but the Confirmation of it. But if the Agreement be that such a Writing shall be made, or that a Lease shall be made of such a Thing between them, and put in Writing, so that the Agreement hath Reference to the Writing, and implieth an Intent not to perfect the Agreement till the Writing be made; in this Case the Lease is not a perfect Lease until the Writing be made. *Per Justice Jones at Gloucester Assises.*

Words.

Altho' the most usual and proper making of a Lease is by the Words *Demise, Grant, and to Farm let*, and with an *Habendum* for Life or Years; yet a Lease may be made by other Words, for whatsoever Word will amount to a Grant, will amount to a Lease; and therefore a Lease may be made by the Word *give, betake*, or the like. The Word *Locavit* also is a good Word. And the Use in the Exchequer is to make Leases by the Word *Committimus*, which is a good Word to make a Lease. *Co. Lit. 5. F. N. B. 270. E. Bro. Leases 71.*

And if A. does but grant and covenant with B. that B. shall enjoy such a Piece of Land for twenty Years; this is a good Lease for twenty Years. *Bro. Leases 60.*

So if A. promises to B. to suffer him to enjoy such a Piece of Land for twenty Years; this is a good Lease for twenty Years. *Per Cur' B. R. Mic. 9 Jac.*

So if A. licences B. to enjoy such a Piece of Land for twenty Years; this is a good Lease for twenty Years: And therefore it is the common Course, if a Man makes a Feoffment in Fee, or other Estate, upon Condition that if such a Thing be or be done at such a Time, that the Feoffor, &c. shall re-enter, to the End that the Feoffor, &c. may have the Land and continue in Possession until that Time, to make a Covenant that he shall hold and take the Profits of the Land until that Time: And this Covenant will make a good Lease for that Time, if the Incertainty of the Time (whereunto Care must be had) do not make it void. And therefore if A. bargains and sells his Land to B. on Condition to re-enter if he pays him 100 l. and B. covenants with A. that he will not take the Profits until Default of Payment, or that A. shall take the Profits until Default of Payment: Notwithstanding this may be a good Covenant, yet it was no good Lease. And if the Mortgagee covenants with the Mortgagor, that he will not take the Profits of the Land until the Day of Payment of the Money; in this Case altho' the Time be certain, yet this is no good Lease.

Lease, but a Covenant only. And if one gives a Bond for the quiet Holding of one Close for three Years; it seems this is no Lease in Law. Agreed by all the Judges, *Mic. 20 Jac. 3 per Justice Bridgman, 8 Car. B. R.*

See the Opinion of the Parliament for Bonds and Covenants both, Stat. 14 Eliz. c. 11.

(1) *Of two Leases at one Time of the same Thing.*

IF a Lease be made for Life or Years to *A.* and after the Lessor makes a Lease for Years to *B.* regularly this concurrent Lease to *B.* is a good Lease at least for so many Years of the second Lease, as shall be to come after the first Lease is determined according to the Agreement; as if the first Lease to *A.* be for twenty Years, and the second Lease to *B.* be for thirty Years, and both begin at one Time; in this Case the second Lease is good for the last ten Years. And yet the Reversion at the Common Law would not pass without the Attornment of the Tenant; and therefore if any Rent was reserved on the first Lease, the second Lessee shall not have it until the first Lessee attorned, (*but now such Attornment is useless*). But if the second Lease be for the same or for a lesser Time; as if the first Lease be for twenty Years, and the second Lease be for twenty or ten Years, to begin at the same Time; these second Leases are for the most part void. *Plow. 433, 421, 273, 521. 1 Co. 155. 4 Co. 58. Bro. Leases 72, 10.*

And yet herein a Difference is taken between Leases made by Matter of Record and by Writing, and Leases that are made by Word of Mouth; for if the second Lease be made by Fine, Deed indented, or Poll, altho' it be but for the same or for a lesser Time, and altho' it be a Lease of the Land itself, and not of the Reversion, yet it will pass the Rent reserved upon the first Lease, if the first Lessee attorns, and so also it will do without Attornment where Attornment is not needful. (*As to where Attornment is needful or not, see the End of the last Section*). But if the second Lease be made by Word of Mouth, it is otherwise, for a Reversion and a Rent in this Case will not pass without Deed, and therefore a Grant by Word does not pass them. And if the second Lease be by Fine or Deed indented, then also it will work by way of Estoppel, both against the Lessor and against the Lessee; so that if the first Lease happens by any Means, as by Surrender, or otherwise, to determine before it be run out, then the second Lessee shall have it; and if there be any Rent reserved upon the second Lease, the Lessee must pay it from the Time of making the Lease. *Dyer 58, 356. Plow. 421, 422. 1 Co. 155.*

And therefore if one makes a Lease of Land to *A.* for ten Years, and after makes a Lease to *B.* of the same Land from *Michaelmas* next for ten Years, and before *Michaelmas* the first Lessee purchases the Fee-simple, so that now by this Means his Term is drowned; in this Case the second Lease shall begin at *Michaelmas*. *Dyer 112. Plow. 432.*

So if one makes a Lease to *A.* for twenty Years, and *A.* makes a Lease of the Land to *B.* for two Years, rendring Rent, and after *A.* makes a Lease for the Rest of his Time to *C.* by Deed; this Lease, if the Lessee for two Years attorns, is a good Lease of the Rent and Reversion; and so it is also without Attornment, if there be any Consideration given for it, for then it is also a good Lease for all the Rest of the Term after the two Years. *4 Co. 53.* But as to *where Attornment is necessary or not, see the End of the last Section.*

So if one makes a Lease to *A.* for twenty Years, if he lives so long, rendring Rent, and after he makes a Lease to *B.* by Indenture for eighty Years, to begin presently, or grants the Reversion to begin at a Day past, or the like; in all these Cases, if the first Lessee attorned, the Rent would pass, but if not, it would be a good Lease for the Land for so many of the Years as shall be to come after the first Lease ended. But if the second Lease be by Parol without a Deed, the Reversion as a Reversion will not pass, and the Grant will be void if there be nothing else to help it. And in Cases where the second Lease is void, altho' the first Lessee surrenders his Estate, or his Estate ends by a Condition, yet the second Lease is not hereby made good. But if the second Lease for Years after another Lease for Life or Years be made for Money, so as it may be said to pass by way of Bargain and Sale; this may help the Matter; for in this Case, altho' it be by Word only, it may pass the Reversion and the Rent also. But in most Cases it is good for the Remainder of the Term after the first Lease ended. And if the second Lease be to begin after the End of the

former Lease; in this Case the former Lease is no Impediment at all to the Validity of the latter Lease, but the latter Lease is good notwithstanding. 1 Co. 155. Plow. 432, 434. Hil. 6 Jac. Finch v. Vangban. Dyer 112. 2 Co. 35, 36.

(K) Of the Commencement, Continuance and End of the Term or Estate.

A Lease for Years may begin at a Day to come, as at *Michaelmas* next, or three or ten Years after, or after the Death of the Lessor, or of *J. S.* and it is as good as where it begins presently. But a Lease for Life of any Thing whatsoever, whether it be in Livery or in Grant, if it be *in esse* before, cannot begin at a Day to come. And therefore if a Lease be made *Habendum* from *Michaelmas* next, or from the Day of the Making it, or after the Death of the Lessor, or after the Death of *J. S.* to the Lessee for Life; this Lease is not good: But in Case of a Lease of Land made thus, it is sometimes by the Livery of Seisin. 5 Co. 1. Co. Lit. 48. Plow. 256, 257.

But all Leases for Years, whether they begin *in presenti* or *in futuro*, must be certain, that is, they must have a certain Beginning and a certain Ending, and so the Continuance of the Term must be certain, otherwise they are not good. And yet if the Years be certain when the Lease is to take Effect in Interest or Possession, it is sufficient, for until that Time it may depend upon an Incertainty, *viz.* upon a possible Contingent precedent before it begins in Possession or Interest, or upon a Limitation or Condition subsequent: But when it is to be reduced to a Certainty upon a Contingent precedent, the Contingent must happen in the Lives of the Parties. And altho' there appears no Certainty of Years in the Lease, yet if by Reference to a Certainty it may be made certain, it is sufficient. *Id certum est quod certum reddi potest.* As if *A.* seised of Lands in Fee grants to *B.* that when *B.* shall pay to *A.* twenty Shillings, that from thenceforth he shall hold the Land for twenty-one Years, and after *B.* pays the twenty Shillings; in this Case *B.* shall have a good Lease for twenty-one Years from thenceforth. And if *A.* grants to *B.* that if his Tenant for Life shall die, that *B.* shall have the Land for ten Years; this is a good Lease. And if one makes a Lease for Years after the Death of *C.* if *C.* dies within ten Years; this is a good Lease if *C.* dies within the ten Years; otherwise not. But if *A.* be seised of Land in Fee, and lease it to *B.* for ten Years, and it is agreed between them that *B.* shall pay to *A.* a hundred Pounds at the End of the said ten Years, and that if he does so, and shall pay the said hundred Pounds, and a hundred Pounds at the End of every ten Years, that then the said *B.* shall have a perpetual Demise and Grant of the Premises from ten Years to ten Years continually following, *extra memoriam hominum, &c.* altho' this is a good Lease for the first ten Years, yet it is void for all the Rest for Incertainty. 1 Co. 155. 6 Co. 35. Co. Lit. 45. Plow. 83, 270.

And if a Lease be made to begin from the Nativity of Christ, and he does not say which Nativity, as next, &c. it is void for Incertainty. Hil. 16 Jac. *in Scacc.*

And yet if a Lease for Years be made of Land in Lease for Life, To have and to hold from the Death of the Tenant for Life; this is a good Lease. So if it be, To have and to hold from *Michaelmas* next after the Death of the Tenant for Life, or from *Michaelmas* next after the Determination of the Estate of the Tenant for Life; these are good Leases. Plow. 192, 523.

So if there be a former Lease in Being for Life or Years, and another Lease for Years is made of the Land, To have and to hold from the End of the former Estate by Surrender, Forfeiture, or otherwise, for twenty Years; or to have and to hold from the Surrender, Forfeiture, or other Determination of the former Lease, if there be any, and if there be none, for twenty Years; these and such like Leases are good, and this Commencement is certain enough. 6 Co. 36.

And if one makes a Lease to begin after the Death of *J. S.* and to continue until *Michaelmas*, which shall be *Anno Domini* 1650. this is a good Lease. Plow. 525. Et 17 Jac. B.R. agreed.

If a Man has a Lease of Land for an hundred Years, and he makes a Lease of this Land to another, To have and to hold to him for forty Years, to begin after his Death; this is a good Lease for the whole forty Years, if there shall be so many of the hundred Years to come at the Time of the Death of the Lessor. But if the Lessor grants the Land to another, To have and to hold to him for and during all the Residue of the Term of an hundred Years that shall be to come at the Time of

the Death of the Grantor; this is void for Incertainty. And yet if in this Case he grants withal, *all his Estate, or all his Term, or all his Interest in the Premises of the Deed*, and then says, *To have and to hold the Land, &c. to the Grantee for all the Residue of the Term of an hundred Years that shall be to come at the Time of his Death*; by this the whole Estate and Interest of the Grantor into the Land passes presently by these Words in the Premises of the Deed. And if in this Case the Lessee for an hundred Years makes a Lease of the Land, *To have and to hold after his Death for a hundred Years*; this will be a good Lease for as many of the first hundred Years as shall be to come at the Time of his Death. *Lit. §. 437. Bro. Grant 154. 1 Co. 155. Plow. 520, 521.*

If a Man makes a Lease for twenty-one Years, if *J. S.* lives so long, or if the Coverture between *J. S.* and *D. S.* shall so long continue, or if *J. S.* shall continue to be Parson of *Dale* so long; these and such like Leases are good. But if *A.* makes a Lease to *B.* for so many Years as *A.* and *B.* or either of them, shall live, not naming any certain Number of Years; this cannot be a good Lease for Years. So if the Parson of *Dale* makes a Lease of his Glebe for so many Years as he shall be Parson there; this is not certain, neither can it be made so by any Means. And yet if a Parson shall make a Lease from three Years to three Years, so long as he shall be Parson; this is a good Lease for six Years, if he continues Parson so long, and for the Residue void for Incertainty. So if I make another a Lease of Land until he be promoted to a Benefice; this is no good Lease for Years, but void for Incertainty. *Co. Lit. 45. Plow. 27.*

If I have a Rent-charge of twenty Pounds *per Annum*, and let it to another until he has levied a hundred Pounds; this is a good Lease for five Years. But if I have a Piece of Land of the Value of twenty Pounds *per Annum*, and I make a Lease of it to another until he shall levy out of the Profits thereof a hundred Pounds; this is no good Lease for Years, but void for Incertainty. *6 Co. 35. 14 H. 8. 10. Plow. 274.*

If *A.* makes a Lease to *B.* for ninety-nine Years, to begin after the Death of *A.* on Condition to be avoided upon the doing of divers Acts by others; and after makes another Lease of the Land, *Habendum* after the Determination or Redemption of the former Lease; this is a good Lease, and certain enough. *Per Justice Bridgman.*

But if a Lease be made to *A.* for eighty Years, if he lives so long, and if he dies within the said Term, or aliens the Premises, that then his Estate shall cease; and then he does further by the same Deed grant and let the Premises for so many Years as shall then remain unexpired after the Death of *A.* or Alienation to *B.* for the Residue of the said Term of eighty Years, if he shall live so long; in this Case the Lease to *B.* is void; for after the Death of *A.* the Term is at an End; but if he says for the Residue of the eighty Years, it is otherwise. *4 Co. 153. Dyer 253.*

If *A.* makes a Lease of Land to *B.* for so many Years as *B.* has in the Manor of *Dale*, and *B.* has then a Lease for ten Years of the Manor of *Dale*; this is a good Lease for ten Years. But if *A.* makes a Lease of Land until *B.* upon an Execution shall be satisfied the Duty for which the Execution is sued; this Lease is void for Incertainty. And if a Lease be made during the Minority of *J. S.* or until *J. S.* shall come to the Age of twenty-one Years; these are good Leases; and if *J. S.* dies before he comes to his full Age, the Lease is ended. But if a Lease be made to another until a Child that now is in its Mother's Belly shall come to the Age of twenty-one Years; this Lease is not good. And if a Lease be made for so many Years as *J. S.* shall name; in this Case if *J. S.* names a certain Number of Years in the Life-time of the Party Lessor, this is a good Lease. But if a Lease be made for so many Years as the Executor of the Lessor or Lessee shall name; this Lease is void. *Plow. 273, 522, 523. F. N. B. 6. N. 14 H. 8. 11. 6 Co. 35.*

But here observe, That in all these Cases of incertain Leases made with such Limitations as aforesaid, as until such a Thing be done, or so long as such a Thing continues, &c. that if Livery of Seisin be made upon them, they may be good Leases for Life, determinable on these Contingents altho' they be no good Leases for Years. *Plow. 27. 6 Co. 35.*

And in some special Cases a Lease may be good notwithstanding some Incertainty in the Continuance of it, for a Lease may cease for a Time, and revive again; as if Tenant in Tail makes a Lease for Years, reserving twenty Shillings, and after takes a Wife and dies without Issue; in this Case as to him in Reversion the Lease is meerly void; but if he endows the Wife of the Tenant in Tail of the Land, as to the Wife, it is revived again. So if Tenant in Tail makes a Lease for Years rendring Rent, and

and dies without Issue, his Wife enseint with a Son, and he in Reversion enters; in this Case as against him the Lease is void; but after the Son is born, the Lease is good again if it be within the Statute. So if Tenant in Fee-simple takes a Wife, and then makes a Lease for Years, and dies; the Wife is indowed; in this Case she shall avoid the Lease, but after her Decease the Lease shall be in Force again. *Co. Lit.* 46. 10 *E.* 3. 26.

Antiently there were no Leases for Years but what were for short Terms, which were little regarded; this was the Reason why if a real Action was brought against the Person who had the Freehold, and a Recovery was thereupon had, tho' by Covin, yet the Lessee for Years, whose Estate was precedent to the Freehold, was bound by this Recovery, and could not falsify till the Statute 21 *H.* 8. c. 15. and therefore the Leases for Years usually made being but short, a Lease was presumed to have a longer Continuance than any Term; and therefore a Devise of such a Term after a Life was void. 1 *Will.* 574, 575.

A. possessed of a long Term for Years, made a Lease to *B.* for five Years, and covenanted for himself and his Executors to renew the Lease at the same Rent, and on the same Covenants, upon the Request of *B.* within the Term; *B.* died within the Term, having laid out a considerable Sum in Improvements, and the Executors within the Term requested *A.* the Lessor to make a new Lease for fifty Years, at the old Rent. Lord Chancellor decreed Lessor to renew, but not for so long as was requested, but for twenty-one Years, that being the usual Term for leasing. 2 *Will.* 196.

(L) Of Forfeiture by Lessees.

WHERE a Man makes a Lease for Life or Years, upon a Condition of Re-entry for a Forfeiture, or that the Lease shall be void if the Lessee assigns or aliens it without Licence; and afterwards the Lessee assigns it without Licence; this is a Forfeiture; and such a Forfeiture against which this Court cannot relieve, because it is unknown what shall be the Measure of the Damages; for the Court never relieves but in such Cases where it can give some Compensation in Damages, and where there is some Rule to be the Measure of such Damages, to avoid being arbitrary. *Mod. Ca. in Law and Eq.* 113.

(M) *Where a Lease for Life or Years shall be void ipso facto by the Death of the Lessor, or by other Means, or not, but voidable by Entry, &c. and how.*

LEASES for Lives or Years are of three Natures, some are good in Law, some avoidable by Entry, and some void without Entry.

Of such as are good in Law, some are good at the Common Law; as Leases made by Tenant in Fee-simple, notwithstanding they be for longer Time than three Lives or twenty-one Years; some by Act of Parliament, as Leases made by Tenant in Tail, Leases made by a Bishop seised in Fee in the Right of his Church alone without the Chapter, Leases made by a Man seised in Fee-simple or Fee-tail of Land in the Right of his Wife, together with his Wife, for twenty-one Years or three Lives, according to the Statutes.

And of such Leases as are void also, some are void at the Common Law, and that sometimes in presenti, as in the Cases before of Leases for Years that have no Certainty in them, or Leases for Lives made without Livery of Seisin, and the like. And some are void in futuro; as if a Tenant in Tail makes a Lease for Years, warranted or not warranted by the Statute, and after dies without Issue; this Lease is void as to him in Reversion or Remainder: *Cessante statu primitivo cessat derivativus*. So if a Prebend, Parson or Vicar, makes a Lease for Years not warranted by the Statutes; this is void by the Death of the Lessor, and the Successor needs not make any Entry or Claim to avoid it. So if a Tenant for Life makes a Lease for Years, and after dies; in this Case the Lease for Years is void; and therefore in all these and such like Cases no Acceptance of Rent after will affirm such Leases. But otherwise it is in Cases of Leases for Years made by Bishops, altho' they be confirmed by Dean and Chapter; and of Leases made by Deans and Chapters, or Tenant in Tail, as to their Successors and Issues, when the Leases are not warranted by the Statutes: And otherwise it is also in the Cases of Leases for Life made by these or any of the former

former Lessors, for in all Cases of Leases for Life it must be avoided by Entry, &c. and therefore such Leases are not void but voidable, viz. the Leases of Bishops and Deans after their Death by their Successors, by the Statute Law; and the Leases of Tenants in Tail by their Issues after their Death by the Common Law. And in these and such like Cases the Acceptance of the Rent by the Issue or Successor will make good the Lease at least for their Time. *Co. Lit.* 45. 3 *Co.* 59, 65. 7 *Co.* 8.

If a Lease be made for Years, on Condition that upon such a Contingent it shall be void; in this Case so soon as the Thing happens the Lease is void *ipso facto* without any Re-entry, &c. But if a Lease for Life be made on such a Condition; in this Case the Lessor must enter, &c. before the Lease will be void. 3 *Co.* 65.

(N) *What shall be said a good Lease at Will, or not.*

If one makes a Lease to another during the Will and Pleasure of him that lets, or him that takes, or both, (for so in Effect is every Lease at Will); this is a good Lease at Will. So if one makes a Feoffment in Fee, or Lease for Life, &c. and does not make Livery of Seisin, and so perfect the Estate, the Feoffee or Lessee has only an Estate at Will.

But if a Bargain and Sale be made of Land, and the same is void, or a Corporation grants Land, and the Grant is void; by this there is no Lease at Will made. 14 *H.* 8. 12. *Co. Lit.* 55, 56, 270.

(O) *Of Repairs, &c. by Lessees.*

A Lease was made for a long Term of Years, and in the Lease there was a Covenant that the Lessee should repair; the Lessee makes an Under-Lease to J. S. who is in Possession; the Under-Lessee is not bound by this Covenant in Equity, there being no Assignment of the Term; but the proper Remedy is against the first Lessee and his Executors, &c. If a Man makes a Lease, rendring Rent, and the Lessee assigns to an insolvent Person, the Lessee in Equity shall be liable to pay the Rent. 1 *Vern.* 87, 88.

If a Lessee for a long Term of Years covenants to lay out 200 *l.* upon the Premises within the first ten Years, and lays out but 30 *l.* and after thirty Years of the Lease are expired, the Lessor brings an Action of Covenant, and recovers 150 *l.* Damages; Equity will neither relieve against the Damage, nor decree the Money to be now laid out in Improvements; for per Lord Chancellor, tho' the Damage seems excessive, yet the Jury were proper Judges; and to decree it to be laid out now the Lease is almost expired, is not proper; for it is probable the Lessee would not be so careful in laying it out in lasting Improvements, as he would be were it laid out at first. 1 *Vern.* 316, 317.

The Plaintiff let a Farm to the Defendant by Lease at an annual Rent, and the Defendant covenanted, amongst other Things, not to plough any of the Pasture Land; and if he did plough up any Part of it, that he would pay after the Rate of twenty Shillings per Acre per Annum: But the Defendant ploughing up some of the Pasture, an Injunction was moved for. The Court would not grant any Injunction; and declared, if the Defendant was Plaintiff to be relieved against paying twenty Shillings an Acre for Ploughing, they would not relieve him. 2 *Vern.* 119.

Long building Leases of Infants Estates, where for their Benefit, have been often decreed by the Court of Chancery. *Ibid.* 225.

(P) *Of Waste committed by Lessees.*

A Lessee for Years without Impeachment of Waste, Remainder to the Bishop of London, upon a Bill brought by the Bishop, was enjoined from digging the Ground for Brick. 1 *Will.* 527.

Lessee for Years, without Waste, cannot pull down an House, or the Trees that are a Defence or Ornament to the House, but may open Mines. 1 *Will.* 528.

S E C T. XII.

Of Releases.

(A) *A Release what, and Releasor and Releasee who.*

A Release (*Relaxatio*) is the giving or discharging of the Right or Action which a Man has or may have or claim against another Man, or that which is his.

Or it is the Conveyance of a Man's Interest or Right which he has unto a Thing to another that has the Possession thereof, or some Estate therein. *Terms de la Ley v. Release. Noy's Max. 74. West's Symb. Part 2. §. 466.*

He who makes the Release is sometimes called the *Releasor*, and he to whom it is made the *Releasee*.

(B) *Kinds of Releases.*

TH E R E are two Kinds of Releases, *viz.* expressed and implied.

A Release expressed or in *Deed*, is a purposed Release, when the Act done, or Deed made, is intended a Release; and this is always made by Writing; and then it is defined by some to be an Instrument whereby Estates, Rights, Titles, Actions and other Things are sometimes extinguished, sometimes transferred, sometimes abridged, and sometimes enlarged, which is after this Manner: *I know, &c. that I A. of B. have remised, released, and wholly of me [or for me] and my Heirs, quit-claim'd to C. of D. all the Right, Title and Claim which I have had, I have, or in what Manner soever I may for the future have of and in one Messuage with the Appurtenances in F. &c.*

A Release implied or in *Law*, is when the Law by Intendment and Construction, and by way of Consequence makes a Release of an Act done to another Purpose. And this is sometimes by Writing, sometimes without Writing.

These Releases also are sometimes of a bare and naked Right, and sometimes of a Right accompanied with some Estate or Interest, and sometimes they are of Actions Real, or in Lands or Tenements, and sometimes of Actions Personal, of or in Goods or Chattels, and sometimes of Actions mix'd, partly in the Realty, and partly in the Personalty. *Co. Lit. 264, 265.*

And a Release may either be made by *Deed Poll* or *Indenture*; and it needs no other Execution than Sealing and Delivery, and will operate without any Consideration.

Acquittance
what.

An Acquittance is a Sort of a Release, and is a Discharge in Writing or by Bill of a Sum of Money, or other Duty, which ought to be paid or done; as,

If one be bound to pay Money on an Obligation, or Rent reserved upon a Lease, or the like, and the Party to whom the Money or Duty should be paid or done upon the Receipt thereof, or upon some other Agreement between them, makes a Writing under his Hand witnessing that he is paid, or otherwise contented, and therefore doth acquit and discharge him of the same; this is such a Discharge and Bar in the Law that he cannot demand and recover the same again; contrary thereto, if the Acquittance be shewed. *Terms de la Ley, verb. Acquittance. Dyer 5.*

An Acquittance is only an Evidence or Proof of Payment, but not pleadable, because no Deed.

Where a Man
is not bound
to pay Money
without an
Acquittance.

The Obligor is not bound to pay Money upon a single Bond unless the Obligee makes to him an Acquittance or Release: Nor is he bound to pay it before he has the Acquittance. And in this Case the Obligor may compel the Obligee to make him an Acquittance. And so also it is in Case of a Statute Merchant, one is not bound to pay the Money thereupon before he has the Acquittance or Release of the Plaintiff. But otherwise it is in Case of an Obligation with a Condition, for there a Man may aver Payment. *22 Ed. 4. 6. 41 Ed. 3. 25. 1 H. 7. 15. 22 Ed. 4. 6. Bro. Debt 43. Oblig. 10.*

But now by the *Stat. 3 & 4 Ann. c. 16.* If an Action of Debt be brought upon a single Bill, if the Defendant has paid the Money due upon such a Bill, such Payment may be pleaded in Bar of the Action upon such Bill.

(C) *What*

(C) *What shall be said a Release in Law or not, and how.*

IF there be Lord and Tenant, and the Lord purchases the Tenancy; by this Means the Services are released and extinct in Law.

And if the Lord disseises his Tenant, and makes a Feoffment in Fee by Deed or without Deed; this is a Release in Law of the Seignior. *Co. Lit. 264.*

If a Disseisee disseises the Heir of the Disseisor, and makes a Feoffment with or without a Deed; this is a Release in Fee in Law of the Right. And if he makes a Lease for Life, this is a Release in Law of the Right, so long as the Lease doth last. *Ibid.*

If a Creditor, as an Obligee, or the like, makes a Debtor, as the Obligor, &c. his Executor; by this Means the Action is released by Act of Law, and yet the Duty remains still, for the Executor may retain so much of the Goods of the Testator. And if the Creditor be a Woman, and she marries with the Debtor; by this the Debt is released in Law. And if there be two Obligees or Debtors, and one of them being a Woman, is married to the Obligor; this is a Release in Law of the Debt, altho' the Creditor be an Infant. *Co. Lit. 264. 8 Ed. 4. 3. 21 Ed. 4. 2.*

But if there be a Woman Executrix to the Debtor, and she takes the Debtor to Husband; this is no Release in Law. *Mich. 30 & 31 Eliz. B. R. adjudged.*

And if an Obligor be made Administrator of the Goods and Chattels of the Obligee; this is no Release in Law. *8 Co. 136.*

(D) *The Nature and Operation of a Release in general.*

A Release is much of the Nature of a Confirmation, for in most Things they agree and produce the like Effects.

It is therefore said sometimes to enure by way of *Mitter le Estate*, i. e. by way of giving or transferring, or Inlargement of an Estate or Interest, and so gives some new Interest or Estate to him to whom it is made.

And sometimes it is said to enure by way of *Mitter le Droit* only, by way of giving, transferring and discharging of a Right, Title or Entry unto him to whom it is made.

And so it sometimes perfects an Estate that was imperfect and defeasible before, and enures by way of Entry and Feoffment.

And sometimes it enures to make a conditional Estate absolute.

And sometimes also it works and enures by way of *Extinguishment* or Discharge.

And then also sometimes it enures by way of *Discharge* or Extinguishment, as against all Persons, and so as that whereof all Persons may take Advantage.

And sometimes it enures only as a *Discharge* against some Persons only, and as to or against other Persons by way of *Mitter le Droit*.

And some of these in Deed enure by way of *Extinguishment*, because he to whom the Release is made cannot have the Thing released.

And some of them have some Quality of such Releases, and are said to enure by way of Extinguishment, but in Truth do not, for that he to whom the Release is made may receive and take the Thing released.

And in some Cases also a Release like a Confirmation enures by way of Abridgment.

But a Man cannot bar himself hereby of a Right that shall come to him hereafter. And therefore it is held that these Words used in Releases [*Quæ quovismodo in futuro habere poterò*] are to no Purpose. *Co. Lit. 193, 273, 277. 1 Co. 147. Lit. §. 606, 459, 465, 466.*

Tho' a Will cannot enure as a Release, even supposing it to be sealed and delivered, for want of its taking Effect in the Testator's Life-time, yet provided it were expressed to be the Intention of the Party that the Debt should be discharged, the Will would operate accordingly. *1 Will. 85. Vide 2 Will. 332.* where A. devised to B. the Debt which B. owed him, and it was said, this could not operate in Strictness as a Release.

Where a Will shall not operate as a Release.

(E) *How*

(E) *How and after what Manner Things may be released.*

IF the Charge or Duty grows by Record, the Discharge and Release thereof must be by Record also.

And if it grows by Writing, the Discharge and Release must be by Writing also. *Nil est magis rationi consentaneum quam eodem modo quodque dissolvere quo conflatum est.*

And therefore a Duty growing by a verbal Agreement may in some Cases be released by Words without Writing.

But regularly Lands and Tenements cannot be given, nor Rights and Titles to Lands, and Actions be discharged by Release without a Deed in Writing. A Release that enures by way of *Mitter le Estate*, *Mitter le Droit*, or Extinguishment, may be made upon Condition, or with a *Defeasance*, so as the Condition or Defeasance be contained in the Release, or delivered at the same Time with it: For no Defeasance made after can avoid the Force of a Release made before. And yet a Release may be delivered as an Escrow, and so the Force of it may be suspended for a Time. But a Release of a Condition may not be made upon a Condition. Nor may a Release of a Chattel be upon a Condition subsequent, but it may be upon a Condition precedent. *Co. Lit. 274. Perk. §. 718. Lit. 467. 1 Co. 111. 21 H. 7. 24.*

And therefore if a Man releases a Debt to another upon Condition that the Releasee may have such a Debt owing from a third Person to the Releasee; this is a good Condition. *H. 9 Car. B. R. Barkley and Perk's Case.*

A Release of all Actions may be made until a Time past, as until the first of May last, or until the Day of the Date of the Release: And this will discharge all Actions till then, and none after. But a Release cannot be made of a Right or Action for a Part of an Estate, or for a Time only, or for one Year, or until Michaelmas next, or the like; for a Release of such a Thing for one Day, or for one Hour, is a Release of it for ever. And yet a Man may release his Right in a Part of the Land. And therefore if a Man be disseised of two Acres, he may release his Right in one of them, and enter into the other Acre. *Dyer 307. 21 H. 7. 24. Co. Lit. 274. Lit. §. 467.*

Also a Release in the Nature of an Acquittance may be of Part of a Debt. And therefore if one be bound in an Obligation of 400 l. to pay 200 l. at Michaelmas, and at Christmas, after the Obligee by his Deed releases 390 l. Parcel of the said 400 l. this is a good Release for so much and no more. *Adjudged Hil. 9 Car. B. R. Barkley and Perk's Case.*

(F) *What Things may be released or not.*

LANDS, Tenements and Hereditaments themselves may be given and transferred by way of Release, and all Rights and Titles to Lands may be given, barred and discharged by Release, and so also may Rights and Titles to Goods and Chattels.

Also all Actions real, personal and mix'd, may be given, discharged or extinct by Release; for howsoever Rights and Titles of Entry cannot be granted by Act of the Party, nor any Action may be granted from one Man to another by the Act of the Law or the Party, yet all these may be released to the Terre-tenant.

And a Right to a Freehold or Inheritance, Seigniorship or Rent in *presenti* or *future*, may be released five Manner of Ways, and the first three Ways without any Privy at all.

First, To the Tenant of the Freehold in Deed or in Law.

Secondly, To him in the Remainder.

Thirdly, To him in Reversion.

The other two Ways in respect of Privy without any Estate or Right, as by Demandant to Vouchee, Donor to Donee, after the Donee has discontinued. *10 Co. 48. Co. Lit. 268, 269, 266.*

Also Conditions annexed to Estates, Powers of Revocation of Uses, Warranties, Covenants, Tenures, Services, Rents, Commons, and other Profits to be taken out of Lands, may be discharged, extinguished and determined by Release to the Tenant of the Land, &c. *Bro. Release in toto.*

Also Possibilities of Land, &c. if they be near and common Possibilities, altho' they be not grantable over to another Person, yet they may be released to him that has the

the present Estate of the Land. And therefore if a Man possessed of a Term devises it to *A.* for Life, the Remainder to *B.* and his Heirs Male during the Term; in this Case altho' *B.* may not grant his Interest over, yet he may release it to *A.* And if *A.* devises to *B.* 20 *l.* when he comes to the Age of twenty-four Years, and dies, *B.* after he is of the Age of twenty-one Years may release this Legacy. 10 Co. 47, 51, 52. 5 Co. 70, 71. Co. Lit. 265. Lit. §. 446. 1 Co. 111, 113, 174. Dyer 57.

So a Covenant to do a future Act may be released before it be broken. And it seems also the Conusee of a Statute or Recognisance may release to a Feoffee of Part of the Land, and so bar himself of the Execution of that Land. And if I grant to *J. S.* that if he does such a Thing he shall have an Annuity of 20 *l.* during Life; *J. S.* may release this before the Condition be performed.

And if I make a Feoffment to *J. S.* to divers Uses with Power to revoke it, I may release this Power to one that has an Estate of Freehold in Possession, Reversion or Remainder in the Land. And yet if I make a Feoffment to *J. S.* with Proviso, that if *B.* revokes, that the Uses shall cease; in this Case *B.* cannot release this Power. And a remote Possibility that is altogether incertain cannot be released. And therefore if the Son of the Disseisee releases to the Disseisor in the Life-time of his Father, this Release is void. And so if the Conusee of a Statute releases his Right to the Land of the Conusor before Execution; this Release is void. And so if a Plaintiff releases to a Bail in the King's Bench before Judgment given, this Release is void. So if one promises to pay me 10 *l.* upon the Surrender of my Land to him, and that if he sells it for above 50 *l.* that then he shall pay me 10 *l.* more, and I release this to him before he does sell it, and before I do surrender; in this Case this does not release the second Promise, because it is not releasable. Adjudged Tr. 14 Jac. B. R.

Also Debts, Legacies, and other Duties may be released and discharged thereby, before or after they become due. And therefore a Rent or Annuity may be released before the Day of Payment, and so also may a Debt due by Obligation: Judgments, Executions, Recognisances, and the like, by apt Words may be discharged by Release.

(G) *Things requisite in Releases of Lands and Tenements in general.*

IN every good Release in Deed, howsoever it enures, these Things are requisite: First, That there be a good Releasor and a good Releasee, and a Thing to be released.

Secondly, That the Deed be well sealed, delivered, &c.

(H) *Things requisite in Releases that enure by way of enlarging Estates.*

First, *In Respect of the Estate of the Releasor.*

IF a Release tends and enures by way of *Enlargement* of an Estate, then these Things are further required to make the Release good.

First, He that makes the Release must have such an Estate in himself, as out of which such an Estate may be derived and granted to the Releasee as is intended by the Release: As if he has the Reversion in Fee of Lands, he may release to a Tenant for Years, and thereby increase his Estate to an Estate for Life or in Tail, or he may pass his whole Fee-simple by the Release. Dyer 251.

But if there be a Lessee for Years rendring Rent, and the Reversion is granted for Life, the Remainder over in Fee, and the Grantee of the Reversion releases all his Right to him in Remainder, and then he in the Remainder grants the Reversion, and the Tenant for Life releases to the Grantee also; in this Case both these Releases are void, and cannot enure as Releases, however it may be if they have Words of Surrender in them, they may enure as Surrenders. Per Justice Jones, 5 Car. Dyer idem.

So if there be Lessee for Years, the Remainder in Tail, the Remainder in Fee, and the Lessee for Years being a Woman, marries with him in the Remainder in Fee, and he in Remainder in Tail releases to him in Remainder in Fee; this is a void Release. So if Tenant for Life releases to him in Remainder in Fee or in Tail; this is void, and cannot enure as a Release. So if there be Tenant for Life, the Remainder

in Tail, the Remainder in Fee, and he in Remainder in Fee releases to the Tenant for Life; this will not increase his Estate. And if the Tenant in Tail in this Case releases to the Tenant for Life, his Estate shall be no longer increased hereby than for the Life of the Tenant in Tail. *Butler's Case, Trin. 5 Jac. B. R. Lit. §. 598. Plow. 556. Co. Lit. 345.*

Secondly, *In Respect of the Estate of him to whom the Release is made.*

He to whom the Release is made must have some Estate in Possession in Deed or in Law, or in Reversion in Deed, in his own or another's Right of the Lands whereof the Release is made to be as a Foundation for the Release to stand upon; for a Release which must enure to enlarge an Estate, cannot work without a Possession joined with an Estate. And therefore the Releasee must be Lessee for Life, Years or Tenant by Statute Merchant, Staple, or *Elegit*, that holds the Land over for the Value, or at least he must be Tenant at Will. And therefore if a Man lets his Land to another for Term of Years, to begin presently, and after the Lessor or his Heir releases to the Lessee (after his Entry, and being in Possession) all his Right in the Land; this is good to enlarge the Estate according to the Time set down in the Release: But if the Release be before the Term begins, or after the Term begins, and before the Lessee has entred, (howsoever if any Rent be reserved on the Lease, it may enure and be good to extinguish that Rent) yet it is not good to enlarge the Estate. And yet if a Tenant for twenty Years in Possession makes a Lease to B. for ten Years, and B. enters, and he in the Reversion releases to the first Lessee for Years; this is a good Release to enlarge the Estate. So if a Man makes a Lease for Years, the Remainder for Life or Years, and the first Lessee enters; in this Case a Release to him in Remainder is good to enlarge the Estate. So if I grant the Reversion of my Tenant for Life to another for Life, and after release to him and his Heirs; this is a good Release to enlarge the Estate. *Co. Lit. 270, 273, 265. Lit. §. 459. Plow. 423. Dyer 4. 15 H. 7. 14.*

So if a Man makes a Lease for Life or Years to a Feme Sole, and she takes a Husband, and he in the Reversion releases to the Husband and his Heirs; this is a good Release to enlarge the Estate according to the Words of the Release. But if the Case be so, that a Man had an Estate in Possession of Land, and he be now out of the Possession of it, and has but a Right only to it; or if he has a Possession only and no Estate, or if he has neither Estate nor Possession; in these Cases a Release made to such a one will not avail to enlarge his Estate. *Co. Lit. 273.*

And therefore if a Man makes a Lease for Life, the Remainder for Life, and the first Lessee dies, and the Lessor releases to him in Remainder for Life before his Entry; this is a good Release to enlarge his Estate, for he has an Estate of Freehold in Law, capable of Enlargement by Release before Entry. *Co. Lit. 270.*

But if there be a Lessee for Life, the Remainder for Life, the Remainder in Tail, the Remainder in Fee, and the Lessee for Life is disseised, and during the Possession of the Disseisor he that has Right releases to one of them in the Remainder; this is void. *Lit. §. 451.*

So if Lands be given in Tail, or leased for Life, and the Donee or Lessee is disseised, and during the Possession of the Disseisor the Donor or Lessor releases all his Right to the Donee or Lessee; this is void, and will not enlarge his Estate; however if there be any Rent reserved on the Estate, it will extinguish the Rent. *Lit. 455, 456.*

So if the Tenant by the Curtesy grants over his Estate, and after he in Reversion releases to the Tenant by the Curtesy; in this Case his Release is void, and will not enlarge his Estate. So if an Infant makes a Lease for Life, and the Lessee grants the Estate over with Warranty, and the Infant at full Age brings a *Dum fuit infans etatem*, and the Tenant vouches the Grantor, who enters into the Warranty, and the Demandant being the Infant, releases to him and his Heirs; this will not enlarge his Estate, for in Truth he had no Estate before, and that which is not cannot be enlarged. *Co. Lit. 273.*

And if a Lessee for Life or Years releases to him in Remainder or Reversion, this cannot be good as a Release; however if there be apt Words, it may amount to a Surrender. *Dyer 251.*

And if a Man has only an Occupation of Land as Tenant at Sufferance, as when a Lessee for Years holds over his Term, or the like, no Release to him can work any

any Enlargement of Estate, for altho' he has a Possession, yet he has no Estate, and besides in this Case there is no Privity, which is the third Thing required in these Releases. *Co. Lit. 271. Lit. §. 461.*

Thirdly, *In Respect of Privity.*

As in all these Cases that enure by way of Increase or Passing an Estate, there must be some Estate in the Releasor and the Releasee, so there must be some Privity in Estate between them at the Time of the Release made, for an Estate without Privity is not sufficient. And therefore it must be between Donor and Donee, Lessor and Lessee, and the like, as in the Cases before, between him in the Reversion and the Lessee for Life or Years, Tenant by Statute Merchant or Staple, or by *Elegit*, that keeps the Land for the Value. *Co. Lit. 296. Lit. §. 461.*

And if Tenant for Life leases for Years, and he in the Reversion, and the Tenant for Life join together and release to the Lessee for Years; this is a good Release to enlarge the Estate. *Plow. 541.*

So if he in Reversion releases to the Husband who has an Estate in the Right of his Wife only for Life or Years; this is a good Release. *Co. Lit. 273.*

So if Lessee for Years makes a Lease of the Land but for Part of the Term, the Privity continues still, and therefore a Release to him is good to enlarge the Estate. But if he assigns over all the Term, then the Privity is gone, and therefore a Release made to him afterwards is void; and then a Release made to the Assignee of the Term is good to enlarge the Estate. *Dyer 4. 3 Co. 22.*

And if a Disseisor makes a Lease for Life or Years, and after he and the Disseisee join together to make a Release to the Lessee for Life or Years; this is a good Release to enlarge the Estate. But if the Disseisor in this Case makes a Lease for Life or Years, the Release is void for want of Privity. *Plow. 540. 14 H. 7. 4. Lit. §. 518.*

And if there be Lessee for Years, the Remainder for Life, and he in Reversion releases to the Lessee for Years, or him in Remainder for Life, and his Heirs, all his Right; this is a good Release to work an Enlargement of Estate. So if one makes a Lease for Life, and grants the Reversion for Life, and then the Lessor releases to the Grantee of the Reversion and his Heirs; this is a good Release to enlarge the Estate of the Grantee, and here is Privity enough. *Co. Lit. 273.*

If *A.* be Tenant for Life, the Remainder to *A.* in Fee, and *A.* dies, and his Heir releases all his Right to *B.* being in Possession; this is a good Release, and gives the Fee-simple. *Bro. Release 71.*

But if *A.* makes a Lease to *B.* for Life, and the Lessee makes a Lease for Years, and after *A.* in the Life-time of the Tenant for Life makes a Release to the Lessee for Years; this Release is void, and will not enlarge his Estate for want of Privity. So if a Man makes a Lease for twenty Years, and the Lessee makes a Lease for ten Years, and the first Lessor releases to the second Lessee and his Heirs; this Release is void. So also if the Donee in Tail makes a Lease for his own Life, and the Donor releases to the Lessee and his Heirs; this Release is void. So also if the Donee in Tail makes a Lease for his own Life, and after the Donor releases to the Donee and his Heirs; this is not a good Release. *Co. Lit. 273. Lit. §. 516.*

Also one Jointenant or Coparcener may release to another, and thereby transfer all his Estate, and give the whole Interest unto his Companion; and this is a good Release to pass all his or her Part of the Land. And if there be three Jointenants in Fee, and they make a Lease for Life, and after two of them release all their Right in the Land to the third; this is a good Release. So if one makes a Lease for Life to another, and after he grants the Reversion to seven, and the Tenant for Life attorns, and after four of the seven release all their Right to the other three, and after one of the three releases to the other two; these are good Releases. So if a Lease for Years be made to two, or to begin at a Day to come, a Release by one of them to the other is good to give all the Term and all the Land to the Releasee. But it seems one Tenant in Common cannot release to another Tenant in Common. *Bro. Release 77. Perk. §. 84. 10 H. 4. 3.*

Fourthly, *In Respect of Words whereby it is made.*

Sufficient Words in Law are required in such a Release, not only to make a Release (which is required in all Releases) but also to raise and create a new Estate. Therefore

Therefore observe, that all Releases (of what Kind soever) are commonly made by the Words *remised, released and quitted Claim*, as being the most antient and significant Words to this Purpose. And amongst these the Word *Release* is the most effectual Word, as that which includes the other two, and as that which is the proper and peculiar Word for this Kind of Conveyance. *Co. Lit. 273, 401.*

But there are other Words also by which a Release may be made, as *renounce, acquit, &c.* And therefore it is held, that if one has Common in another's Land, and he by Deed releases it to him thus, *I renounce my Common, &c.* this is a good Release. And if the Lessor does but grant to his Lessee for Life that he shall be discharged of the Rent, this is a good Release of the Rent. And it is a Rule, *That by what Words a Debt or Duty may be created, by Words of a contrary Signification it may be released.* And therefore if one acknowledges himself to be satisfied and discharged a Debt, this is a good Release of the Debt. *9 H. 6. 35. Dyer 116. Lit. §. 544. Co. Lit. 264. Dyer 307. 9 Co. 52.*

And for Words to raise the Estate, it is usual and most safe to specify in the Deed what Estate he to whom the Release is made shall have; and in most Cases this is needful: For it is generally true, that when a Release enures by way of Enlargement of Estate, no Inheritance in Fee-simple or Fee-tail can pass without apt Words of Inheritance. And therefore if I make a Lease of Land to another for his Life, and after I release to him all my Right without saying more in the Release; hereby his Estate is not enlarged. But if I release to him and his Heirs, by this he has a Fee-simple. And if I release to him and the Heirs of his Body, by this he has an Estate-tail. But where a Release works by way of *Mitter le Estate*, then in some Cases there needs not any Words of Inheritance; and in Cases where Releases are made between Jointenants and Coparceners, as where a joint Estate is made to the Husband and Wife, and a third Person and their Heirs, and the third Person releases all his Right to the Husband alone, or the Wife alone. So if there be three Jointenants, and one of them releases to one of the other two; in all these and such like Cases there needs not any Limitation of the Estate, for the Release is good without it. *Co. Lit. 273. Lit. §. 465, 468, 469.*

(H) *Things requisite in Releases of Lands and Tenements that only give, discharge or extinguish any Right or Title of Lands.*

First, *In Respect of the Estate of the Releasor.*

IN every good Release in Deed that tends and enures to give, discharge or extinguish any Right or Title of Lands, it is also further requisite,

First, That he who makes it has at the Time of making the Release some Right or Title to release. As where one disseises me of Land, and I release to him all my Right in the Land; this is a good Release. So if one disseises my Tenant for Life, and I (being the next in Remainder or Reversion in Fee) do release to him that did make the Disseisin; this is a good Release. So if the Husband makes a Lease for Life, and then takes a Wife and dies, and the Wife releases her Dower to him in Reversion; this is a good Release. And so also if after the Marriage a Man makes a Lease for Life, the Remainder in Fee, and she releases all her Right to him in Remainder in Fee, or to him in Reversion; this is a good Release, and will bar her for ever. *Lit. §. 466. Co. Lit. 265. 5 Co. 70, 71. 1 Co. 111. 8 Co. 151.*

And therefore if the Releasor has only a Possibility of a Right, or a Right happens to come to him after the Release; this is not sufficient to make the Release good.

And therefore if the Father be disseised, and the Son before his Father's Death releases all his Right to the Disseisor, and after the Father dieth, so that the Right doth descend; this is no good Release to bar the Releasor of his Right.

So if there be Grandfather, Father and Son, and the Father disseises the Grandfather, and makes a Feoffment, and the Son releases in the Life-time of his Father, and after the Father and Grandfather die; this Release in this Case will not bar him.

So if a Lease be made for Life, the Remainder to the right Heirs of J. S. and the Lessee is disseised, and the Eldest Son of J. S. living, his Father doth release to the Disseisor; this Release is void.

So if the Conufee of a Statute, &c. releases to the Conufor all his Right in the Land, this is void, and he may fue Execution after notwithstanding.

Or if the Releasor have only a Power; this is not fufficient to make a Release good.

And therefore if a Man by his Will devifes that his Executor fhall fell his Land, and dieth, and the Executors release all their Right and Title in the Land to their Heir; this is void.

Secondly, *In Refpect of the Estate of him to whom the Release is made.*

In all Cafes of a Release of a bare Right of a Freehold in Lands or Tenements, he to whom the Release is made muft at the Time of the Making thereof in any Cafe have the Freehold in Deed or in Law in Poffeffion, or fome Estate in Remainder or Reversion in Deed (and not in Right only) in Fee-fimple, Fee-tail, or for Life, of the Lands whereof the Release is made: For Rights of Entry, and Actions, and the like, are not to be transferred to Strangers, but are thus to be released, as fuch Releases are good.

As if the Diffeifor releases to the Diffeifor himfelf who hath the Freehold in Deed, or to the Heir of the Diffeifor before his Entry, who hath the Freehold in Law, or to the Lefsee for Life of the Diffeifor; thefe Releases are good.

So if a Diffeifor makes a Leafe to *A.* and his Heirs during the Life of *B.* and *A.* dies, and the Diffeifor releases to his Heir before his Entry; this is a good Release. *Co. Lit. 267.*

So if a Fine *Sur confufance de droit cum ceo*, &c. or *Sur confufance de droit* only (which is a Feoffment on Record) be levied; or if Tenant for Life, by Agreement of him in the Reversion, furrenders to him in the Reversion; or if a Man do bargain and fell his Land by Deed indented and inrolled; or Ufes are raifed by Covenant on good Confiderations; in all thefe Cafes the Conufee, he in Reversion, Bargainee, and *Ceftuy que Ufe*, have a Freehold in Law in them before Entry.

And therefore a Release to them of the Right of the Land by him that hath it is good, and will bar the Releasor.

But otherwife it is in Cafes of Exchange, Partition, or upon Livery within the View, for in thefe Cafes no Release is good until an actual Entry made, for till then they have neither Freehold in Right nor Law.

So if a Diffeifor makes a Gift in Tail, or Leafe for Life or Years of the Land, and keeps the Reversion, and then the Diffeifor or his Heir releases to the Diffeifor all his Right; this is a good Release to bar his Right for ever.

So if the Heir of the Diffeifor be diffeifed, and the firft Diffeifor do after release to him all his Right; this is a good Release to bar him.

So if a Donee in Tail difcontinues in Fee, and the Donor releases to the Difcontinuee, and dies; this is a good Release againft the Donor.

So if the Donee in Tail be diffeifed, and after the Donor releases to the Donee all his Right; this is good: But in this Cafe nothing of the Reversion will pafs by the Release, for the Donee had then nothing but a Right.

But if any Rent be referved on the Estate-tail, the Rent is gone by the Release.

So if a Leafe be made to one for Life rendring Rent, and the Lefsee is diffeifed, and the Lefsee releases to the Releasor and his Heirs all his Right; in this Cafe altho' the Rent be extinct, yet nothing of the Right of the Reversion doth pafs.

And yet if a Woman that hath a Right of Dower releases to the Guardian in Chivalry; this is a good Release, and her Right or Title of Dower is gone.

But if a Diffeifor makes a Leafe for Years, and the Diffeifor releases to the Lefsee for Years; this Release is void becaufe he hath no Freehold.

But if he makes a Leafe for Life, and the Diffeifor releases to the Lefsee for Life; this is a good Release.

So alfo a Release to the Diffeifor after the Leafe for Years made is good.

And if Lefsee for Years be ousted, and he in the Reversion diffeifed, and the Diffeifor makes a Leafe for Years, and the firft Lefsee releases to him; this is a good Release. *Lit. §. 448, 449, 455, 456. Co. Lit. 265, 266, 275. 1 H. 6. 4. Dyer 302.*

Alfo in fome Cafes a Release made to one that hath neither Freehold in Deed nor Freehold in Law, is good when he hath an Estate in Reversion or Remainder, as in the Cafe before, where the Release is made by the Diffeifor to the Diffeifor after he hath made an Estate for Life.

So if the Demandant in a real Action release to the Tenant that comes in by Receipt upon a Prayer of Aid, or voucher upon a Warranty; this is good.

And yet if it be before the Receipt or Entry into the Warranty, or it be by any other besides the Demandant, it is void.

So if the Tenant in a real Action aliens, hanging the *Præcipe quod reddat* against him, and after Alienation the Plaintiff releases all his Right in the Land to him; this is a good Release.

So if a Disseisor makes a Lease for Life, the Remainder to another for Life, the Remainder to a third in Tail, the Remainder to a fourth in Fee, and the Disseisee releases to either of them in Remainder; this is a good Release.

But if in this Case Tenant for Life be disseised, and after he that hath Right (the Possession being in the Disseisor) doth release to either of them in Remainder; this is a void Release. *Lit.* §. 448, 449, 450, 451. 8 Co. 151.

Thirdly, *In Respect of Privity.*

But in all the Cases of a Release of a bare Right to him that hath the Estate of a Freehold in Deed or in Law, generally there needs no Privity to make the Release good; as in the Cases before of a Release made to the Tenant for Life of the Disseisor, and them that follow.

For if Tenant for Life makes a Lease to another for Life of the Lessee, the Remainder over in Fee, and the first Lessor releases all his Right to him to whom the Tenant made the Lease for Life; this is a good Release and a perpetual Bar, altho' the Release be not to him and his Heirs. And so it is in Case of a Reversion.

If Lessee for Years be ousted, and he in the Reversion disseised, and the Disseisor makes a Lease for Years, and the Lessee that is ousted doth release to the Lessee or the Disseisor; this is a good Release.

And yet if the Disseisee do release to the Lessee for Years of the Disseisor; this is void.

If Lessee for a thousand Years be ousted by the Lessor, and he makes a Lease for two Years, and the Lessee for a thousand Years releases unto him; this is a good Release.

But if a Lessor disseises his Lessee for Life, and makes a Lease for a thousand Years, and the Lessee for Life releases to this Lessee of a thousand Years; this is void. *Co. Lit.* 275. *Lit.* §. 470, 471. 10 Co. 48.

If one be disseised, and after another doth disseise him, and the Disseisee releases to the last Disseisor; this is a good Release.

So if *A.* disseises *B.* who infeoffeth *C.* with Warranty, who infeoffeth *D.* with Warranty, and *E.* disseiseth *D.* to whom *B.* the first Disseisee releaseth; this is a good Release, and doth defeat all the mean Estates and Warranties.

So if my Disseisor leases for Life, and the Lessee for Life aliens in Fee, and I release to the Alienee all my Right, &c. this is a good Release, and will bar me of my Entry: But if my Entry be gone, as if I lease for Life, and my Lessee be disseised, and that Disseisor is disseised, and I release to the second Disseisor; in this Case the first Disseisor may enter upon the second.

So if my Disseisor in the Case aforesaid make a Lease for Life, and the Lessee for Life makes a Feoffment to two, and I release to one of the Feoffees; this is a good Release, and will bar me and my Disseisor also.

So if Tenant for Life let the Land to another for the Life of the Lessee, the Remainder to another in Fee, and the Lessor releases to his Tenant for Life; this is a good Release. *Lit.* §. 473, 470, 471, 478. *Co. Lit.* 277.

If one that hath a Son within Age be disseised and die, and the Disseisor die seised and the Land descend to his Heir, and a Stranger abate, to whom the Son when he comes of Age doth release; this is a good Release.

So if one be disseised by an Infant which doth alien in Fee, and the Alienee dies seised, and his Heir entreth, the Disseisor being within Age, and the Disseisee releases to the Heir of the Alienee; this is a good Release.

But where an Inheritance or an Estate for Life is released to one that is but Tenant for Years; the Release is not good without Privity.

And therefore if Tenant for Life or in Fee releases to the Lessee for Years of his Disseisor; this is not good.

But the Release of a Term of Years to the Lessee for Years of him that doth eject him, is good enough without Privity, as in the Case before. 9 H. 6. 43. 18 Co. 48.

But here note, that in Cases of a void Release of a Right to an Inheritance or Freehold, where there is a Warranty contained in the Deed, the Warranty may be good, and be used by way of Rebutter, altho' the Release be void.

As if the Son of the Disseisee releases with Warranty in the Life-time of his Father, or there be Grandfather, Father and Son, and the Father disseises the Grandfather, and makes a Lease with Warranty and dies; in both these Cases, altho' the Son be not barred by the Release, yet he is barred by the Warranty. *Co. Lit.* 265.

Fourthly, *In Respect of the Words whereby it is made.*

Such Words as will make a good Release in the Cases of Releases that enure by way of Inlargement of Estate, will make a good Release in these Cases.

And note, that this Kind of Release is good without any Limitation or Specifying of the Estate, for by a Release of all a Man's Right, without saying, To have and to hold to him and his Heirs, &c. in all the Cases before, he that makes the Release is barred of his Right for ever; for if I be seised of an Estate in Fee by Wrong, and he that hath Right releases to me all his Right, altho' it be but for one Hour, yet this is a good Release for ever.

(1) *Of Releases of other Things than Lands or Tenements, as Seigniories, Rents, Common, Debts, &c.*

First, *Of a Seignior, Rent-Service, Common, or the like.*

IF there be Lord and Tenant, and the Lord releases to the Tenant all his Right that he has in the Seignior, or all his Right that he has in the Land, &c. this is a good Release to extinguish the Seignior. And in this Case there needs no Words of Inheritance or Limitation, for by Release of all the Right in the Seignior, the same is extinct for ever, without saying *To him and his Heirs*. And yet in this Case the Lord may by apt Words release his Seignior to the Tenant only in Tail or for Life, and it shall be good so long. But if a Lord grants to his Tenant that he shall do his Suit to another Manor of the Lord's, or that the Tenant shall give him yearly 12 d. for his Suit; this Grant will not extinguish and determine the Services or Tenure. *Lit.* §. 480. *Co. Lit.* 280, 305. *Perk.* §. 70.

If there be Lord and Tenant, and the Tenant be disseised, and after the Lord releases all his Right, &c. to the Tenant: By this Release the Service or Seignior is extinct, for altho' a Right regularly cannot be released to him that has but a bare Right, yet a Seignior may be released and extinct to him that has but a bare Right in the Land. But if the Tenant makes a Feoffment in Fee, and then the Lord releases all his Right, &c. to the Tenant; this is not good to extinguish the Seignior or Services, but it will discharge all the Arrearages. *Lit.* §. 457. 10 *Co.* 58. *Co. Lit.* 268.

If a Rent-Charge, Common of Pasture, or any other Profit appender be issuing out of my Land, and he that has it releases it to me; this is a good Release, and will extinguish it: But if I be disseised of the Land, and have but a Right at the Time of the Release made, the Release is not good, as it is in the Case of a Rent-Service and a Seignior: But if Lands be given to me in Tail or for Life rendring Rent, and I be disseised, and after the Donor releases to me all his Right in the Land; this is a good Release, and shall extinguish the Rent. So if in this Case where I am Tenant in Tail, and I make a Feoffment in Fee rendring Rent, and after I release to the Feoffee; this is a good Release, and hereby the Rent is extinct. And if two Coparceners be of a Rent, and one of them take the Terretenant to Husband, and after either of them releases; these Releases will be good. *Lit.* §. 480, 336, 357. *Co. Lit.* 273, 305. *Lit.* §. 455, 456.

If one disseises me of Land, and then grants a Rent-Charge out of the Land, and I reciting the same, grant a Release to the Grantee: This Release it seems is good, and will bar me so as after my Re-entry I shall not be able to avoid it. *Lit.* §. 527. *Co. Lit.* 300.

Secondly,

Secondly, *Of an Advowson, &c.*

If two have the Grant of the next Advowson or Avoidance of a Church before it be void, one of them may release to the other, but afterwards they cannot.

Thirdly, *Of a Condition.*

If *A.* makes a Feoffment in Fee, Gift in Tail, Lease for Life or Years to *B.* on Condition that upon such a Contingent it shall be void: In this Case *A.* may before Condition broken release all his Right in the Land, or release the Condition to *B.* and this will be good to make the Estate absolute, and to discharge the Condition. So if a Feoffee on Condition makes a Gift in Tail or Lease for Life, and after the Feoffor releases to the Donee or Lessee; this is a good Release to discharge the Condition. So if a Copyholder surrenders to the Use of another on Condition, and this is presented to be without Condition; and after the Surrenderor releases to him to whose Use the Surrender was made all his Right, &c. this is a good Release, and extinguishes the Condition. But if a Disseisor makes a Feoffment on Condition, and the Disseisee releases to the Feoffee on Condition; howsoever this bars the Right of the Disseisee, yet it does not discharge the Condition. 1 Co. 112. Perk. §. 823, 764.

Fourthly, *Of a Power of Revocation.*

Where a Power or Authority is such that respects the Benefit of the Lessor, as in the usual Cases of Power of Revocation of Uses, when the Feoffor, &c. has Power to alter, change, determine or revoke the Uses being intended for his Benefit, and he releases to any one that has a Freehold in Possession, Reversion or Remainder, by the former Limitation: This is a good Release, and extinguishes the Power, and makes the Estates that were before defeasible absolute, and he excludes him from any Power of Alteration or Revocation. But if the Power be collateral, or to the Use of a Stranger, and nothing to the Benefit of him that makes the Release: As if *A.* makes a Feoffment to *B.* to divers Uses, provided that *B.* shall revoke the Uses, and *B.* releases to any one of them that has an Use; this does not extinguish the Power, as in Case where the Power is given to *A.* and *A.* releases it. 1 Co. 112, 113, 173, 174.

Fifthly, *Of a Warranty.*

If a Feoffment be made with Warranty, and the Feoffee releases the Warranty; this makes it extinct. And so it is of other Warranties. But if Tenant in Tail releases the Warranty annexed to his Estate-tail, this does not extinguish the Warranty. Bro. Release 88. 21 H. 7. 29. 5 Co. 27.

Sixthly, *Of Debts and other Personal Duties.*1. *In Respect of Persons.*

Any Man may release any Debt or Duty due to himself. Also a Man may discharge or release any Thing, or any Wrong done to his Wife before or after the Marriage. And therefore, if a Trespass were done, or a Promise were made to my Wife before the Marriage, I may at any Time during the Marriage release it. So if any Wrong be done, or Obligation, Statute or Promise made to her alone, or to her and me together at any Time during the Marriage; I alone may release and discharge this. And if my Wife be an Executrix to any other Man, I may release any Debt or Duty due to the Testator.

And if a Legacy be given to a Feme Sole to be paid at Michaelmas next, and I marry her, and I release the Legacy before the Day, the Legacy is gone. Per Chief Justice B. R. Mic. 17 Jac.

An Infant Executor may release a Debt duly paid him of the Testator's Debt; but if he releases that which he does not receive, it is a void Release. And regularly the Release of an Infant is void. 5 Co. 27.

2. In Respect of the Time.

An Executor before Probate of the Will may release a Debt or Duty due to the Testator, and this Release is good to bar him. 5 Co. 27. 9 Co. 39.

A future or contingent Promise may be released and discharged before the Contingent happens. Trin. 4 Jac. in *Elton's Case*.

A Debt on an Obligation or Rent may also be released before the Day of Payment as well as after, but not by the same Words: And therefore if one promises to J. S. that upon the Surrender of J. S. he will pay him 110 l. and after the Promise and before the Surrender he releases this Debt; this discharges the Debt. But if the Promise be, that if the Surrendree shall sell the Land, and shall have 500 l. and then he shall pay the Surrendror an 100 l. more, and the Surrendror before Sale releases this Sum; this is no Discharge of it. And yet a Release of the Promise is a Discharge of it. And if A. promises to me, that if J. S. does not pay me an 100 l. 1 October that he owes me, that A. will pay me the 100 l. 1 November, and I 10 September release to him this Debt, or all Actions and Demands; this Release is not good to discharge this Promise. But by a Release of the Promise the same is discharged. Hil. 16 Jac. *B. R. Brisco v. Heirs.*

3. In Respect to Words.

And all these Releases must be made by apt Words, and such as the Law shall judge sufficient for that Purpose. 9 Co. 53.

And in all these Cases Care must be had there be no Mistakes, for Mistakes will make Releases and Confirmations void as well as other Grants. And therefore if A. makes a Release to B. in this Manner: *Know, &c. that J. A. of B. have remised, &c. B. all Actions which the same B. has against A. whereas it should be, Which the same A. has against B.* this Release is void. Bro. Release 56, 58.

If a Man releases to another all Actions, and does not say further which he has against him; this is as good a Release as if these Words were inserted, *Quod necessario subintelligitur non deest.* Bro. Release 29.

(K) The Force and Virtue of a Release, and how it shall enure and be construed.

First, In Respect of the Persons; and where a Release made by one shall bind another, and where not; and where a Release made to one shall enure to others, or not.

WHERE divers join in any Suit or Action to recover any Personal Thing of which they are to have the joint Benefit or Interest when the Law does not compel them to join, there the Release of one of them shall bar all the Rest. And therefore if two Men join in an Action of Debt, Trespas, or the like, and one of them alone releases to the Defendant; this is a Bar to the other Plaintiffs also. So if a Statute or an Obligation be made to two or more, and one of them releases it to the Conusor or Obligor; this is a Discharge of the whole Duty, and a Bar to the Rest, so that they can make no Use of the Statute or Obligation. But if divers be charged in an Action, and they for the Discharge of themselves only join in a Suit or Action, where also they can do no otherwise, being compelled by Law to join; in this Case the Release of one of them shall not hurt the others. And therefore if divers join in a Writ of Error, Attaint, or *Audita Querela*, and one of them releases to the Defendant in the Writ; this will not bar the Rest of their Remedy, but they may go on in their Suit notwithstanding. 5 Co. 22. Bro. Releases 84, 94. Stat. 23 H. 8. c. 3.

If there be two or more Executors, and one of them alone releases a Debt or Duty to the Testator before Judgment obtained in a Suit, had by all the Executors against the Debtor; this will bar all the Rest. Executors.

But it is otherwise after Judgment obtained. 61 H. 7. 4.

A Release made to the Tenant in Tail, or for Life, of the Right to the Land, shall avail and enure to him that hath a Reversion or Remainder in Deed; and so *converso*. A Release made to him that hath a Remainder or Reversion will avail and enure to the Benefit of him that has the Estate-tail for Life, or Years precedent. As if a Disseisor makes a Lease for Life, and the Disfisee releases to the Tenant for Life; this shall enure to the Disseisor. So if he or a Tenant for Life makes a Lease for Life, the Remainder for Life, the Remainder in Tail, the Remainder in Fee, and the Disfisee or first Lessor releases all his Right to any of them in Remainder; this shall enure unto and benefit all the Rest. And if the Husband makes a Lease of his Wife's Land to one for Life, the Remainder to another in Fee, and the Wife after his Death releases all her Right in the Land to him in Remainder; this shall enure to the Lessee for Life. *Co. Lit.* 275, 290, 267, 268. 8 *Co.* 131.

If a Disseisor makes a Lease for Life, and the Disfisee releases all his Right to the Tenant for Life; this shall enure to the Benefit of the Disseisor. But if the Disfisee releases no more to the Tenant for Life but all Actions; this Release will not benefit him in Remainder or Reversion after the Death of the Tenant for Life. *Co. Lit.* 275.

If a Disseisor makes a Feoffment to two in Fee, and the Disfisee releases to one of the Feoffees; this shall enure to both. *Lit.* § 472.

If a Tenant in Tail be disseised by two, and he releases to one of them; this shall enure to them both: But if the King's Tenant be disseised by two, and he releases to one of them; this shall not enure to the other. So if two Jointenants make a Lease for Life, and then disseise the Tenant for Life, and he releases to one of them; in this Case his Companion shall have no Benefit by it. *Co. Lit.* 276.

If a Tenant in Fee-simple be disseised by two, or two do abate or intrude, and he releases to one of them; the other shall have no Benefit thereby. But if Tenant for Life after he is disseised releases to one of the Disseisors; this shall enure to both. *Lit.* § 422, 512.

And if there be two Disseisors, and they make a Lease for Life or Years, and after the Disfisee releases to one of the Disseisors; this shall enure to them both, and to the Benefit of the Lessee for Life also. *Co. Lit.* 276.

And if a Lessee for Years be ousted, and he in Reversion disseised, and the Lessee releases to the Disseisor; the Term of Years is hereby extinct, the Disfisee may take Advantage of it, and enter presently.

But if two Jointenants in Fee be disseised by two Disseisors, and one of the Disfisees releases to one of the Disseisors all his Right; this shall enure to the other, for this extends but to a Moiety.

If Tenant for Life be disseised by two, and he in the Reversion and the Tenant for Life join in a Release to one of the Disseisors; this shall not enure to the other. But if they do severally release their several Rights, their several Releases shall enure to both the Disseisors. *Co. Lit.* 276.

If a Mortgagee upon Condition after the Condition broken be disseised by two, and the Mortgagor that has the Title of Entry releases to one of the Disseisors, this shall enure to both. And the like Law is for an Entry for Mortmain, or a Consent to Ravishment, &c. *Ibid.*

If there be Lord and two Jointenants, and the Lord releases to one of them; this shall avail his Companion. *Co. Lit.* 269.

If Tenant in Fee-simple makes a Feoffment in Fee, and after the Lord releases to the Feoffor; this shall not enure to the Feoffee to extinguish the Seignior. But if he releases to the Feoffee, this shall enure to the Feoffor to extinguish the Seignior.

If there be Lord and Tenant, and the Tenant makes a Lease for Life, the Remainder in Fee, and the Lord releases to the Tenant for Life; the Rent is hereby wholly extinguished, and he in Remainder shall take Advantage of it: As when the Heir of a Disseisor is disseised, and the Disseisor makes a Lease for Life, the Remainder in Fee, and the first Disfisee releases to the Tenant for Life; this shall enure by way of Extinguishment to him in Remainder, viz. to the Lessee for Life first, and after to him in Remainder. *Co. Lit.* 279.

If two Tenants in Common of Land grant a Rent of forty Shillings out of it, and the Grantee releases to one of them; this shall not enure to the other. But if one be Tenant for Life of Lands, the Reversion in Fee to another, and they join in the Grant of a Rent out of the Lands, and the Grantee releases either to the Tenant for Life, or to him in Reversion; this shall enure to the other, and extinct the whole Rent. *Co. Lit.* 267.

If two Men gain an Advowson by Usurpation, and the right Patron releases to one of them; this Release shall enure to them both.

If two be bound jointly and severally in any Obligation, or other Specialty, and the Obligee, &c. releases to one of them; this shall enure to discharge the other also, if it be a good Release as to him that makes it. But otherwise it is in Case of a Release made by the King. 5 Co. 59. Co. Lit. 232. Lit. §. 376.

And if two commit a Trespass on another together, and he on whom it is made releases it to one of them; this shall enure to discharge the other. If Husband and Wife and J. S. purchase to them and the Heirs of the Husband, and after J. S. releases all his Right in the Land to the Husband; the Wife shall not have Benefit by this, but it shall enure to the Husband alone. And if there be two Women joint Disseisores, and the one takes a Husband and the Disseisee releases to the other; in this Case the Husband and Wife will take no Benefit by this. And if the Disseisee releases to the Husband, this shall enure to him and his Wife and the other Woman. And if one that has a Rent out of my Wife's Land releases it to me and my Heirs; this shall enure by way of Extinguishment, and my Wife shall have Advantage of it. And yet if the Words be, *Grant and Release* the Rent to the Husband and his Heirs, the Husband may take as a Grant if he will. Dyer 319. Co. Lit. 273, 276. 14 H. 8. 6.

But here note, all these Cases of Releases when one Man will take Advantage of a Release made to another, he must have the Release to shew and plead. Co. Lit. 232.

If I be disseised, and I release to the Disseisor all Actions I have or may have against him; this is but personal, and shall not be expounded to bar my Heir after my Death of his Remedy, neither will it bar me of my Remedy against his Heir after his Death. So if I deliver Goods to another, and afterwards I release to him all Actions, and then he dies; by this I am not barred so, but I may sue his Executors. 10 Co. 51. 22 H. 6. 1.

See more in Title Confirmation hereafter.

Secondly, In Respect of the Thing released.

A Release of all Actions without any more Words, is better than a Release of all All Actions. Actions real only, or a Release of all Actions personal only: For by a Release of Actions, or a Release of all Manner of Actions without more Words, are released and discharged all real, personal and mix'd Actions depending, and all Causes of Suit for any real or personal Thing: As Appeals for the Death of an Ancestor, Conspiracies, Suits by *Scire Facias* to have Execution of a Judgment, and *Detinue* for Charters. And if two conspire to indict me, and I release to them all Actions, and after they go on with their Conspiracy; by this Release I am barred to do any Thing against them. By this Release also of all Actions, a Debt due to be paid upon a Statute or an Obligation at a Day to come, altho' the Release be before the Day is discharged, and by this also the Statute itself, if it be at any Time before Execution, is discharged. And if one be to pay 40 l. at four Days, and some of the Days are past, and some to come, and the Debtee makes such a Release; by this the whole Debt is discharged. Also in a *Scire Facias* upon a Fine or Judgment this Release is a good Plea in Bar. But this Release of all Actions will not discharge Executions, or bar a Man of taking out Executions, except it be where it must be done by *Scire Facias*. Neither will it discharge or bar a Man of Suits by *Audita Querela*, or Writ of Error, to reverse an erroneous Judgment; neither will it discharge Covenants before they be broken, nor will it discharge any Thing for which the Lessor had no Cause of Action at the Time of the Release made; as if a Woman has Title of Dower, and releases all Actions to him that has the Reversion of the Land after an Estate for Life; or a Man is by an Award to pay me 10 l. at a Day to come, and before the Time I make such a Release; or I make a Lease rendring Rent, or an Annuity is granted to me, and before the Rent-Day I make the Lessee or the Grantor such a Release; in these Cases, and by a Release in these Words without more, the Dower, Debt, Rent or Annuity, is not discharged. 8 Co. 153. 5 Co. 28, 70. Kelw. 113. Co. Lit. 286, 290, 292, 289. Lit. §. 492, 505, 506, 512, 513. Bro. Stat. 39.

And if a Man has two Remedies or Means to come by Land, as Action and Entry; or by Goods, as Action and Seizure, or the like; in this Case by a Release of all Actions he does not bar himself of the other Remedy. *Et sic e converso*. Lit. §. 496, 497. And

And if a Man covenants to build a House, or make an Estate, and before the Covenant broken, the Covenantee releases unto him all Actions; by this the Covenant itself is not discharged. And yet after the Covenant is broken, this Release will discharge the Action of Covenant given upon that Breach. *Co. Lit.* 292.

Right.

By a Release of *all a Man's Right* into any Lands or Tenements without more Words, all Manner of Rights of Action and Entry the Releasor hath to, in or against the Land, is released and discharged; for there is *jus recuperandi, prosequendi, intrandi, habendi, retinendi, percipiendi, possidendi*; and all these Rights, whether they accrue by Fine, Feoffment, Descent or otherwise, are extinct and discharged, so that if the Releasee has got into the Land of the Releasor by Wrong, by this Release the Wrong is discharged, and the Releasee is in the Land by good Title. Also by this Release are discharged and released all *Titles of Dower*, and Titles of *Entry* upon a Condition or Alienation in Mortmain. And if a Woman has Title of Dower after an Estate for Life, and makes such a Release to him in Reversion, this bars her. By such a Release also from the Lord to the Tenant, the Services are extinct. 8 Co. 151. *Plow.* 484. 6 H. 7. 8. 3 Co. 29. 6 Co. 1. *Co. Lit.* 345.

But this Release will not bar a Man of a Possibility of a Right that he has at the Time of the Release, or of a Right that shall descend to him afterwards. And therefore if the Conusee of a Statute before Execution releases all his Right into the Land to the Terretenant, or the Heir of the Disseisor in the Life-time of his Father releases to the Disseisor all his Right; these Releases do not bar them. Nor will this Release bar a Man of an *Audita Querela*, and such like Things. Yet if the Tenant in a real Action after the Demandant has recovered the Land, releases to him all his Right in the Land; this bars him of a Writ of Error for any Error in the Proceeding in that Suit. 10 Co. 47. *Co. Lit.* 289.

And if there be Lord and Tenant by Fealty and Rent, and the Lord by his Deed reciting the Tenure, releases all his Right in the Land, saving his said Rent; by this Release the Right of the Seignior, save only of the Seignior of the Rent and Fealty, is extinct. And if the Lord releases to the Tenant all his Right to the Land and Seignior, *salvo sibi dominio suo*, &c. hereby the Services only, not the Tenure, is extinct. *Co. Lit.* 150. *Dyer* 157.

And if one has a Rent-charge out of my Land, and makes such a Release of all his Right to the Land to me that am the Terretenant without Exception of the Rent; hereby the Rent is extinct and gone for ever. *Perk.* §. 644.

Title.

By a Release of *all a Man's Title* into Lands or Tenements, without more Words, is released and discharged as much as is released by the Release of all a Man's Right, and both these Releases have the like Operation: For howsoever *Title* strictly and properly is where a Man has lawful Cause of Entry into Lands whereof another is seised, for which he can have no Action, yet it is commonly taken more largely, and includes a Right also. And *Titulus est justa causa possidendi quod nostrum est*. *Kelw.* 484, 6, 7, 8. *Co. Lit.* 265, 345.

Entries or Rights of Entry.

By a Release of *all Entries or Rights of Entry* a Man has into Lands, without more Words, a Man is barred of all Right or Power of Entry into those Lands upon any Right whatsoever. And if a Man has no other Means to come by the Land but by an Entry, and he has released that, by these Words he is barred for ever. But if one has a double Remedy, *viz.* a Right of Entry, and an Action to recover his Right by, and then releases all Entries; by this he is not barred of his Action. 8 Co. 151.

Actions real.

By a Release of *all Actions real*, without more Words, are discharged all real and mix'd Actions then depending, and all Causes of real and mix'd Actions not depending. And therefore all Causes of suing of Assises, Writs of Entry, *Quare Impedit*, Actions of Waste, and the like, which the Parry has at the Time of the Release made, are hereby discharged. But this Release will not bar him that makes it of any Causes of Action that shall arise and accrue afterwards. Neither will it bar him of any Appeal of Death or Robbery, Writ of Error, or such like Thing; nor of any Thing which a Release of all Actions will not bar. And yet when Land is to be restored or recovered by Judgment in a Writ of Error, this Release is a Bar to the Writ of Error. So if a Judgment be given upon a false Verdict in a real Action, a Release of all Actions real is a Bar in an Attaint. *Lit.* §. 492, 493, 495. 8 Co. 151. *Lit.* §. 115, 500. *Co. Lit.* 288, 289.

Actions personal.

By a Release of *all Actions personal*, without more Words, are discharged all personal Actions then depending, and all Causes of personal Actions wherein a personal Thing only is to be recovered; and therefore hereby are discharged all Causes of suing

suing out of Actions of Debt, Trespafs, *Detinue*, or the like. Also all mix'd Actions, as Actions of Waste, *Quare Impedit*, an Affise of *Novel Disseisin*, Writ of Annuity, Appeal of Maihem, and the like. *Bro. Release* 47. *Co. Lit.* 285. 9 H. 6. 57. *Lit.* §. 502.

And if Debt, &c. or Damages be recovered in a personal Action by false Verdict, and the Defendant brings a Writ of Attaint; or if a Writ of *Audita Querela* be brought by the Defendant in the former Action to discharge him of Execution; by this Release the Defendant in both Cases is barred of his Suit. *Co. Lit.* 209.

Also when by a Writ of Error the Plaintiff shall recover or be restored to any personal Thing only, as Debt, Damage, or the like; as if the Plaintiff in a personal Action recovers any Debt, &c. or Damages, and be outlawed after Judgment; in this Case in a Writ of Error brought by the Defendant upon the principal Judgment, this Release will bar him: But where by a Writ of Error the Plaintiff shall not be restored to any personal or real Thing, this Release is no Bar; as if a Man be outlawed in an Action personal by Process upon the Original, and brings a Writ of Error, and then releases; this is no Bar to him. *Co. Lit.* 288. *Lit.* §. 503.

If a Man by Wrong takes or finds my Goods, or they be delivered to him, and I release to him all Actions personal; notwithstanding this Release I may take my Goods again, altho' I be barred of my Action by the Release. Neither is this Release a Bar in any Appeal of Robbery or Death. Neither will it bar in any Case where a Release of all Actions will not bar. Neither is it any Bar to an Action of Debt brought for an Annuity, granted for a Term of Years for any Arrearages that shall grow due after the Release. Nor for any Rent or Sum of *Nomine pænæ*, when the Release is before the same Day, or *Nomine pænæ* happens. Neither is it a Bar in such real Actions wherein Damages are recoverable only by the Statute, and not by the Common Law, as in a Writ of Dower, Entry *sur Disseisin in le per*, *Mortdancesfor*, *Aile*, &c. *Lit.* §. 497, 498, 50. *Co. Lit.* 292, 285.

By a Release of *all Debts*, without more Words, are discharged and released all Debts. Debts then owing from the Releasee to the Releasor upon Specialties, or otherwise, all Debts due also upon Statutes; and therefore if the Conusor himself, or his Land, be in Execution for the Debt, and he has such a Release, he must be discharged: And so he cannot be upon a Release of all Actions. *Co. Lit.* 76, 291. *Fitz. Audita Querela* 3.

By a Release of *all Duties*, without more Words, a Releasor is barred, and the Releasee discharged of all Actions, Judgments and Executions; also of all Obligations. And if the Body of a Man be in Execution, and the Plaintiff makes him such a Release, hereby he shall be discharged of Execution, because the Duty itself is discharged. And if there be Rent or Services behind to the Lord from his Tenant, and the Lord makes such a Release to his Tenant; by this the Arrearages are released. 8 Co. 153. *Co. Lit.* 291.

The Word *Suits* is of somewhat a more large Extent than Actions, for by a Release of all Suits, without more Words, is released and discharged as much as by a Release of all Actions. And hereby also are discharged all Executions in the Case of a Subject. But in the Case of the King it doth not release Executions. And it does not release a Covenant before it be broken. 8 Co. 154, 157. 5 Co. 70. *Co. Lit.* 291.

By a Release of *all Quarrels*, without more Words, all Actions real and personal, and all Causes of such Actions, are released and discharged. So likewise by the Release of *all Controversies*, or by the Release of *all Debates*. But this will not bar the Releasor of any Causes of Suit that shall arise after, and was not at the Time of the Release: As the Breach of a Covenant which shall be after, altho' the Covenant be before, is not discharged hereby. *Co. Lit.* 292. 8 Co. 157. 5 Co. 70.

By a Release of *all Covenants*, without more Words, all Covenants then broken, and all that shall be after broken that were then made and in Being, are discharged. *Qui destruit medium destruit finem.* 1 Co. 112. 10 Co. 51. *Co. Lit.* 292.

And therefore if a Lessee covenants to leave a House leased to him at the End of the Term, as it was at the Beginning of the Term, and the Lessor before the End of the Term releases to the Lessee all Covenants; this discharges the Covenant. But this Release discharges nothing else but Covenants. Adjudged *Hil. 4 Jac. Hancock's* Case.

By a Release of *all Statutes* from the Conusor to the Terretenant, without more Words, the Statute is discharged. And yet if he releases all his Right in the Land of the Conusor; this will not discharge the Land of Execution. 10 Co. 47.

- Errors.** By a Release of *all Errors* and Writs of Error; all Errors and Writs of Error, even before they be brought, are extinct and discharged. And if a Man be outlawed in a personal Action by Process upon Original, and makes such a Release; this will bar him. 2 Co. 16. Lit. §. 503.
- Warranties.** By a Release of *all Warranties* or Covenants real, all Warranties then made and being are for ever discharged. Lit. §. 148.
- Legacies.** By a Release of *all Legacies*, without more Words, a Man bars himself of all the Legacies given him *in presenti* or *futuro*, so that if he be to have a Legacy at twenty-four Years old, and at twenty-one Years of Age he releases to the Executor all Legacies, or this Legacy in particular; this is a Bar to him of this Legacy for ever. And yet a Release of *all Demands* in this Case is no Discharge of this Legacy. 10 Co. 51. Dyer 56. Co. Lit. 76.
- Rent.** By a Release of *Rent*, the Rent is extinct and discharged whether the Day of Payment be come or not. But a Release of *all Actions* will not discharge a Rent before the Day of Payment comes. Co. Lit. 292.
- Promises.** By a Release of *all Promises* or *Assumpsits*, without more Words, a Man may bar himself of a contingent or future Thing that by other Words could not be released; as if a Man promises to me that if J. S. does not pay me 100 l. the tenth of March next, that he will pay it me the twentieth of that Month, and before the Time I release him to all Actions and Demands; this will not discharge the Promise. But if I release to him all Promises, this will bar me, & *sic de similibus*. Adjudged Hil. 16 Jac. B. R. *Briscoe v. Heires*, 10 Co. 51. But as to Promises by one Person for another, see the Statute of Frauds, 29 Car. 2. c. 3.
- Judgments.** By a Release of *all Judgments*, without more Words, he that maketh it is barred of the Effect of any Judgment he has against the Releasee; for if Execution be not taken out, he is now barred of it. And if the Releasee, or his Land, &c. be in Execution, *he*, and it shall be discharged thereof by *Audita Querela*.
- Executions.** And by a Release of *all Executions*, without more Words, a Man is barred of taking or having out any Execution upon any Judgment either before *Scire Facias* or after. But if, after Execution be made by *Capias ad Satisfaciendum*, *Elegit*, or *Fieri Facias*, the Plaintiff releases to the Defendant all Executions, he cannot plead such a Release, but he must have an *Audita Querela*, and that he may have to discharge him of Execution. Lit. §. 507. 8 Co. 151. Co. Lit. 290.
- Appeals.** By a Release of *all Appeals*, all Appeals of Felony, of Death, of Robbery, of Rape, of Burning, of Larceny depending, and all Causes not yet moved also, are discharged. Co. Lit. 287, 288.
- Advantages.** By a Release of *all Advantages*, it seems Actions of Debt upon Account are discharged. 8 Co. 150.
- Conspiracies.** By a Release of *all Conspiracies*, all Conspiracies past are discharged, and such also as are only begun and shall be prosecuted and perfected after the Release, are likewise hereby discharged. *Kelw.* 113.
- Forgeries.** By a Release of *all Forgeries* before Publication, the Forgery is discharged, but not the Publication, and therefore the Releasor may take his Remedy for that notwithstanding. 10 Co. 48.
- Demands and Claims.** A Release of *all Demands*, is the best Release of all; and the Word *Demands* is the most effectual Word of all, and indeed includes and comprehends within it most of all the Releases before. By a Release therefore of *all Demands*, without more Words, are released *all Rights and Titles to Land, Warranties, Conditions* annexed to Estates before they be broken or performed, and after they be broken. Also by this Release are released and discharged *all Statutes, Obligations, Contracts, Recognisances, Covenants, Rents, Commons*, and the like. Also all Manner of *Actions* real and personal, *Appeals, Debts and Duties*. Also all Manner of *Judgments and Executions*. Also all *Annuities*, and *Arrearages of Annuities and Rents*. And therefore if a Man has a *Title of Entry* by Force of a Condition, &c. or a Right of Entry into any Lands; by such a Release the Right and Title is gone. And if a Man has a *Rent-Service, Rent-Charge, Estovers*, or other Profit to be taken out of the Land; by such a Release to the Tenant of the Land it is discharged and extinct. Co. Lit. 291. 8 Co. 154. Lit. §. 501, 509, 510.
- And therefore if a Termor for Years grants the Land by Indenture to A. rendering Rent, and at the End of the first Year he releases to the Grantee all Demands; the Rent is hereby extinct during all the Time. And a Release of *all Claims* it seems is much of the same Nature. Adjudged Pas. 17 Jac. B. R. in *Wotton's Case*.

But by a Release of *all Demands*, or of *all Claims*, any such Thing as whereof a Release cannot be made, as a mere Possibility, or the like, is not released. 5 Co. 70.

Neither will this Release discharge a *Covenant* or *Promise* that is future and contingent before it be in Being; nor a *Covenant* before it is broken: And therefore if the Lessee of a House covenants to leave it as well in the End of the Term as it was in the Beginning of his Term, and before the End of the Term the Lessor releases to the Lessee *all Demands*: This is no Bar to an Action brought for a Breach of the Covenant afterwards. Adjudged Hil. 4 Jac. B. R. *Hancock's Case*.

And if a Man, in Consideration of a Sum of Money given to him by a Woman Sole, assumes to her that if she marries one M. that he will pay to her after the Death of M. 100 l. by the Year, if she survives him, and she marries him, and the Husband releases *all Demands*, and then dies; this is no Bar to the Duty. So if one promises a Woman that if she will marry him, that he will leave her worth 100 l. if she survives him, and before the Marriage she releases to him *all Actions* and *Demands*; this does not discharge the Promise. Hil. 6 Jac. B. R. *Belcher and Hudson's Case*.

Note, That all these Words are of the same Force, when they are joined with other Words, as when they are alone.

If two Tenants in Common of Land grant a *Rent-Charge* of 40 s. out of it to one in Fee, and the Grantee releases to one of them; this shall extinguish but 20 s. for that the Grant in Judgment of Law is several. Co. Lit. 267.

If one has *several Causes of Action* against two, and makes a *joint Release* to them; this shall be taken to be a Release of all joint and several Causes of Action. 19 H. 6. 4.

So if an Executor has some Cause of Action for himself, and some for his Testator, and he releases all Actions indefinitely; this Release discharges both Sorts of Actions. Bro. Release 31, 29.

If the *Tenancy* be given to the Lord and a Stranger, and to the Heirs of the Stranger, and the Lord releases to his Companion *all his Right in the Land*; this shall enure not only to pass his Estate in the Tenancy, but also to extinguish his Right in the Seignior. Co. Lit. 280.

If there be Lord and Tenant of two Acres, and the Lord releases *all his Right in one* of them to the Tenant; hereby the Services are extinct for both. So if one has a *Rent-Charge* out of twenty Acres, and releases all his Right in one Acre; hereby all the Rent is extinct. And yet if A. leases *Whiteacre* to B. for Life rendring Rent, and afterwards releases Part of the Rent; this is good only for such Part. Perk. §. 71. Bro. Release 85. 9 Ed. 3.

If I be seised of Land in Fee, and make a Lease of it to one for Life, and after I release *all my Right in the Land* for the Life of the Tenant for Life, so as neither I nor my Heirs shall have, claim or challenge any Thing or Right in that Land for the Life of the Tenant for Life; by this Release nothing is extinct or discharged but the Causes of Action of Waste that were then, and not any Cause that shall happen afterwards. Bro. Release 65.

If a Statute be entred into the twentieth of April, and the Conussee by a Release dated the nineteenth of April (meaning to except this Statute) releases *all Debts and Demands till the making of the Release*; by this Release the Statute is discharged: But if the Words had been to the Day of the Date of the Release, *contra*. Dy. 307.

If a *Promise* be of two Parts, and he to whom it is made releases *one Part*; this is a Release of both. Per Justice Doderidge, Trin. 14 Jac.

If A. on the first of January enters into an Obligation of 40 l. to B. and B. on the thirteenth of July makes a Deed thus: *It is agreed between B. on the one Part, and A. on the other Part, that upon good Considerations B. doth acknowledge himself fully satisfied and discharged of all Bonds, Debts or Demands whatsoever from the Beginning of the World to this Day by the said A. and that he the said B. is to deliver all such Bonds as he has yet undelivered to A. except one Bond of 40 l. yet unforfeited, which is for the Payment of, &c. which was the Obligation before*: In this Case it was adjudged a good Release and Discharge of all the Bonds excepting this one, and that this Exception shall go to all the Premises. 9 Co. 53.

Thirdly, *In Respect of the Time or Estate.*

A Release of a Right, or an Action, cannot be for a Time, but it will be for ever. And therefore if a Release be made to any one that has a Fee-simple by Wrong by him

him that has the Right for one Hour, one Year, for Life or Years; this is a good Release for ever. And if the Disseisor releases *all his Right in the Land to the Disseisor without naming his Heirs, or setting down any Time* how long the Releasee shall have the Land, or the Right of the Disseisor therein; this is a good Release for ever, and makes the Estate of the Disseisor good for ever, and so makes a good Estate in Fee-simple without the Words, *his Heirs, &c.* And if the Disseisor or his Heir makes a Gift in Tail, or a Lease for Life, and the Disseisor releases all his Right to the Donee or Lessee for Life, To have and to hold for Life only; this is a good Release of his Right for ever. But if the Disseisor disseises the Heir of the Disseisor, and makes a Lease for Life, (which is a Release in Law) by this the Right is released during that Time only. So if one Jointenant or Parcenor releases to the other *all his Right* in the Land, without the Word *Heirs*, or any more Words; this Release gives to his Companion his whole Interest for ever. And when the Lord or Grantee of a Rent releases to the Tenant, or Terretenant generally; by these Releases a Fee-simple is transferred without the Word *Heirs, &c.* and yet the Lord may release his Seignior to his Tenant, to hold to him in Tail or for Life, and this shall be taken and enjoyed accordingly. But if the Lord releases the Seignior to his Tenant without the Word *Heirs* put in the Deed, the same is extinct. *Lit. §. 467, 470. Co. Lit. 273, 264, 280. Kelw. 88. Co. Lit. 9.*

And if I let Land to a Man for Term of Years, and after I release to him all my Right which I have in the Land, without using any other Words in the Deed; or release to him, to have and to hold for his Life: In both these Cases he has an Estate for his Life only. And if I lease Land to a Man for his own Life, and after release to him, to have and to hold for his own Life; hereby he has but an Estate for his own Life. But if I make a Lease to him for another's Life, and after release to him, *Habendum* to him for his own Life; by this he has an Estate for his own Life. But if I be seised of Land in Fee-simple, and let it to another for Life or Years, and then release all my Right to him, to have and to hold to him and his Heirs; hereby he has the Fee-simple. And if I release all my Right to him, to have and to hold to him and the Heirs of his Body; hereby he has an Estate-tail. *Lit. §. 545, 546, 465. Plow. 556. Dyer 263.*

And if one be seised in Fee of a Rent-Service or Charge, and grant it first for Life, and then release it to the Grantee, to hold to him and his Heirs, or to him and the Heirs of his Body; this shall enure to an Enlargement according to the Agreement. But if one grants a Rent-Charge out of the Land *de novo*, and after releases to the Grantee all his Right in the Rent, to have and to hold to him in Fee-simple or Fee-tail; this does not enlarge the Estate. *Lit. §. 549.*

And if Tenant in Tail or for Life makes a Lease for Years, and after by Deed releases all his Right to the Lessee for Years in Possession, to hold to him and his Heirs for ever; this will not make the Estate of the Lessee good for longer Time than the Life of the Releasee. *Lit. §. 606, 610. 24 Ed. 4. 28.*

If one makes a Lease for ten Years, the Remainder for twenty Years to another, and he in Remainder releases all his Right to the Lessee for ten Years; in this Case the Releasee has an Estate for thirty Years, and no less, for one Lease for Years cannot drown in another. *Co. Lit. 273.*

If I let Land to a Feme Sole for her Life, or for Years, and she takes a Husband, and after I release to them two, to hold for their Lives; this shall enure no further than the Intent; and in the first Case he shall hold jointly with his Wife, but in her Right whilst she lives, and after for his own Life, if he survives; and in the last Case they shall have the Freehold jointly. *Lit. §. 526. Co. Lit. 299, 300.*

A. had a Judgment for 6000 l. against B. B. gave A. a Legacy of 5 l. and died; A. on Receipt of this 5 l. gave the Executor of B. a Release in this Manner: I acknowledge to have received of C. 5 l. left me as a Legacy to B. and do release to him all Demands which I have against him as Executor of B. and have for any Matter whatsoever; and it was adjudged, that the Generality of the Words all Demands should be restrained by the particular Occasion mentioned in the former Part thereof, viz. the Receipt of the 5 l. Legacy, and should not be a Discharge of the Judgment.

1 Lev. 101.

(L) *Where Releases shall be avoided and set aside.*

IT is the constant Rule in Equity, that where there is either *suppressio veri*, or *suggestio falsi*, the Release shall be avoided. 1 Vern. 20. 1 Will. 240.

In Chancery a Release was set aside by a *subsequent Accident*, having Relation to the original Equity: A Man seised of a Term for Years in Church-Land, purchased the Fee of the Trustees for Sale of Church-Lands, in the Time of *Oliver Cromwell*, and then settled the same on his Wife for a *Jointure*, and died; the Wife released to the Executors all her Right to the personal Estate, and afterwards the Fee was evicted, on the Restoration of King *Charles the Second*. And notwithstanding *that*, and the *Release*, the Wife was decreed to hold for so many Years of the Term as she lived, she being in Possession, &c. 1 Chan. Ca. 47.

A Man who was possessed of a Lease for three Lives of a Rectory in *Kent*, devised the Rectory by Will, but that being void, it came to his three Daughters, as Coheirs and special Occupants: And there being a Suit concerning this Rectory in Chancery, the Husband of one of the Daughters fearing to be in Law, and being made to believe that he should be obliged to pay large Costs; on his Suggestion he released the Arrears that should be coming to him for his Share of the Profits of the Rectory (his Share amounting to 1000 *l.*) to the other Sisters, who were to bear the Charge of the Suit: This Release was set aside and declared void; and it was held, that Misapprehension in the Parry shall avoid his Release. 1 Vern. 32.

If a Child releases to his Father his *Orphanage Part* which he is intitled to by Virtue of the Custom of the City of *London*; and this Release is obtained by Threats, or unduly, it shall be set aside in Equity. 1 Will. 639.

S E C T. XIII.

Of Lease and Release.

HAVING before in §. 11. treated of Leases, and in §. 12. of Releases, to which I refer the Reader as introductory to this Section, wherein I only propose to treat of such Conveyances as are both by Lease and Release.

(A) *A Conveyance by Lease and Release, what.*

A Conveyance by Lease and Release, is where he who is to convey any Lands or Tenements first makes a *Lease* (or *Bargain and Sale*) of the Premises to the Person to whom the same is to be conveyed for six Months, a Year, &c. but usually for a Year, to the Intent that by Virtue thereof the Lessee may be in the actual Possession of the Premises granted by the Lease, (or *Bargain and Sale*) and intended to be released to him; and then the Lessee (or Bargainee) by Virtue of the Statute of the 27 H. 8. c. 10. for transferring Uses into Possession, is enabled to take a Grant or Release of the Reversion and Inheritance of the said Lands, to the Use of himself and his Heirs for ever, &c. And then a *Release* (usually dated the Day next after the Date of the Lease, reciting the said Lease and declaring the Uses) is accordingly made; which in this Case is a Conveyance of one's Right or Interest that he has in a Thing to another who has the Possession thereof.

A Lease and Release are but one Conveyance, and in the Nature of one Deed.

1 Mod. 252.

Lease and Release is now become the most common Conveyance of Lands. It amounts to a *Feoffment*; for by the said Statute the *Uses* are transferred into the *Possession*, so that thereby the Place of *Livery of Seisin* is supplied; which indeed saves much Trouble, especially when the Bargainor, &c. lives at a Distance from the Premises; in which Case a Letter of Attorney to make Livery was obliged to be made, otherwise the Bargainor, &c. was to deliver Seisin in Person.

(B) *Things requisite in a Lease (or Bargain and Sale) for a Year.*First, *With Respect to the Consideration.*

IT is requisite, and the usual and best way, to mention a Consideration of Money, as five Shillings, or some other small Sum, tho' it be never paid; for it was a Question upon a Lease for a Year made by the Words *Demise, Grant and to Farm let*, rendering a Pepper-Corn Rent, whether the Release could operate upon it? And it was objected, that the Release was void, because there was no Entry found, nor any Consideration to raise an Use, it being but a Pepper-Corn, which is not sufficient, for it is to be paid out of the Profits of the Land. Chief Just. *North* at first said, the Reservation seemed to him not to be sufficient to raise an Use, because the Use must be raised out of the Land, and united to it before a Rent can result out of it. But *Windham* Just. was of Opinion, that the Reservation, tho' but a Pepper-Corn, would raise an Use. And after Time taken to advise, Judgment was given, that the Word *Grant* would make the Land pass by way of Use; and that the Reservation of a Pepper-Corn is a good Consideration to raise an Use to support a Recovery. Also that this Lease being within the Statute of Uses, there needs be no actual Entry to make the Lessee capable of the Release; for by Virtue of the Statute he shall be adjudged to be in actual Possession. 2 *Mod.* 252, 253.

If the Words *bargain and sell*, in Consideration of Money, be in a Lease; or if in Consideration of Money he does *demise*, &c. there an Use will arise by the Statute of Uses. But if it be only rendering Rent out of the Land, that seems not to be a sufficient Consideration to raise an Use. 1 *Mod.* 262, 263.

Secondly, *With Respect to the Estate and Possession.*

The Person who makes the Bargain and Sale for a Year, must be in the actual Possession at the Time of the Sale, otherwise he cannot make it.

But if he has not the Possession before the Sale, he must enter upon the Land, and seal and deliver the Deed upon the Land to the Bargainee; and this puts the Bargainee into Possession. *Vide Carter* 161. *Cro. Eliz.* 483, 446, 447. *Dalison* 81. 1 *Lev.* 47, 270, 271, 272. 3 *Lev.* 387.

And if a Man is seised in Fee, and makes a Lease for Years, unless he gives Possession, and the Lessee enters, he must raise an Use. 1 *Mod.* 263.

Upon a Lease for a Year, it being within the Statute of Uses, there is no need of an actual Entry to make the Lessee capable of taking the Release, for by the said Statute he is deemed in actual Possession. 2 *Mod.* 252, 253.

If a Lease for Years be made, without any Consideration of Money, the Lessee has not any Estate till Entry; for before Entry he has but an *Interesse Termini*, and no Possession. *Co. Lit.* 278. a. 46. b.

Neither has the Lessor any Reversion till the Lessee's Entry; nor will a Release to him, which enures by way of enlarging an Estate, operate without a Possession; for before a Possession there is no Reversion. *Co. Lit.* 270. a. *Cro. Jac.* 169. pl. 9.

By a Bargain and Sale of the *Reversion and Reversions*, Remainder and Remainders, Rents, Issues and Profits, &c. the Bargainee, by Virtue of the Statute of Uses, becomes possessed, 2 *Co.* 35. b. (it being a Term) without any Attornment, and he may without Attornment distrain or bring an Action of Debt for Rent. *Vaugh.* 51. 8 *Co.* 93. b. 94. a.

Thirdly, *With Respect to Inrolment.*

There needs no Inrolment of a Bargain and Sale for Years, that executes by the Statute without it. 2 *Co.* 35. b. 36. a. 8 *Co.* 93. 2 *Roll. Abr.* 204.

(C) *Things*

(C) *Things requisite in the Release.*First, *With Respect to the Consideration.*

A Release will operate without a Consideration, but it is convenient to put a valuable Consideration in, as Money, or Love and Affection, or Marriage, &c. for since the Statutes of 13 *Eliz. c. 5.* and 27 *Eliz. c. 4.* against fraudulent Conveyances, if a Man makes a voluntary Feoffment, or other Conveyance, without good Consideration, it shall be fraudulent against a Purchaser for a real Consideration, or a Mortgagee, a Judgment or Statute Creditor, for good Consideration.

But it shall be good against the Party, his Executors, Administrators, &c. *Cro. Jac. 271. pl. 3.*

Secondly, *With Respect to the Estate and Possession.*

It has been the great Wisdom and Prudence of the Sages of our Law to provide, that no Possibility, Right, Title or Chose in Action, may be granted or assigned to Strangers, for that would make a Multiplicity of Suits, and great Oppression to the People; neither can they be transferred by Act in Law; but all Rights, Titles and Actions may, by the Prudence and Policy of the Law, be released to the Terretenant, for the Reason of his Repose and Quiet, and for Avoidance of Contentions and Suits. *10 Co. 48. a.*

Wherever a Release is made, it is absolutely necessary that the Releasee be in Possession of *some* Estate at the Time of the Release. *Lit. §. 447.*

1. He who makes a Release of Lands must have an Estate in himself, out of which the Estate may be derived to the Releasee.

2. The Releasee must have an Estate in Possession in Deed or in Law, in the Land whereof the Release is made, as a Foundation for the Release.

3. There must be Privity of Estate between the Releasor and Releasee.

4. And there must be sufficient Words in Law, not only to make the Release, but also to create and raise a new Estate, or the Release will not be good. *Co. Lit. 271.*

If a Man occupies as Tenant at Sufferance, a Release will not enure to him for want of Privity. *Lit. §. 461.*

His being Tenant at Sufferance is not good to vest any Estate in him for want of Privity between them; and a Release to him, as to him who had the Reversion, is void, because he had not any Possession, there being no Estate in him; and an Estate cannot be vested in him in Reversion by this Means, for if Tenant for Life releases to him in the Reversion, it is void by way of Release; and it cannot pass as a Surrender for want of apt Words. *Cro. Eliz. 21. Dyer 251.*

But where a Man is in Possession by Virtue of a Lease at Will, there a Release shall operate by Reason of the Privity between the Parties. And it is vain to make an Estate by Livery of Seisin to another who has the Possession before. *Lit. §. 461, 462.*

Thirdly, *With Respect to the Words in a Release.*

If I let Land for Life or Years, and release all the Right I have without the Word *Heirs*, this at the Common Law is but an Estate for Life; but if I release to him and his *Heirs*, or to him and the *Heirs* of his Body, then this is an Inheritance. *Lit. §. 465.*

Fourthly, *With Respect to Recitals, the Uses, Conditions, Defeasances, Warranties and Covenants.*

A Release may have one or more Recitals in it (which is most commonly the Case) yet it is good without any.

If the Words, *To the only Use and Beboof of the said A. B. and his Heirs and Assigns for ever*, or such like Words, are not in the Release, then the Estate executes by the Statute of Uses, and the Trust is void.

Where

Where no *Use* is declared, it is to the Use of the Releasor and his Heirs.

Where a Release is made to *A. B.* his Heirs and Assigns for ever, to the only *Use* and Behoof of the Releasee, his Heirs and Assigns for ever, in Trust for the said *C. D.* (which said *C. D.* must be a Party to the Deed, and a Consideration of 5 s. to be paid by the Releasee, and the Purchase-Money declared to be paid by *C. D.* the *Cestuy que Trust*) if these Words are not in the Deed, then the Estate executes by the Statute of Uses, and the Trust is void.

In Case of Lease and Release to make a Tenant to the *Præcipe* in a common Recovery, if the Release is made to the Tenant and his Heirs; it must also be to the *Use* of him, his Heirs and Assigns for ever; for the Releasee must be absolute Tenant of the Freehold.

A Release that enures by way of passing away an Estate, &c. may be made upon Condition, or with a *Defeasance*; so as the Condition be contained in the Release, or delivered at the same Time with it. *Co. Lit.* 236.

And altho' there may be Warranties, Covenants, and such Additions in Releases, (which is usually the Case) yet they are good without them.

(D) Of setting aside a Lease and Release, &c.

A. Devise Lands to *J. S.* and his Heirs, but the Will was defectively executed, and afterwards the Heir at Law, in Consideration of one hundred Guineas paid him by *J. S.* the Devisee, by Deed, reciting that this Will was duly executed, released to the Devisee all his Right to the Estate devised; and after that, there being Debts appointed by the Will to be paid, the Disseisee told the Heir, that it would facilitate the Raising of the Money for the Payment of the Debts, if he (the Heir) would join in a Lease and Release of the devised Premises; and thereupon, for fifty Guineas more paid to the Heir, he, together with the Devisee, by Lease and Release conveyed the Premises to *J. N.* and his Heirs, in Consideration of 4000*l.* mentioned to be paid by *J. N.* and a Receipt was given; but in Truth this Purchase-Money was not paid, but *J. N.* was only a Trustee for *J. S.* The Court set aside this Lease and Release, upon Payment of the one hundred and fifty Guineas and Interest; and said, either *suppressio veri*, or *suggestio falsi*, is a good Reason to set aside any Release or Conveyance; and that to recite in a Deed (as in this Case) that the Will was duly executed, when it was not, is *suggestio falsi*, and to conceal from the Heir (as here) that the Will was not duly executed, is *suppressio veri*. 1 Will. 239, 240, 727.

S E C T. XIV.

Of Confirmations.

(A) A Confirmation what, and Confirmor and Confirmer who.

A Deed of Confirmation is the Conveyance of an Estate or Right that one has into Lands or Tenements to another who has the Possession thereof, or some Estate therein, whereby a voidable Estate is made sure and unavoidable; or whereby a particular Estate is increased and enlarged. *Terms de la Ley. Co. Lit.* 295.

And he that makes the Confirmation is sometimes called the *Confirmor*, and he to whom it is made the *Confirmer*.

(B) The Nature and Operation of a Confirmation in general.

A Confirmation operates, (1) either to increase and enlarge the Estate of him to whom it is made from a lesser to a greater, and to give him some new Interest he had not before; or (2) to corroborate and perfect the Estate that was imperfect before; or (3) to change the Quality of it, from an Estate upon Condition, to an absolute Estate or otherwise, for this a Confirmation will do.

In some Cases also it will *extinguish* Rights and Titles of Entry. But it will not make an Estate *good* that is merely *void*, nor *add* nor *take* from an Estate a descendible Quality, and make a Man capable of it that is incapable of himself, or *econtra*.

In some Cases also it will *lessen* and *diminish* Rents or Services: But it *cannot*, neither will it change the Nature of the Service into some other Kind of Service, nor increase it into a greater Service. *Co. Lit.* 295. a. 9 *Co.* 142. *Dyer* 109. *Lit.* §. 539. 7 *H.* 6. 7.

In some Cases a Confirmation is good where a Release is not; as if I let Land to A. for Life, who lets it to B. for twenty Years, who enters: Now if I confirm the Estate of the Tenant for twenty Years, and the Tenant for Life dies during the Term, I cannot enter during the Term. *Lit.* §. 516. *Poph.* 105. The Release cannot operate for want of Privity. *Lit.* §. 517.

Littleton in his Chapter of Confirmation makes eight Diversities between a Confirmation and a Release; and therein puts eight different Cases wherein a Confirmation and a Release have the like Operation in Law. *Vide Lit.* §. 516, 517, &c. *Co. Lit.* 296, 297, &c.

But many of the Curiosities of some Kinds of Confirmations and Releases are supplied by *Fines to Uses*, by *Bargain and Sale and Deed inrolled*, and by *Lease and Release*. *Wood's Inst.* B. 2. c. 3.

The Acceptance of Rent will make a Confirmation of a Lease. 2 *Danv. Abr.* 128.

And if a Man leases for Life, reserving Rent upon a Condition of Re-entry; and if after the Condition is broken by Non-payment of the Rent, the Lessor distrains for the said Rent, this Act shall be a Confirmation of the Lease, so as he cannot enter. *Ibid.*

A Confirmation shall not discharge a Condition, but it is only to bind the Right of him who made it in the Possession of him to whom it is made. *Poph.* 51.

(C) Kinds of Confirmations.

THERE are two Kinds of Confirmations, *viz.* a Confirmation *implied* or in Law, which is when the Law by Construction makes a Confirmation of a Deed made to another Purpose, and a Confirmation *express* or in Deed, which is when the Act done or Deed made is intended for a Confirmation. And both these are always in Writing (Confirmations not in Writing are void by Statute of Frauds and Perjuries, 22 *Car.* 2. c. 3.) The latter is properly called a Deed or Instrument of Confirmation, and is made after this Manner: *Know all Men, that I A. of B. have ratified, approved and confirmed C. of D. the Estate and Possession which I have of and in one Messuage, &c. with the Appurtenances in F. Or it may be by Indenture, &c.*

A Confirmation is also distinguished by its Effects; for sometimes it tends and serves to confirm and make good a wrongful and defeasible Estate, or to make a conditional Estate absolute; and then it is said to be *Confirmatio perficiens*. And sometimes it tends and serves to increase and enlarge a rightful Estate, and so to pass an Interest; and then it is called *Confirmatio crescens*. And sometimes it tends and serves to diminish and abridge the Services whereby the Tenant holds; and then it is called *Confirmatio diminuens*. *Lit.* §. 515. *Co. Lit.* 295. a. 301. b. 9 *Co.* 142. *Plow.* 140.

(D) Of a Confirmation confirming or altering the Quality of the Estate of him to whom it is made.

A Confirmation binds the Right of him who makes it, but does not alter the Nature of the Estate of him to whom it is made. *Poph.* 51.

These Things are requisite in every good Confirmation tending to confirm an Alteration, or alter its Quality:

1. There must be good and capacitated Parties, and a Thing to be confirmed, as in other Grants, and the Deed must be well sealed, &c.
2. There must be a precedent rightful or wrongful Estate in him to whom the Confirmation is made; at least he must have Possession of the Thing confirmed, else there is no Foundation for the Confirmation to work upon.

3. The Confirmor must have such an Estate and Property in the Thing whereby Confirmation is made, as that he may thereby be enabled to confirm the Estate, else the Confirmation is void; as if the Heir of Disseisee, during the Life of Disseisee confirm to the Disseisor, this is no Confirmation.

4. The precedent Estate must continue till the Confirmation is come; as in all Cases of voidable Estates the Confirmation must be before the Estate, or made void by Entry.

5. The Estate precedent, and that which is to be confirmed, must be lawful, and not prohibited by any Act of Parliament: Therefore if a Spiritual Person makes a Lease not warranted by the Statutes, as a Prebend, or the like, the Confirmation of the Dean and Chapter will not help or amend it.

6. There must be apt Words in the Deed or Instrument the most proper for the Purpose, as before mentioned.

I. *As to the Parties, and a Thing to be confirmed, sealing the Deed, &c.* see before Chap. 4. and the various Sections of this Chapter.

II. As to the second Article, *That there must be a precedent rightful or wrongful Estate in him to whom the Confirmation is made in his own or in another's Right, or at least he must have the Possession of the Thing whereof the Confirmation is to be made, that may be as a Foundation for the Confirmation to work upon,* take the following Examples.

If a Feoffee on Condition makes a Feoffment over, and the Feoffor confirms his Estate to him to whom the second Feoffment is made, and his Heirs; this is a good Confirmation to make his Estate absolute. 1 Co. 146. 9 Co. 142. 7 H. 6. 7.

And if Lessee for Life makes a Feoffment in Fee, or Lease for Years, and the first Lessor confirms this second Estate; this is a good Confirmation. Lit. §. 516.

And if one disseises me of Land, I may after confirm the Estate of the Disseisor, or of his Heir, if he be dead; or of his Feoffee, if he has aliened it; and this will make his Estate good for ever. And if the Disseisor makes a Lease for Life or Years of it, I may confirm the Estate of the Lessee, and this will make it good for the Time. 9 Co. 142. 6 Co. 15. Perk. §. 86. Lit. §. 518, 521. 11 H. 7. 28, 29.

And if one makes a Lease for Life absolute, or a Feoffment in Fee, or Lease for Life on Condition; or be disseised of Land, and the Lessee for Life, Feoffee, or Disseisor, grants a Rent out of the Land in Fee, and the Lessor, Feoffor or Disseisee confirms the Estate of the Grantee; this makes good the Grant for ever. And so also if the Heir of a Disseisor that is in by Descent grants a Rent-Charge, and the Disseisee confirms it; this is a good Confirmation. And if an Infant makes a Lease for twenty Years, and the Lessee makes a Lease to another for all or part of the Time, and the Infant at his full Age confirms this second Lease; this is a good Confirmation, and perfects the Lease; for it is a Rule, *That which I may defeat by my Entry, I may confirm by my Deed.* 1 Co. 144. Lit. §. 527, 529, 547. 11 H. 7. 28. Co. Lit. 300.

But if there be no precedent Estate on which the Confirmation may work, or the Estate be such an Estate as is merely void, then is the Confirmation void, and cannot take Effect as a Confirmation; as for Example, If a Man assigns Dower to a Woman that has nothing to do with it, or a Court that has not Power makes Leases by Commission, or an Estate that was upon Condition is avoided by Entry, or a Lessee surrenders, or a Disseisee enters upon a Disseisor, and afterwards he that has the rightful Estate confirms their Estates so defeated and gone; these Confirmations are void: *Debile fundamentum fallit opus.* And a Confirmation to him that has nothing in the Land is void. And hence it is that if one confirms all his Estate that he has granted to another, when in Truth he has granted none at all, this is void. Co. Lit. 295, 301. Dyer 263.

And so also it is if there be an Estate and no Possession: As if a Disseisor makes a Lease for Years to begin at Michaelmas, and before the Day the Disseisee confirms the Estate of the Lessee for Years; it is said this is not a good Confirmation; *sed quere.* 4 H. 7. 10.

III. As to the third Thing requisite, *viz. That the Confirmor must have such an Estate and Property in the Thing whereof the Confirmation is made, as he may be thereby enabled to confirm the Estate to the Confirmee, as the Lessors, Feoffors and Disseisees in the Cases before have, otherwise the Confirmation is void.* Dyer 109.

Observe, that if the Heir of the Disseisee during the Life of the Disseisee confirms to the Disseisor; this is no good Confirmation to perfect his Estate altho' the Disseisee dies, and the Right of the Land descends to his Heir afterwards. 19 H. 6. 62.

So if Land be given to *A.* and *B.* his Wife, and the Heirs of their Bodies issuing, the Remainder in Fee to *A.* and *A.* levies a Fine with Proclamations, and dies, and she within five Years enters and claims, and after the Conusee confirms the Estate made by the first Gift to the Wife, to have and to hold according to the same; this Confirmation is to no Purpose. 9 Co. 138.

So if Lessee for Life makes a Lease for thirty Years, and after he in Reversion and the Lessee for Life leases for sixty Years; in this Case he cannot confirm the Lease for thirty Years, because he has granted it before for sixty Years. Co. Lit. 296.

And hence it is also that the Confirmation by one Jointenant of the Estate of his Companion works nothing, for their Estates are equal, and each has Interest in the whole Land. Fitz. Confirmation 15.

And yet if one Jointenant confirms the whole Land to his Companion, to have and to hold the Land to him and his Heirs; this shall amount to a Grant, and so will be good to pass his Moiety. Lit. §. 523. Dyer 263.

And hence it is also, that if a Man grants a Rent-Charge out of his Land to another for Life, and then confirms his Estate without any Clause of Distress, (for by a Clause of Distress a Grant of a new Rent may be made) to have and to hold to him in Fee-simple or Fee-tail; that this is void, for the Confirmor has no Reversion of the Rent in him.

IV. As to the fourth Thing requisite, viz. *That the precedent Estate must continue until the Confirmation comes, as in all the Cases of voidable Estates made, the Confirmation must be before the Estates be made void by Entry, &c. or otherwise the Confirmation will be void.* Observe, if a Lessee for Life or Years surrenders, or the Disseisee enters upon the Disseisor, and after the Lessor or the Disseisee confirms the Estate of the Lessee or Disseisor; this Confirmation comes too late.

V. As to the fifth Thing requisite, viz. *That the Estate precedent, and that which is to be confirmed, must be lawful, and not prohibited by an Act of Parliament,* Observe, if a Spiritual Person, as Prebend, or the like, makes a Lease not warranted by the Statutes; the Confirmation of the Dean and Chapter will not help nor amend it. And if Tenant in Tail makes a voidable Lease, and after confirms it himself, this is voidable still. 5 Co. 15. Lit. §. 607.

VI. As to the sixth Thing requisite, viz. *That there must be apt Words of Confirmation in the Deed or Instrument,* Note, That altho' the Words, *I have confirmed, ratified and approved,* be the most significant and proper Words to make this Conveyance, yet such as are made by other general Words may make a good Confirmation: And therefore it is agreed, that a Deed made by the Words, *Hath given, granted or demised,* may make a good Confirmation.

And therefore that if the Disseisee, Coparcenor or Lessor, makes a Deed of the Land by the Words, *Hath given or granted* to the Disseisor, other Coparcenor, or Lessee for Life, and delivers the Deed; this is a good Confirmation without Livery of Seisin. Also if a Feoffment be made to *A.* to the Use of *B.* and his Heirs upon Condition, and before the Condition broken the Feoffor and *B.* join in the Grant of a Rent-charge, and after the Condition is broken; the Law interprets this is a good Grant from *B.* and a good Confirmation of the Feoffor without any Words of Confirmation. So if Tenant for Life grants a Rent to him in Reversion, and he by Deed grants it to another and his Heirs in Fee; the Law construes this a good Grant and a Confirmation also. Lit. §. 531, 532. 10 Ed. 4. 3. Co. Lit. 295. Dyer 116. 1 Co. 147. 5 Co. 15.

And in these Cases of Confirmations of Estates, if it be by the Disseisee to the Disseisor, it is good without any Word of *Heirs*; as if the Disseisee confirms the Estate of the Disseisor, or confirms the Land *unto him*, and says *not to him and his Heirs*; this is an effectual Confirmation to him and his Heirs for ever. And if a Lessee for Life, or a Disseisor, makes a Lease for Life or Years, &c. and he in the Reversion, or the Disseisee, confirm their Estates, and not the Land, and without any *Habendum* or Limitation of Estate; this is good for so long as the Estates continue. Lit. §. 519. Co. Lit. 296.

But it is most safe always to express the Estate, to say, *To have and to hold the Land to him and his Heirs, or for Life, &c.* as the Agreement is. If Lessee for Life grants a Rent to one and his Heirs out of the Land, and the Lessor confirms the Estate, or this Rent-charge; this makes the Estate of the Rent sure. And so also if he confirms the Rent, and says, *To have and to hold to him and his Heirs*; this is a good

good Confirmation. But if he confirms the Rent, *To have and to hold to him in Fee*, without naming his Heirs; hereby his Estate is not made better. 1 Co. 147.

(E) *Of a Confirmation enlarging the Estate of him to whom it is made.*

IF the Lessor confirms the Estate of his Lessee for Life with this Clause, *To hold without Impeachment of Waste*; this is a good Confirmation to change the Quality of the Estate, so far as to make it dispunishable of Waste. So if the Lord Paramount confirms the Estate of the Mesne with Clause of Acquittal. And so if Lessee for Years, or for another's Life, be without Impeachment of Waste, and the Lessor confirms to him for his own Life, and omits that Clause; hereby this Privilege is gone, and the Estate is become punihable for the Waste. 9 Co. 139. 8 Co. 76. Dyer 10. F. N. B. 136.

A Confirmation *Crescens*, must have all the Qualities of a Confirmation which confirms or alters the Quality of the Estate of him to whom it is made, which are before mentioned; and there must be also in this Case a Privity between the Confirmor and the Confirmer; and then it may enlarge the Estate of him to whom it is made, as from an Estate at Will to an Estate for Years, or to a greater Estate; from an Estate for Years to an Estate for Life, or to a greater Estate; from an Estate for Life to an Estate in Tail or in Fee; and from an Estate-tail to an Estate in Fee; and these Confirmations are good. But in all these Kinds of Confirmations, Care must be had of the Manner of Penning them, and that in every such Deed there be a Limitation of the Estate, *i. e.* that these Words be inserted, *To have and to hold the Tenements, &c. to him and his Heirs, or to him and the Heirs of his Body, or to him for Term of Life or Tears*, as the Agreement is; for if a Lessee for Life makes a Lease for Years, and then the Lessee for Life and he in Reversion confirms the Land, *To have and to hold to him for Life, or to him and his Heirs*; these Words will make the Estate increase. 9 Co. 142. 6 Co. 15. Co. Lit. 305. Dyer 145, 263, 296. Lit. §. 533, 532, 523.

But if the Confirmation be made to the Lessee for Life or for Years of his Term or Estate, and not of the Land; as when he confirms his Estate, *To have and to hold his Estate, to him and his Heirs*; this does not increase the Estate. And yet if he confirms the Land, *To have and to hold the Land to him and his Heirs*; this will increase the Estate. *Et sic de similibus.* Lit. §. 524, 545. Plow. 540.

If the Husband has an Estate of Land for Life or Years in the Right of his Wife, or to them both for Life, and a Confirmation is made to him alone of his Estate, or of the Land, *To have and to hold the Land to him and his Heirs*; this is a good Conveyance of the Fee-simple to him after the Death of his Wife. And if I let Land to a Feme Sole for the Term of her Life, who takes a Husband, and after I confirm the Estate of the Husband and Wife, *To have and to hold for the Term of their two Lives*; this is good, but it shall enure only to enlarge his Estate for the Term of his Life, if he survives his Wife. But if one leases to another for Life, and after confirms the Estate of the Lessee to him and his Wife for the Term of their two Lives; this is void as to his Wife. Co. Lit. 299. Plow. 160. Lit. §. 525. Fitz. Confirmation 7, 17.

If one grants a Rent-charge out of his Land for Life, and after the Grantor confirms the Estate of the Grantee in the Rent without any Clause of Distress, *To have and to hold to him in Fee-simple or Fee-tail*; this Confirmation is not effectual to enlarge the Estate. But if a Man be seised of an old Rent-charge or Rent-service, and grants the same first for Life, and after confirms the Estate of the Grantee in Fee-simple or Fee-tail; this is good, and will enlarge the Estate accordingly. Lit. §. 548, 549.

If a Tenant for Life grants a Rent out of the Land to one and his Heirs during the Life of the Lessee for Life, and after the Lessor confirms the Rent to the Grantee and his Heirs; the Estate is not hereby enlarged, but when the Tenant for Life dies, the Rent shall cease. 1 Co. 147.

This Kind of Confirmation may be made by the same Words as the former, *viz.* by the Words *give, grant or demise*. But neither of these may be made by the Words *Surrender, Release, Exchange*, or the like; for these are peculiar Words destined to a special End, being proper and peculiar Manner of Conveyances. And yet

yet if I that am a Lessor say to my Lessee for Years by my Deed, *I will that you shall hold the Land for your Life*; this is a good Confirmation to increase the Estate by the Words *I will* only. So if I grant to my Lessee for Years, that he shall hold the Land for Term of his Life; this without any other Words is a good Confirmation. *Co. Lit. 301. Fitz. Confirmation 23.*

(F) *Of a Confirmation diminishing or abridging Services, &c.*

BY a Confirmation the Lord may confirm the Estate of his Tenant to hold at Common Law where before he held in Antient Demesne, and such a Confirmation is good. But such a Confirmation as is to hold by new Services, as a *Rose* for Money, or the like, is not good for that Purpose. And in this Case there must be also a Privy. And therefore if there be Lord, Mesne and Tenant, and the Lord confirms the Estate of the Tenant to hold by less Services; this is void. And if the Lord confirms to his Tenant after he is disseised before his Entry, to hold by less Services; this is void. *Lit. §. 538. 9 Co. 142.*

(G) *How to make a Deed of Confirmation.*

1. **I**T may either be made by Deed Poll or by Indenture.

Poll or Indenture.

2. It is good without any Consideration expressed in the Deed.

3. The Words, *Have granted, ratified and confirmed*, are usual Words; and the Words, *Dedi, Concessi & Confirmavi*, are as good, and work without Livery. *Lit. §. 531. Co. Lit. 301. Lit. Rep. 270. 2 Saund. 96, 97.*

Consideration.
Words of Confirmation.

If the Words be, *Volo that the Lessee for Years shall have for his Life*; this is a good Confirmation. *Lit. Rep. 270.*

And the Word *Demise* may amount to a Confirmation. *Lit. Rep. 270. Plow. 187. Dyer 178.*

4. It is necessary in every Confirmation to have the Words, *To have and to hold, &c.* in Fee, Fee-tail, for Life or Years, as the Case requires. *Lit. §. 523.*

Habendum.

In a Deed of Confirmation it is proper to recite in the Premises the Estate of the Tenant which is to be confirmed, and also the Estate of him that is to confirm, and to express the Condition thereof, if there is any. *1 West's Symb. §. 457.*

(H) *Where the Confirmation of some Persons is needful to perfect the Grant of others, or not; and how it may be done.*

IF a Bishop, Dean, Archdeacon, Prebend, or the like, makes any Lease of the Land they have in the Right of their Bishoprick, Deanry, Archdeanry or Prebendship, not warranted by the Statute of 32 H. 8. and within the other Statutes; this Lease must be confirmed by the Dean and Chapter by their common Seal; and if there be two Chapters, it must be confirmed by them both, or otherwise it is not good. But if the Lease be such a Lease as is warranted by the Statutes, the Bishop may make it without the Confirmation of the King, the Patron and Founder of Bishopricks, or the Dean and Chapter; and so also it seems of the Rest. And a Corporation Aggregate, as Dean and Chapter, Master and Fellows, and the like, may grant without any Confirmation of the Founder, and this Grant will be good. *Co. Lit. 300, 301. 10 Co. 62. 5 Co. 3. Dyer 145, 273, 349, 338, 339, 61.*

If a Bishop, &c. grants an antient Office belonging to his Bishoprick, altho' it be but for the Life of the Grantee, yet it must be confirmed by the Dean and Chapter, otherwise it is not good. *10 Co. 62.*

If a Parson or Vicar had made any Lease for longer Time than his own Life, it must have been confirmed by the Patron and Ordinary: But at this Day altho' it be confirmed by the Patron and Ordinary, yet the Lease is good for no longer than during the Parson's ordinary Residence, except it be impropriated. *Dyer 52. Stat. 13 Eliz. c. 20.*

If a Parson leases his Rectory for sixty Years, and this is confirmed by the succeeding Bishop, and succeeding Patron also, neither of them being Bishop or Patron at the Time of granting of the Lease, it is good. *Cro. Car. 38. pl. 3.*

If Tenant for Life grants a Rent-charge to J. S. and his Heirs; in this Case he in Reversion must confirm it; otherwise the Grant of the Rent will be good for no longer than the Life of the Tenant for Life. 1 Co. 147.

Where a Man has an Interest in any Lands, Tenements, Rents, Commons, Fe-lons goods, or the like, by any Grant of any of the Kings of the Realm, he need not have the Confirmation of any or of every succeeding King. Also grants of Fairs, Markets, Warrens, and the like, made by one King, will be good in Law against his Successors without any Confirmation. But all such as have any judicial or ministerial Offices, Commissions and Authorities derived from the King, must have the Confirmation of every succeeding King, otherwise they may lose them. 8 Co. 167. Dyer 277, 327. Kelw. 145, 188.

(I) *Where a Confirmation may be good for Part of the Estate, or for Part of the Thing, or not.*

A Confirmation by apt Words in case of a Lease for Years may be for Part of the Time, but in case of a Freehold it cannot be so. And so also it may extend to Part of the Thing before in Estate. And therefore if a Disseisor, Tenant in Tail, Husband of the Land he has in the Right of his Wife, or a Lessee for Life makes a Lease for Years, and the Disseeisee, Issue in Tail, Wife, or Lessor makes a Confirmation of all the Land for Part of the Time, or of Part of the Land for all the Time; this Confirmation is good. But if any such Person makes a Lease for Life, Gift in Tail, &c. the Disseeisee cannot confirm Part of the Estate but he must confirm all. And therefore if he confirms his Estate for one hour, it is a Confirmation of the whole Estate. And so also if he confirms the Land to the Disseisor himself but one Hour, one Week, one Year, or for his Life, &c. this is a good Confirmation of the Estate for ever. And if it be a Lease for Years that is confirmed, care must be had to the Manner of the Confirmation, for if the Confirmation be of the Estate or the Term for one Hour; this is a good Confirmation for the whole Time: And therefore the Confirmation must be had of the Land, *To have and to hold for Part of the Term*; and being so made it may be good for that Time only, and no longer. Lit. §. 519, 520. Co. Lit. 297. 3 Co. 81, 82.

(K) *The Force and Virtue of a Confirmation, and how it shall enure and be construed and taken.*

I F I make Feoffment on Condition, and before the Condition broken I confirm the Estate of the Feoffee absolutely; this will not extinguish the Condition. And yet if the Condition be broken first, so that my Entry is lawful; the Confirmation will extinguish the Condition. And if the Feoffee makes a Feoffment over absolutely to another, and I confirm the Estate of the second Feoffee whether it be before or after the Condition broken; by this the Condition is discharged. 11 H. 7. 29. 1 Co. 146.

If the Lord confirms the Estate of his Tenant in the Tenements, or one that has a Rent, Common, or Profit out of Land confirms to the Tertenant his Estate; in these Cases notwithstanding this Confirmation the Seignior, Rent, Common, &c. continues, and this shall not enure to extinguish it. Lit. §. 535, 536, 537.

If the Disseeisee and a Stranger disseises the Heir of the Disseisor, and the Disseeisee confirms the Estate of his Companion; this shall not enure to extinguish the suspended Right of the Disseeisee, but when the Heir of the Disseisor shall re-enter it shall be revived. And if the Grantee of a Rent-charge, and a Stranger disseise the Tenant of the Land, and the Grantee confirms the Estate of his Companion; this shall not enure to the Rent suspended to extinguish it, but after the Re-entry of the Tenant, the Rent shall be revived. Co. Lit. 298.

If I have an Estate in Land for my Life, and he in Reversion confirms the Estate to me and my Wife for the Term of our Lives; this shall enure only as a Confirmation of my Estate, and not so as to give any Estate to my Wife. But if I have a Lease for Life or Years in right of my Wife, and he in the Reversion confirms the Estate to me and my Wife, *To have and to hold to us for our Lives*; this shall enure not only to confirm the Estate, but also to create an Estate to me after my Wife's Death: And in Case of a Lease for Years, it makes our Estate joint; but in case of a Lease

Lease for Life, I shall take by Way of Inlargement of Estate for my Life after my Wife's Death; and if in this Case the Confirmation be to me and my Wife, *To have and to hold the Land to us two and our Heirs*; this shall enure to us in Fee-simple as Jointenants.

If Land be let to Husband and Wife, *To have and to hold the one Moiety to the Husband for his Life, and the other Moiety to the Wife for her Life*, and the Lessor confirms to them both their Estate in the Land, *To have and to hold to them and their Heirs*; in this Case as to the one Moiety, it enures only to the Husband and his Heirs, but as to the other Moiety they shall be Jointenants. And yet if such a Lease for Life be made to two Men by several Moieties, and the Lessor confirms their Estates in the Land, *To have and to hold to them and their Heirs*; by this they are Tenants in Common of the Inheritance. *Co. Lit. 299.*

If the Disfeisee confirms the Estate of the Disfeisor, *To have and to hold to him and his Heirs of his Body engendred*, or *To have and to hold to him for Term of his Life*; this shall enure to him as a Fee-simple, and shall confirm his Estate for ever. *Lit. §. 419.*

If my Disfeisor makes a Lease for Life, the Remainder over in Fee, and I confirm the Estate of the Tenant for Life, this shall not enure to, nor avail him in Remainder. And if the Disfeisor makes a Gift in Tail, the Remainder to the right Heirs of the Tenant in Tail; this shall not extend to the Fee-simple, no more than if the Disfeisor makes a Gift in Tail, the Remainder for Life, the Remainder to the right Heirs of the Tenant in Tail, and the Disfeisee confirms the Estate of the Tenant in Tail; for this shall extend only to the Estate-Tail, and not to the Remainder for Life or in Fee. But if the Disfeisee in the first Case, confirms the Estate of him in the Remainder; this shall enure to and avail the Tenant for Life. And so if a Disfeisor makes a Lease for Life and keeps the Reversion, and after the Disfeisee confirms to the Disfeisor; this shall enure to the Tenant for Life. And so if a Disfeisor makes a Lease for Life to *A.* and *B.* and the Disfeisee confirms the Estate of *A.* this shall enure to *B.* and make his Estate good also in the other Moiety. And so if there be two Disfeisors, and the Disfeisee confirms the Estate of one of them without saying more, this shall enure to them both. But if the Confirmation be of the Land, *To have and to hold the Land to one*; in this Case it may enure to him alone. So if a Disfeisor infeoffs *A.* and *B.* and the Heirs of *B.* and the Disfeisee confirms the Estate of *B.* altho' it be but for his Life; yet this shall enure to both, and to the whole Fee-simple. *Co. Lit. 297, 298.*

If a Lease be made for Life to *A.* the Remainder to *B.* for Life, and the Lessor confirms their Estates in the Land, *To have and to hold to them and their Heirs*; this shall enure as to the one Moiety to *A.* in Fee after the Death of *B.* and as to the other Moiety in Fee to *B.* after the Death of *A.* *Co. Lit. 299.*

If Lands be given to two Men, and the Heirs of their two Bodies begotten, and the Donor confirms their Estates in the Land, *To have and to hold the Land to them and their Heirs*; this shall enure to them as a joint Estate for their Lives, and after for several Inheritances. *Co. Lit. 299.*

If the Lessee for Life, or the Disfeisor, makes an absolute Lease for Years, and he in Reversion, or the Disfeisee confirms the Estate of the Lessee for Years; this makes the Lease good for all the Time. So if the Disfeisor makes a Lease for Life, and the Disfeisee confirms the Estate of the Lessee for Life; this makes the Estate good for the Life. And if he in Reversion confirms the Estate of the Termor but *an hour*; this makes it good for all the Term. And if an Estate for Life or in Fee be confirmed but for *one hour*, it is a good Confirmation for all the Estate. And if the Disfeisee confirms the Estate of the Disfeisor, *To have and to hold for one Hour, Year, or for Life, or in Tail*; this is a good Confirmation for ever, and makes his Estate unavoidable. And yet if the Disfeisee confirms the Land, *Habendum the Land for Life, or Tail, &c. contra. Lit. §. 516, 519, 520, 521, 541. 5 Co. 79.*

If a voidable Lease be made for forty Years, and the Lessor confirms the Term for twenty Years; this is a good Confirmation of the whole Term; but if he confirms the Land for twenty Years, it may be good for that Time only, and no longer; wherein as in divers other Cases before observed, that the very Words whereby the Confirmation is made, are much to be heeded, for *Parols font plea. Dyer 52, 339. 5 Co. 81.*

If Tenant in Tail or for Life of Land, lets it for Years, and after confirms the Land to the Lessee for Years, *To have and to hold to the Lessee and his Heirs for ever*; by

by this the Lessee has only an Estate for Term of the Life of the Tenant in Tail, or for Life, and therein his Lease for Years is extinct. *Lit. §. 606, 607, 610.*

If Tenant for Life grants a Rent to another and his Heirs during the Life of the Tenant for Life, and the Lessor confirms to the Grantee and his Heirs; this shall be construed to be an Estate for Life only, and no Inlargement of the Estate. But if Tenant for Life grant a Rent-charge in Fee, and the Lessor confirms it, this shall be construed to be a Confirmation of the Fee-simple. *1 Co. 147. Co. Lit. 301.*

A Man, in Consideration of natural Love and Affection which he bore to his Son, bargained and sold, gave, granted and confirmed, the Land to him and his Heirs; the Deed was inrolled, (*But Note, the Inrollment signified nothing in this Case*): The Question was, whether this Land would pass, and how? Thereupon it was resolved that it should not pass by Way of Use, unless Money was paid, or the Estate executed; but because the Son was then in Possession, it was held to enure by Way of Confirmation. *Cro. Jac. 127. pl. 17.*

S E C T. XV.

Of Assignments.

(A) Assignment what, Assignor and Assignee, who.

AN Assignment is the Setting over, or Transferring a Right or Interest which one has in a Thing to another.

The *Assignor* is he who makes the Assignment, and the *Assignee* is he to whom it is made.

An Assignee is he to whom the Thing is appointed or assigned, to be occupied, used, paid or done; and is always such a Person, who has the Thing so assigned in his own Right and for himself; *i. e.* the Interest is vested in him.

(B) Things requisite in an Assignment.

THERE needs no Consideration in an Assignment by Tenant for Years; for the Tenure and Attendance, and being subject to Forfeiture and Payment of Rent, (if there were any) is sufficient to vest an Use in the Assignee. *1 Mod. 263.*

An Assignment is usually made by the Words *have given, granted, assigned and set over.* See before p. 248.

In an Assignment it is necessary to have *Covenants.*

First, On the Assignor's Part, viz. to save harmless of former Rents, Grants and Incumbrances, and for the Delivery of Evidences and Deeds; that the Assignor is Owner in Possession, and has Power to grant and assign; that the Assignee may quietly enjoy, to make further Assurance, &c.

Secondly, On the Assignee's Part, viz. to pay the Rent, to perform Covenants, &c. See before Chap. 4. Of Things necessarily incident to a good Deed.

(C) Of what an Assignment may be made, or not.

THERE may be an Assignment of Lands given in Fee for Life or Years; of a Mortgage for Years forfeited, the Mortgagor being made a Party and confirming the Assignment; of an Annuity, Rent-charge, Judgment, Statute, &c. *Wood's Inst. B. 2. c. 3.*

Where a Person has a Term for Years, he cannot grant and assign the same over, unless he has actual Possession; but if he has not, then it must be by sealing of the Deed upon the Ground. *Carter 161. Cro. Eliz. 483, 446, 447. 1 Lev. 47, 270, 271, 272. 3 Lev. 387. Dalison 81.*

If a Devisee in Remainder of a Term articles for a valuable Consideration to sell it; this is a good Assignment in Equity, and the Devisee in Remainder is afterwards but a Trustee for the Purchaser. *1 Will. 574.*

An *Authority* or *Trust* cannot be assigned over unless it be granted to him and his Assigns. *Perk.* §. 99. *4 Inst.* 85. *Finch* 16, 17, 31. And then it must be in Writing.

A Right of Entry, or *Thing in Action*, or Cause of Suit, or Title for Condition broken cannot be granted or assigned over.

A *Thing in Action*, as a Bond, a just Debt, &c. is vulgarly said to be assignable over; and Assignments are sometimes made of them; but the very Form used in such Cases (except in Cases of Bankrupts, *ut infra*) shew them not to be assignable in their Nature, for as the Assignee cannot sue for the same in his own Name, a Letter of Attorney is added in the same Deed, empowering the Assignee to receive the Debt, &c. or to sue for it in the Name of the Assignor; so that in Reality it amounts to little more than a Letter of Attorney to sue in his Name.

But the Paper, Parchment and Wax of a Bond, &c. may be assigned over, and the Assignee may keep or cancel it. *Co. Lit.* 232. *a. b.*

Altho' a *Chose in Action* cannot be assigned to a common Person, yet it may to the King, and he or his Grantee or Assignee may sue for it in their own Name. *1 Will.* 252, 253. *Vide Lucas* 245.

Altho' a *Chose in Action* is not assignable (*i. e.* to common Persons; *see before*) at Law, yet it is in Equity, where the Husband may assign it alone, as he may any other Part of the Wife's personal Estate. *2 Will.* 608.

By a Settlement of Lands, a Sum of Money was to be raised for Daughters Portions; one of the Daughters married and died before her Portion was paid, whereupon the Husband took Administration to her, and made an Assignment of all his Interest in that Portion to his Son whom he had by a former Wife: The Son by this Title, after his Father's Death, sued in Equity for the Money. Defendant insisted that tho' *Choses in Action* might be assigned in Equity, on a Consideration paid by the Party who had the Interest, and were recovered there by the Assignee; yet in this Case the Assignment being by an Administrator, and not the Person who had it in his own Right, this had never been allowed good. *Per Lord Keeper*: There is a great Difference between the Assignment of the Party and of the Administrator, where the Administrator is a Stranger, and has no Right but merely by the Administration: But here the Administration was *pro forma* only, and the Administrator had a Right to the Money as the Portion or Provision for his Wife; and it was disposable by the Husband as other Money. *Decreed pro Quer.* *1 Chan. Ca.* 169, 170.

A Possibility is not assignable in Equity, for that which is a Rule of Law (the Lord Keeper said) is a Rule in Equity. *2 Vern.* 563. But it may be released; for it is unreasonable there should be an Incumbrance on a Man's Estate, that can no way be discharged. *Ibid.*

Yet an Assignment of a *contingent Interest* which the Husband has in Right of the Wife, or a Possibility of a Term tho' not good strictly by way of Assignment, yet will operate as an Agreement where it is for a valuable Consideration. *2 Will.* 608.

A. possessed of a Term settled it in Trust to the Use of himself and his Wife for Life, Remainder to the Use of such Issue of the Husband and Wife as he should by Will appoint: He by Will settled it on B. his Son, who in the Life-time of his Mother assigned and released it to C. to whom the Trustees likewise assigned their Interest; and it was held by the Court, with the Advice of the Judges, that tho' a Grant of a future Possibility is not good in Law, yet a Possibility of a Trust in Equity may be good; and that it was the rather so in this Case, because the Trustees joined in it. *1 Chan. Rep.* 29.

Matters of *Ease* and *Pleasure* granted to a Person cannot be assigned, as to go to Church over my Ground, to dine at my Table, &c. But generally speaking, Matters of *Profit* may be granted over.

The Estates of Bankrupts may be assigned over by the Commissioners, and the Assignees may bring Actions relating thereto (as to recover their Debts, &c.) in their own Names. *Stat. 1 Jac. 1. c. 15.*

The Judge's Certificate for taking and prosecuting Felons to Conviction, may be assigned over once. *Stat. 10 & 11 W. 3. c. 23.*

Bills of Exchange are assignable over.

And so are all Notes whereby any Person shall promise to pay another, or Order, or Bearer, the Money mentioned in such Note. *Stat. 3 & 4 Ann. c. 9.*

Bail-Bonds may be assigned over by the Sheriff, &c. *Stat. 4 & 5 Ann. c. 16.*

And Exchequer Orders, Stocks, &c. may be assigned or transferred from one to another by different Statutes.

(D) *How far a Grantor or a Grantee, Lessee, or his Assigns, are chargeable, before or after an Assignment made, with the Rent, &c.*

IF a Lessee assigns over his Term, the Lessor may charge the Lessee or Assignee as he pleases; but if he accepts the Rent of the Assignee (knowing of the Assignment) he has determined his Election, and cannot afterwards have an Action of Debt against the Lessee for the Rent due after the Assignment. But a Lessor shall not be forced to take the Assignee for his Tenant. 3 Co. 23, 24, 64.

By such Acceptance of the Rent the Lessor extinguishes the Privity of the Contract. But after such Acceptance he may have an Action of Covenant for his Rent. 1 Saund. 240, 241. Cro. Jac. 521, 334. Cro. Car. 518. & vide 3 Lev. 233. Carth. 178.

And altho' he refuses to accept the Assignee as his Tenant, yet if he thinks proper he may afterwards charge him in an Action for the Rent. 2 Saund. 181.

And if a Lease be made for Years rendring Rent, with a Condition, that if the Lessee assigns his Term, the Lessor may re-enter; and the Lessee assigns, the Lessor receives the Rent of the Assignee, (not knowing of the Assignment) it does not exclude the Lessor of his Entry; for the Lessee shall not take Benefit of his own Fraud. 3 Co. 64.

And if a Lessee for Years assigns over his Term and dies, his Executors are not chargeable for the Rent due after his Decease. Noy's Max. 71.

If a Lessee covenants for himself and his Executors (not Assignees) to repair the House; Covenant lies against the Assignee tho' not named, it being for the Support of the Premises demised. 5 Co. 24. b.

Lessee covenanted for himself and his Assigns to rebuild a House before such a Time, which he did not, but after the Time expired he assigned the Term; this Covenant does not bind the Assignee, as it was broken before the Assignment. 1 Salk. 199. Goulf. 129. Cro. Eliz. 457. Moor 399, 400.

An Assignee of a Lease rendring Rent, after Enjoyment of Part of the Term, made an Assignment over for the Residue of his Term; on a Bill brought against him to account for the Rent for such Time as he held the Land, it was decreed, that he should be chargeable for such Time as he received the Profits. 1 Vern. 165.

In Strictness of Law in this Case there was no Privity of Contract to charge the Assignee; but by assigning his Interest he cannot discharge himself of the Rent without tendring the Arrears, and giving Notice of the Assignment, for till then he is liable in an Action of Debt. 1 Lev. 215. and see above.

So in an Action of Covenant likewise for the Rent due before the Assignment. 1 Salk. 81.

But for Rent which became due after the Assignment, he is not liable tho' he does not give Notice of the Assignment. 1 Salk. 81. 2 Vent. 228.

Where the Assignee of a Mortgagor was obliged to pay the Rent, tho' he never entered nor took Possession but lost the Mortgage Money, vide 2 Vern. 374.

By the Statute of Assignments, (32 H. 8. c. 34.) *All Persons, their Heirs, Successors and Assigns, who have any Gift or Grant of the King of any Lands, &c. which belonged to any dissolved Monastries, &c. and all other Persons being Grantees or (1) Assignees to or by any other Person than the King, and the Heirs, Successors and Assigns of every of them, shall and may have and enjoy like (2) Advantages against the (3) Lessees, their Executors, Administrators and Assigns, by Entry for (4) Non-payment of Rent, Waste, and other Forfeiture; and also the Remedies by Action only, for not performing of other Conditions, Covenants or Agreements contained and expressed in their Leases or Grants against Lessees and Grantees, their Executors, Administrators and Assigns, as the Lessors or Grantors, or their Heirs or Successors might if the Reversion of such Lands, &c. had not come to the King's Hands.*

1. *Who are Assignees within this Statute.* A Bargainee of a Reversion by Deed enrolled, in Consideration of Money, is an Assignee within the Statute. Co. Lit. 215. a. Godb. 162. 1 Roll. Rep. 80. Owen 151. 2 Bulst. 181. 1 Leon. 252. Moor 93, 98. Cro. Eliz. 833.

And if a Lessor grants his Reversion to the Use of A. and his Heirs, A. is an Assignee within the Statute. Co. Lit. 215. b. Moor 98. 4 Leon. 27, 29.

2. *Who are intitled to the Advantages and Remedies in this Statute.* The Statute is general, viz. That the Grantee of the Reversion of every common Person, as well as

of the King, shall take Advantage of Conditions for Non-payment of Rent, &c.
Co. Lit. 215. a.

A Bargainee of a Reversion by Deed inrolled, in Consideration of Money, is an Assignee within the said Statute, but cannot take Advantage to enter upon the Lessee for a Condition broken without giving Notice of the Bargain and Sale. Co. Lit. 215. a. b. Godb. 162. 5 Co. 113. b. 1 Roll. Rep. 80. Owen 151. 2 Bulst. 181. 1 Leon. 252. Moor 93, 98. Cro. Eliz. 833.

Secus of a Covenant. Godb. 262. Cro. Jac. 476. Bridg. 130.

The Assignee of the Reversion of a Copyhold Estate shall take Advantage of Covenants upon this Statute. 3 Lev. 327.

A Grantee for Years of a Reversion on a Lease for Years may take Benefit of a Condition. Co. Lit. 215. a.

But a Grantee of Part of a Reversion shall not have Advantage of the Condition, but he shall have the Rent upon an Apportionment. Co. Lit. 215. a.

3. Against whom Advantages may be taken. The Statute speaking only of Lessees, does not extend to Donees in Tail. Co. Lit. 215. a.

Nor to Covenantees upon Estates in Fee or in Tail, but only to Tenants of Estates made upon Leases for Lives or Years. Cro. Eliz. 864.

4. Of what Advantages, &c. may not be taken. Altho' the Words of the Statute are for Non-payment of Rent, doing of Waste, or other Forfeiture, yet the Assignees shall not take Advantage of every Forfeiture by Force of a Condition, but only of such as are either incident to the Reversion, as Rent, or for the Benefit of the Estate, as for not doing of Waste, or keeping the House or Fences in Repair, or for preserving of Wood, or such like. 5 Co. 18. Moor 159, 243, 876. Owen 41. 1 And. 82. Raym. 250. 1 Saund. 159. And not for Payment of a Sum in Gross, Delivery of Corn, Wood, or such collateral Things. Co. Lit. 215. b. Dyer 304.

And further by the said Statute, All Leases and Grantees of Lands, &c. for Years or Life, their Executors, Administrators and Assigns, may have like Action, Advantage and Remedy against the Grantees of the King, or of any other Person, of the Reversions of the same Lands, &c. or any Part thereof, for any Condition, Covenant or Agreement in their Leases, as the Lessees might have had against the Lessors or Grantors; all Benefit of Advantages of Recoveries in Value, by Voucher, &c. only excepted.

S E C T. XVI.

Of Mortgages.

(A) Mortgage what.

A Mortgage is a Pawn or Conveyance for securing the Payment of Money borrowed and Interest, of all one's Right or Title in Lands or Goods, on Condition to be void on Payment of the Principal and Interest at the Day appointed.

He who mortgages or pawns is called the Mortgagor or Pawnor, and he to whom the Mortgage or Pawn is made is called the Mortgagee or Pawnee, or Tenant in Mortgage.

The Word Mortgage is derived of two French Words, Mort, i. e. Mortuum, and Gage, i. e. Vadium, or Pignus. And it is called in Latin Mortuum Vadium, or Morgagium. Co. Lit. 205. a.

A Mortgage is so called for two Reasons, the first (according to Lit. §. 332.) is because it is doubtful whether the Feoffor will pay the Mortgage Money at the Day limited, and if he does not pay, then the Land pledged upon Condition is taken from him for ever, (Note, Littleton can't here mean that the Mortgagee shall have a greater Estate in the Land than the Mortgagor had, but that he shall have the like, whether in Fee for Life or Years) and so dead to him upon Condition, &c. And if he pays the Money, then the Pledge is dead as to the Tenant, &c.

And the second Reason it is so called, is to distinguish it from that which is called Vivum Vadium. Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte quod ex suis proventibus acquiratur. As if a Man borrows 100 l. of another, and makes an

Estate

Estate of Land to him until he has received the said Sum of the Issues and Profits of the Land, so that as in this Case neither Money nor Land dies, or is lost, and therefore is called *Vivum Vadium*. Co. Lit. 205.

All Pledges of Land are commonly called Mortgages, tho' improperly, as appears by what is said before; for Pledges of Land are either *Vivum Vadium*, or *Mortuum Vadium*.

In the first Case the Pawnee is let into the Receipts and Profits of the Estate till the Money is paid.

And in the latter Case, which is more common, the Mortgagor holds the Lands; and if Failure of Payment be made, and the Mortgagee enters into the Lands, yet the Mortgagor has an Equity of Redemption in the Court of Chancery, and may call the Mortgagee to an Account for the Profits.

But when the Mortgagor holds the Lands, and the Money is not paid at the Day, he may bring his Bill to foreclose the Equity of Redemption.

See of *Conditions in Deeds* before at p. 280, &c.

A Mortgage is the same Thing as the *Hypotheca* of the Civilians, and may be defined a Pledging of Lands or other immovable Thing for Money lent in such Manner that the Profit or *usufructus* of the Thing pledged remains with the Debtor till such Time as Default is made in Payment of the Money at the Time appointed. *Abr. Ca. Eq.* 310, 311.

(B) *How a Mortgage is made.*

IT is usually made by a Lease for a long Term of Years, by Lease and Release, by Assignment, Bargain or Bill of Sale, &c. of which see a Variety of Forms in the *Second Part*.

A Mortgage may be made without a Covenant or Bond for Payment of the Money. *1 Will.* 270.

(C) *What shall be a good Mortgage.*

IF *A.* agrees for a valuable Consideration to convey Lands to *J. S.* and afterwards makes a Mortgage for a valuable Consideration and without Notice, the Mortgagee shall hold his Mortgage against the intended Purchaser. *1 Will.* 277.

Where a first Mortgagee is a Witness to a second Mortgage, tho' there is no actual Proof of his knowing the Contents thereof, yet since the Presumption is that he might have known the same, this shall postpone him. *1 Will.* 394.

It is a general Rule in Chancery, that once a Mortgage and always a Mortgage.

(D) *Of usurious Mortgages.*

HAzardous Bargains are not always set aside in a Court of Equity, for they may be fair; and it is only upon the Circumstances of Fraud, or being extremely unreasonable, that they can be overthrown. But Bargains of this Kind will be assisted in Equity tho' there are not sufficient Grounds to set them quite aside. *Vide 1 Vern.* 271. *2 Chan. Ca.* 136, 137. *2 Vern.* 15.

And regularly the Party who comes to be relieved must restore the Money paid, &c. according to that Maxim in Equity, *He who would have Equity must do Equity*. A Person intitled to an Estate after the Death of two old Lives, took 330*l.* to pay 700*l.* when the Lives should die, and the Estate failed, and mortgaged the Estates by way of Security: No Relief was had against this Bargain tho' both the Lives died in two Years. And the Lord Keeper said, Suppose these Lives had lived never so long, could the other Party have Relief in Equity? No, there is no Precedent for it. *1 Vern. Rep.* 141, 142.

P. being possessed of a Reversionary Term for thirty-six Years, to commence in the Year 1700. of the Value of about 200*l.* per Annum when the Estate should fall, in the Year 1683. borrowed of *D.* 200*l.* as a Security for which *P.* assigned his Term to *D.* defeasanced to be void on Payment of 40*l.* per Ann. for eight Years. *P.* brought his Bill to redeem, paying Principal, Interest and Costs; and the Defendant insisted

insisted on the Benefit of his Bargain, having lent his Money on such a remote Reversion. The Court decreed a Redemption on Payment of the 200 *l.* with simple Interest at 6 *l.* per Cent. because the Security is as Usurious and against Conscience. 2 Vern. 402.

(E) *What shall be taken as a new Mortgage.*

AN old Mortgage assigned to another ought to be taken as a new Mortgage, but no Assignee of a Mortgage shall be in a better Condition than the Mortgagee, unless the Mortgagor comes into the Assignment. 3 Ch. Rep. 79. 1 Chan. Ca. 218.

A second Mortgage of Lands has been decreed where a former was bad and defective, the Land being still chargeable with the Debt in Equity. Finch Rep. 29. 2 Vern. 554.

(F) *What shall affect a second Mortgage, or not.*

IT has been held that if a prior Mortgagee conceals and denies his Mortgage to a second Mortgagee before he lends the Money, the Estate in Equity shall stand charged in the first Place for the second Mortgagee's Debt. Finch Rep. 29. 2 Vern. 554.

Where the first Mortgagee is a Witness to the second Mortgage, though it does not appear that he actually knew the Contents of the second Mortgage; yet since the Presumption is that he might have known the same, this shall give a Preference to the second Mortgage. 2 Will. 394.

If a Man lends Money on a Mortgage, and the Scrivener who was intrusted to draw the Mortgage Deed had Notice of a prior Mortgage, this Notice shall affect the second Mortgagee. 2 Vern. 574.

A. Mortgaged a great Part of his Estate for 50 *l.* and afterwards became a Lunatick, and his Committee transferred this Mortgage and took up 400 *l.* more upon it; and Lord Chancellor declared the Mortgage should stand as a Security for the 50 *l.* only. 1 Vern. 262.

(G) *Of buying in old Incumbrances to protect Mortgages.*

THERE was first, second and third Mortgagees, who had all lent their Money without Notice; the third Mortgagee hearing of the two former Securities, buys in the first Incumbrance, viz. a Judgment that was satisfied, and he was allowed the Benefit of it to protect his own Security, tho' it was strongly insisted to be against Conscience and contrary to Equity. This Point was settled in the Case of *Marsh and Lee*, wherein the Court decreed that a Mortgagee may protect his Mortgage by getting in an old Incumbrance, tho' nothing be due on it. 1 Vern. Rep. 187, 188. 1 Chan. Ca. 162. 2 Vent. 387. Hard. 173.

A Mortgagee buying in a precedent Security of the Lands contained in his Mortgage, and other Lands, shall hold against a middle Mortgagee of those Lands till all due on both Securities be paid and satisfied. 1 Chan. Ca. 201, 202.

But when only Part of the Lands are mortgaged to the first, and the whole to the second, and after to the third, if the third Mortgagee buys in the first Title, it shall protect only that Part which is first in Mortgage. 2 Vent. 339.

So a Purchaser or Mortgagee coming in upon a valuable Consideration without Notice, and then purchasing in a precedent Incumbrance, shall protect his Estate against any Person that has a Mortgage subsequent to the first, tho' before the last Mortgage; and tho' he purchased in the Incumbrance after Notice of a second Mortgage. 2 Vent. 339.

In these Cases a Bill may be brought to compel the middle Mortgagee to redeem, or be foreclosed if he does not pay off both Securities.

If a Man lends 600 *l.* on a Mortgage, and afterwards discovering that the Estate is premortgaged to J. S. he gets in an old satisfied Incumbrance, and brings his Bill against J. S. to redeem or be foreclosed, he needs not prove the actual Payment of any Money for such precedent Incumbrance, the having the Deed or an Acquittance being sufficient, altho' it is objected that J. S. is equally a Purchaser with him. 2 Vern. 279.

If a prior Mortgage or Statute be brought in, pending a Bill brought by *A.* against the Mortgagor, and *B.* who buys in such precedent Statute or Mortgage to foreclose, tho' this Purchase be *pendente lite*, yet it will protect *B.* he being at Liberty to do what he can for his own Security. 2 Vern. 29. See *Mod. Ca. in Law and Eq.* 153.

But where *A.* made a Mortgage to *B.* and afterwards a Commission of Bankruptcy was taken out against him, and the Commissioners made an Assignment of the Estates, and then *C.* lent the Bankrupt 2000*l.* on a second Mortgage having no Notice of the first, tho' he afterwards got in the first Mortgage; yet it was held by two Lords Commissioners against one, that this prior Mortgage should not protect the Mortgage subsequent to the Bankruptcy, for every one is bound to take Notice of a Commission of Bankruptcy. 2 Vern. 157, 160.

And tho' a Purchaser or Mortgagee may buy in an Incumbrance, or lay hold on any Plank to protect himself; yet he shall not protect himself by the taking a Conveyance from a Trustee after he had Notice of the Trust, for by taking such Conveyance he becomes the Trustee himself. 2 Vern. 271.

(H) *In what Order, Mortgages, Judgments, &c. are to be paid.*

MORTGAGES have been decreed to be paid to Creditors before Judgments and Recognizances, &c. but on Appeal to the Lords, it was adjudged that Mortgages should not be preferred to other real Incumbrances; but Mortgages, Judgments, Statutes, &c. should take Place and be paid according to Priority. 2 Vern. 525.

If Lands are devised in Trust to pay Mortgages in the first Place, and then Legacies, and the Trustee is made Executor who mortgages the Lands to pay other Debts, the last Mortgage shall be paid before the Legacies.

(I) *How Mortgagee must be satisfied where the Premises fall short.*

PLAINTIFF lent a Sum of Money on the Mortgage of some Houses, and had a Bond for Payment of the Money; afterwards he lent a farther Sum on the Equity of Redemption, and had a Bond for that likewise; afterwards the Mortgagor became a Bankrupt, and by some Accident the Value of the Houses sunk so much that they were not sufficient to raise the Money first lent: A Bill was brought to have them sold, and that as to so much as they fell short to answer the first Mortgage Money, the Mortgagee might come in upon his Bond as a Creditor; whereupon it was so decreed; and as to the other Sum lent upon the Equity which was worth nothing, it must stand singly upon the Bond. *Abr. Ca. Eq.* 312.

(K) *Where Mortgage Money is presumed to be satisfied.*

MORTGAGE Money shall be presumed to be satisfied on a sleeping Mortgage, where the Lands go into other Hands by Purchase, and no Notice is given of the Mortgage, &c. and the Deed of Mortgage shall be delivered up and cancelled. Also Relief has been given in Equity against an old Mortgage where no Demand was made upon it in 40 Years, and the Mortgagor decreed to hold the Lands and a Vacat to be entered on the Inrolment of the Mortgage. 1 Chan. Rep. 105, 106.

(L) *To whom Mortgage Money shall be paid on Death of Mortgagee, and to whom Mortgages shall descend.*

ALL Mortgages ought to be looked on as Part of the personal Estate, and on the Death of the Mortgagee the Money shall be paid to the Executor, (*because the Mortgage Money came first out of the personal Estate, and therefore should return thither again*) except the Mortgagee in his Life-time or by his last Will do otherwise declare and dispose of the same. 1 Chan. Ca. 286. See *Max. Eq.* 21, 22. *Abr. Ca. Eq.* 326, 327.

A forfeited Mortgage in Fee has been decreed to be personal Estate, and to belong to the Executor and not to the Heir. 1 Chan. Rep. 283. 1 Vern. 412.

But where a Mortgage in Fee was devised to Daughters and their Heirs, &c. the Court held that altho' it was a Mortgage as between the Mortgagor and Mortgagee, yet the Testator's Intent was, that it should pass to his Daughters as a real Estate to them and their Heirs, and not as a personal Estate, and so decreed it to descend. 1 Vern. 582, 583.

So where a Mortgagee in Fee entred for a Forfeiture, and after many Years Injoyment sold the Land to J. S. and his Heirs; *per Cur.* the Estate shall not be looked on to be a Mortgage in the Hands of J. S. to make it Part of his personal Estate, but shall be for the Benefit of the Heir. 1 Vern. Rep. 271.

(M) *What shall be accounted Principal, and what Interest, and what shall carry Interest, and what the Mortgagee is accountable for.*

A Mortgagee had assigned his Mortgage, and the Question was, if what was really due to the Mortgagee, when he made his Assignment, for Principal and Interest, and paid him by the Assignee, should be taken as Principal, or so much only as the Mortgagee first lent; upon which it was decreed that all Money actually paid by the Assignee which was due to the Mortgagee, should be Principal from the Time of the Assignment, but the Account between the Mortgagee and Assignee was not to conclude the Mortgagor. 1 Chan. Ca. 67; 68.

Where a Mortgagor signs an Account, whereby so much is admitted to be due for Interest, this will not carry Interest, unless the Mortgagor by some Letter or Writing under his Hand agrees to make it Principal. 1 Will. 653.

Equity apportion Interest due upon a Mortgage. 2 Will. 176.

If a Mortgage be twenty Years old, it is generally said, that the Mortgagee shall have no Interest on Interest in Equity; but in the Case of *Howard* and *Harris*, the Lord Keeper was of Opinion, and accordingly decreed, that as to so much Interest as was reserved in the Deed of Mortgage being 60 l. a Year payable for 1000 l. principal Money, that should be accounted Principal and carry Interest, because it being ascertained by the Deed, Action of Debt would lie for it, and therefore there ought to be Damages for Non-payment. 1 Vern. 194, 195.

It is a Rule that a Mortgagee of a Mortgage forfeited shall have Interest for his Interest, and shall be only accountable for what Profits he has received, and not for what he might have received except there were Fraud; and it was always the Rule that the Mortgagee assigning, the Assignee shall have Interest for the Interest then due. 1 Chan. Ca. 258.

J. S. mortgaged his Estate to the Plaintiff and died, leaving Defendant his Daughter and Heir who was an Infant, and had nothing to subsist on but the Rents of the mortgaged Estate, and the Interest being suffered to run in Arrear, the Plaintiff threatened to enter on the Estate unless his Interest might be made Principal; upon which the Defendant's Mother with the Privity of her nearest Relations stated the Account, and the Defendant herself (who was then near of Age) signed it; and the Account being admitted to be fair, it was held, that tho' regularly Interest should not carry Interest, yet that in some Cases and upon some Circumstances it would be Injustice if Interest should not be made Principal, and the rather in this Case, because it was for the Infant's Benefit who without this Agreement would have been destitute of Subsistence. *Abr. Ca. Eq.* 287.

But if a Mortgage be forfeited, and the Mortgagee refuses to receive his Money due from the Mortgagor on Tender, he shall lose his Interest from the Time of the Tender. 1 Chan. Ca. 29.

(N) *Who may redeem Mortgages.*

BY Stat. 4 & 5 W. & M. c. 16. §. 4. it is enacted, That if it so happen there be more than one Mortgage at the same Time made by any Person or Persons, to any Person or Persons of the same Lands and Tenements, the several late or under Mortgagees, his, her, or their Heirs, Executors, Administrators or Assigns shall have Power to redeem any former Mortgage or Mortgages upon Payment of the principal Debt, Interest, and Costs of Suit to the prior Mortgagee or Mortgagees, his, her, or their Heirs, Executors, Administrators or Assigns; any thing therein contained to the contrary thereof in any wise notwithstanding.

A

A Bill was exhibited by the Creditors of a Mortgagor to have the Estate sold for the Payment of their Debts, pending which Suit the Mortgagee obtained a Decree to foreclose the Mortgagor of the Equity of Redemption: Decreed that the Creditors should redeem upon Payment of the Principal, Interest and Costs to the Mortgagee. *Mod. Ca. in Law and Eq.* 153.

A second Mortgagee may redeem the first Mortgage; also Creditors on Judgments, &c. have been decreed to redeem Mortgages towards Satisfaction of their Debts. *2 Ch. Rep.* 396.

One who comes in by a voluntary Conveyance may redeem a Mortgage. *1 Vern.* 193. Admitted he who comes to redeem a Mortgage must shew a Title. *1 Vern.* 182.

If a Man enters into a Bond in which he binds himself and his Heirs, and dies, leaving a real Estate to descend to his Heir, subject to a Mortgage for Years, and the Heir sells the Equity of Redemption, the Obligee cannot redeem the Mortgage without first having a Judgment at Law. *Abr. Ca. Eq.* 315.

A. gives a Bond to his intended Wife to leave her 1000*l.* if she survive him; the Marriage was had, and A. died, leaving a Freehold and Copyhold Estate in Mortgage; and it was held, that the Wife should redeem both Estates, and hold over till she was satisfied. *2 Vern.* 480.

(O) *Of what a Bill in Equity may or may not be to redeem.*

A Bill in Equity will not lie to redeem a Mortgage of Chambers in the Inns of Court, but the Plaintiff must apply to the Bench or to the Judges of the Society; *secus* if on Application to the Bench they refer the Plaintiff to his Remedy in Equity. *1 Will.* 511.

(P) *Where one of two Things mortgaged, or Mortgage and Bond cannot be redeemed without the other.*

IF A. mortgages his Tenement for 200*l.* to B. and afterwards mortgages his Manor of C. to B. likewise for 300*l.* The first Mortgage being deficient in Point of Value, it was held, that if A. will redeem one, he must both. *2 Vern.* 286.

Where there is a Debt secured by Mortgage, and likewise a Bond Debt, the Mortgagor or his Heir shall not be admitted to redeem the Mortgage without paying the Bond Debt too, if the Heir be bound. *2 Ch. Rep.* 23. *1 Vern.* 244. *2 Vern.* 177. *Abr. Ca. Eq.* 314.

And if a Man makes two Mortgages of several Lands, and dies, and one of the Mortgages is of an intailed Estate, or deficient in Value, the Heir of the Mortgagor shall not redeem one without redeeming the other. *2 Vern. Rep.* 207.

(Q) *Where a new Term is subject to the old Redemption.*

ONE possessed of a renewable Term mortgages it to J. S. who gains a new Term from the original Landlord, to commence after the old one; this new Term shall be subject to the old Equity of Redemption. *1 Will.* 511.

(R) *What a Mortgagor, &c. is liable to pay on Redemption.*

IF a Man has a Debt owing to him by Mortgage, and another by Bond from the same Person, he cannot tack them together against the Mortgagor, but he shall be let into a Redemption on Payment of the Mortgage only; but the Heir in such a Case shall not be let into a Redemption without paying both, because the Land in his Hands is chargeable with the Bond even at Law; and since the Statute against fraudulent Devises, the Devisee of the Equity of Redemption is in the same Case with the Heir, and cannot redeem without Payment of both, because the Statute makes such Devise void as against Creditors, and then the Devisee stands in the same Place as the Heir must have done if no Devise had been made; but before that Statute such Devisee would not be liable to the Bond Debt. *Abr. Ca. Eq.* 325.

A. mort-

A. mortgaged his Estate to *B.* and then assigned the Equity of Redemption to *C.* afterwards *D.* obtained a Judgment against *A.* and *B.* the Mortgagee assigns to *D.* his Mortgage, and then *C.* tenders the Money due to *D.* who had Notice of the Assignment of the Equity of Redemption upon his first purchasing in his first Mortgage: It was resolved that *C.* should redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment, because the Equity of Redemption was never bound by the Judgment, for the Judgment was not confessed so as to become a real Lien upon the Estate at the Time when this Equity was assigned, and therefore the Judgment could never charge or affect it; and consequently *C.* purchased an Estate not bound by the Judgment, and by Consequence the Judgment-Creditor by purchasing in the prior Mortgage could never defeat the Interest of *C.* It was also declared, that if a Person who had a first Mortgage should, without the Consent of the Mortgagor, purchase in a subsequent Judgment that a mesne Mortgagee or Assignee of the Equity of Redemption should not be obliged to pay the Money due on both Securities in order to redeem, because such Transactions of the Mortgagee was only to load the Estate without the Consent of the Owner when he had no Prospect of bettering his own Security. *Abr. Ca. Eq. 326.*

(S) *In what Time Redemption must be made.*

NO Clause can confine the Equity of Redemption of a Mortgage to the Life-time of the Mortgagor, or to him and the Heirs Male, or the Heirs only of his Body. *1 Will. 269.*

The Plaintiff's Grandfather in 1686. mortgaged the Estate in Question, about 10*l.* per Ann. for securing 100*l.* in 1696. this Mortgage was assigned to Defendant, who was let into Possession, and continued so ever since, and is now about ninety Years old: The Mortgagor died several Years since, leaving the Plaintiff's Father his eldest Son of full Age, who likewise died in 1714. leaving the Plaintiff his Son and Heir then about twelve Years of Age, who brought his Bill for a Redemption, but was dismissed: And Lord Chancellor ordered it to be entred down as one of the Reasons for dismissing the Bill, that the Plaintiff had no Remedy by Ejectment at Law to recover the Possession, being barred by the Statute of Limitations, and he thought that a reasonable Ground for this Court to follow as to the Redemption in Equity. *Abr. Ca. Eq. 315.*

But see first of *Will. Rep. 271.* where if a Mortgage was made never so many Years since, yet if the Mortgagor, and those claiming under him, had continued to pay Interest, the Length of Time was in such Case no Objection to the Right of Redemption. See *Abr. Ca. 313, 314, 317.*

No Agreement in a Mortgage can make it irredeemable in Equity, as after the Death of the Mortgagor, &c.

And where a Mortgage was made redeemable during the Mortgagor's Life only, the Lord Chancellor decreed that the Heir should redeem. *2 Ch. Rep. 127. 1 Vern. Rep. 7, 8, 190.*

In *Pearson's Case* the Lord Keeper said, he would have a Rule to limit to what Time a Mortgage shall be redeemable; and he conceived twenty Years to be a fit Time, in Imitation of the Statute of Limitation of real Actions. *1 Chan. Ca. 102.*

But a Mortgagor was allowed to redeem a Mortgage after fifty Years, the Length of Time being excused by Infancy, Coverture, an Account made up thirty Years before, &c. Tho' this has been denied in a like Case by Reason of the Difficulty of the Account and great Length of Time. *2 Vern. 377, 418.*

A Mortgagor had Liberty to redeem before the Day of Payment limited in the Deed of Mortgage, where the Land was conveyed to the Mortgagee conditionally at so much Rent, and the increasing Rent exceeded the Interest of the Money; and altho' the Equity of Redemption of Lands mortgaged was foreclosed by Decree signed and inrolled, and a Purchase made upon it, yet another Person was permitted to redeem on the extraordinary Circumstances of the Case. *1 Vern. 183. Finch's Rep. 406, 409.*

(T) *Where a Mortgagor concealing a former Incumbrance shall lose his Equity of Redemption.*

BY Stat. 4 & 5 W. & M. c. 16. intituled, *An Act to prevent Frauds by clandestine Mortgages, it is recited, (§. 1.) That whereas* great Frauds and Deceits are too often practised by necessitous and evil-disposed Persons, in borrowing of Money, and giving Judgments, Statutes and Recognisances privately for securing the Repayment of the said Money; and the same Persons do afterwards borrow Money upon Security of their Lands of other Persons, and do not acquaint the latter Lender thereof with the same, whereby such late Lender is very often in Danger to lose his whole Money, or forced to pay off the Debts secured by the said Judgments, Statutes and Recognisances, before they can have any Benefit of the said Mortgages: And whereas divers Persons do many Times mortgage their Lands more than once, without giving Notice of their first Mortgage, whereby Lenders of Money upon second or after Mortgages do often lose their Money, and are put to great Charges in Suits and otherwise. *And*

(§. 2.) *For Remedy whereof, and preventing the same as much as may be for the future, it is enacted,* That if any Person from and after the first Day of May 1693. shall borrow any Money, or for any other valuable Consideration for the Payment thereof voluntarily give, acknowledge, permit or suffer to be entred against him or them, one or more Judgment or Judgments, Statute or Statutes, Recognisance or Recognisances to any Person or Persons, Creditor or Creditors; and if the said Borrower or Borrowers, Debtor or Debtors, shall afterwards take up or borrow any other Sum or Sums of Money of any other Person or Persons, or for other valuable Considerations become indebted to such Person or Persons, and for securing the Repayment and Discharge thereof, shall mortgage his, her or their Lands or Tenements, or any Part thereof, to the said second, or other Lender or Lenders of the said Money, Creditor or Creditors, or to any other Person or Persons in Trust for or to the Use of such second or other Lender or Lenders, Creditor or Creditors, and shall not give Notice to the said Mortgagee or Mortgagees of the said Judgment or Judgments, Statute or Statutes, Recognisance or Recognisances in Writing under his, her or their Hand or Hands, before the Execution of the said Mortgage or Mortgages, unless such Mortgagor or Mortgagors, his, her or their Heirs, upon Notice to him, her or them, given by the Mortgagee or Mortgagees of the said Lands and Tenements, his, her or their Heirs, Executors, Administrators or Assigns, in Writing under his, her or their Hands and Seals, attested by two or more sufficient Witnesses of any such former Judgment or Judgments, Statute or Statutes, Recognisance or Recognisances, shall within six Months pay off and discharge the said Judgment or Judgments, Statute or Statutes, Recognisance or Recognisances, and all Interest and Charges due thereupon, and cause or procure the same to be vacated or discharged by Record, that then the Mortgagor or Mortgagors of the said Lands and Tenements, his, her or their Heirs, Executors, Administrators or Assigns, shall have no Benefit or Remedy against the said Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, or any of them, in Equity or elsewhere, for Redemption of the said Lands and Tenements, or any Part thereof, but the said Mortgagee and Mortgagees, his, her or their Heirs, Executors, Administrators and Assigns, shall and may hold and enjoy the said Lands and Tenements for such Estate and Term therein as were or was granted and settled to the said Mortgagee or Mortgagees, against the said Mortgagor or Mortgagors, and all Person and Persons lawfully claiming from, by or under him, her or them, freed from Equity of Redemption, and as fully to all Intents and Purposes whatsoever as if the same had been purchased absolutely and without any Power or Liberty of Redemption.

(§. 3.) And it is further enacted, That if any Person or Persons who have or hath once mortgaged, or from and after the said first Day of May shall mortgage any Lands or Tenements to any Person or Persons for Security of Money lent, or otherwise accrued or become due, or for other valuable Considerations; and if the said Mortgagor or Mortgagors shall again mortgage the same Lands or Tenements, or any Part thereof, to any other Person or Persons for valuable Considerations, (the said former Mortgage being in Force, and not discharged) and shall not discover to the said second, or other Mortgagee or Mortgagees, or some or one of them, the former

Mortgage

Mortgage or Mortgages in Writing under his or their Hands, that then and in those Cases also the said Mortgagor or Mortgagors, his, her or their Heirs, Executors, Administrators or Assigns, shall have no Relief or Equity of Redemption against the said second or after Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, upon the said after Mortgage or Mortgages, but that such Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators and Assigns, shall and may hold and enjoy such more than once mortgaged Lands and Tenements, for such Estate and Term therein as were or was granted and conveyed by the said Mortgagor or Mortgagors against him, her or them, his, her or their Heirs, Executors or Administrators, respectively freed from Equity of Redemption, and as fully to all Intents and Purposes as if the same had been an absolute Purchase, and without any other Power or Liberty of Redemption.

(§. 4.) See it under the Head of redeeming Mortgages.

(§. 5.) Provided always that nothing in this Act contained shall be construed, deemed or extended to bar any Widow of any Mortgagor of Lands or Tenements from her Dower and Right in or to the said Lands, who did not legally join with her Husband in such Mortgage, or otherwise lawfully bar or exclude her from such her Dower or Right.

(U) *Where a Court at Law may relieve the Mortgagor (Ejectment for the Land, Actions on the Bonds for the Mortgage Money, Bills of Foreclosure, &c. being brought) on Payment of Principal, Interest and Costs.*

BY Stat. 7 Geo. 2. c. 20. intituled, *An Act for the more easy Redemption and Foreclosure of Mortgages*, (§. 1.) it is recited, *That whereas* Mortgagees frequently bring Actions of Ejectment for the Recovery of Lands and Estates to them mortgaged, and bring Actions on Bonds given by Mortgagors to pay the Money secured by such Mortgages, and for performing the Covenants therein contained, and likewise commence Suits in his Majesty's Courts of Equity to foreclose their Mortgagors from redeeming their Estates, and the Courts of Law where such Ejectments are brought have not Power to compel such Mortgagees to accept the Principal Monies and Interest due on such Mortgages, and Costs, or to stay such Mortgagees from proceeding to Judgment and Execution in such Actions; but such Mortgagors must have Recourse to a Court of Equity for that Purpose, in which Case likewise the Courts of Equity do not give Relief until the Hearing of the Cause: *And for Remedy thereof, and to obviate all Objections relating to the same, it is enacted*, That from and after the first Day of Easter Term 1734. where any Action shall be brought on any Bond for Payment of the Money secured by such Mortgage, or Performance of the Covenants therein contained; or where any Action of Ejectment shall be brought in any of his Majesty's Courts of Record at *Westminster*, or in the Court of Great Sessions in *Wales*, or in any of the superior Courts in the Counties Palatine of *Chester*, *Lancaster* or *Durham*, by any Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, for the Recovery of the Possession of any mortgaged Lands, Tenements or Hereditaments; and no Suit shall be then depending in any of his Majesty's Courts of Equity, in that Part of *Great Britain* called *England*, for or touching the Foreclosing or Redeeming of such mortgaged Lands, Tenements or Hereditaments, if the Person or Persons having Right to redeem such mortgaged Lands, Tenements or Hereditaments, and who shall appear and become Defendant or Defendants in such Action, shall at any Time pending such Action pay unto such Mortgagee or Mortgagees, or in Case of his, her or their Refusal, shall bring into Court where such Action shall be depending, all the Principal Monies and Interest due on such Mortgage, and also all such Costs as have been expended in any Suit or Suits at Law or in Equity upon such Mortgage, (such Money for Principal, Interest and Costs, to be ascertained and computed by the Court where such Action is or shall be depending, or by the proper Officer, by such Court to be appointed for that Purpose) the Monies so paid to such Mortgagee or Mortgagees, or brought into such Court, shall be deemed and taken to be in full Satisfaction and Discharge of such Mortgage; and the Court shall and may discharge every such Mortgagor or Defendant of and from the same accordingly; and shall and may by Rule or Rules of the same Court compel such Mortgagee or Mortgagees, at the Costs and Charges of such Mortgagor or Mortgagors, to assign, surrender or re-convey such mortgaged Lands,

Lands, Tenements and Hereditaments, and such Estate and Interest as such Mortgagee or Mortgagees have or hath therein, and deliver up all Deeds, Evidences and Writings in his, her or their Custody, relating to the Title of such mortgaged Lands, Tenements and Hereditaments, unto such Mortgagor or Mortgagors who shall have paid or brought such Monies into the Court, his, her or their Heirs, Executors or Administrators, or to such other Person or Persons as he, she or they shall for that Purpose nominate or appoint.

(W) *Where a Court of Equity may make a Decree on a Bill of Foreclosure before the Suit shall be brought to a regular Hearing.*

AND by the said Act (§. 2.) it is enacted, That from and after the first Day of Easter Term 1734. where any Bill or Bills, Suit or Suits, shall be filed, commenced or brought in any of his Majesty's Courts of Equity, in that Part of Great Britain called England, by any Person or Persons having or claiming any Estate, Right or Interest in any Lands, Tenements or Hereditaments, under or by Virtue of any Mortgage or Mortgages thereof, to compel the Defendant or Defendants in such Suit or Suits (having or claiming a Right to redeem the same) to pay the Plaintiff or Plaintiffs in such Suit or Suits the Principal Money and Interest due on any such Mortgage, or the Principal Money and Interest due on such Mortgage, together with any Sum or Sums of Money due on any Incumbrance or Specialty charged or chargeable on the Equity of Redemption thereof; and in Default of Payment thereof to foreclose such Defendant or Defendants of his, her or their Right or Equity of redeeming such mortgaged Lands, Tenements or Hereditaments; such Court and Courts of Equity where such Suit or Suits shall be depending upon Application made to such Court by the Defendant or Defendants in such Suit, having a Right to redeem such mortgaged Lands, Tenements or Hereditaments; and upon his or their admitting the Right and Title of the Plaintiff or Plaintiffs in such Suit, may and shall at any Time or Times, before such Suit or Cause shall be brought to a Hearing, make such Order or Decree therein as such Court or Courts might or could have made therein in Case such Suit or Cause had then been regularly brought to Hearing before such Court or Courts, and all Parties to such Suit or Suits, shall be bound by such Order or Decree so made, to all Intents and Purposes, as if such Order or Decree had been made by such Court at or subsequent to the Hearing of such Cause or Suit; any Usage to the contrary thereof in any wise notwithstanding.

And by §. 3. it is provided, That this Act, or any Thing herein contained, shall not extend to any Case where the Person or Persons against whom the Redemption is or shall be prayed, shall (by Writing under his, her or their Hands, or the Hand of his, her or their Attorney, Agent or Solicitor, to be delivered, before the Money shall be brought into such Court at Law to the Attorney or Solicitor for the other Side) insist either that the Party praying a Redemption has not a Right to redeem, or that the Premises are chargeable with other or different principal Sums than what appear on the Face of the Mortgage, or shall be admitted on the other Side, nor to any Case where the Right of Redemption to the mortgaged Lands and Premises in Question in any Cause or Suit shall be controverted or questioned by or between different Defendants in the same Cause or Suit; nor shall be any Prejudice to any subsequent Mortgagee or Mortgagees, or subsequent Incumbrancer; any Thing in this Act contained to the contrary thereof in any wise notwithstanding.

Decree to foreclose Tenant in Tail shall bind his Issue in an Equity of Redemption, because that is a Right set up only in a Court of Equity, and so may be here extinguished. 1 Chan. Ca. 220.

Yet if there be an Infant in the Case, he ought not to be foreclosed without a Day to shew Cause after he comes of Age; but the Court may decree the Lands to be sold to pay Debts, and that will bind the Infant. 1 Vern. Rep. 295.

If an Annuity be granted out of Lands redeemable on Payment of Money, the Grantor cannot be foreclosed of the Land, but he may of the Redemption of the Annuity. 1 Vern. 209, 210.

(X) Of

(X) *Of Re-conveyance of Mortgage on Payment of the Money. See before the Stat. 7 Geo. 2. c. 20.*

ON a Bill to compel a Re-assignment of a Mortgage from the 25th of September 1722. there having been then a Tender made of 1000 l. Principal and Interest. It appeared that on the Day before the 25th of March 1722. the Mortgagor gave personal Notice in Writing to the Defendant the Mortgagee, that he would render the Money and Interest between the Hours of ten and twelve in the Morning, at *Lincoln's Inn Hall*, on the 25th of September 1722. which accordingly was done. It was objected, that *Lincoln's Inn Hall* was not named in the Proviso in the Mortgage Deed as the Place for the Payment of the Money, and therefore the Tender must be to the Person. By Lord Chancellor: The Money being lent in Town, and after personal Notice given for the Payment thereof, and no Objection made by the Mortgagee to the Place at the Time of the Notice, it would be very hard to make the Mortgagor travel with this great Sum of Money where the Mortgagee lived; but in this Case it ought to appear that the Mortgagor from that Time always kept the Money ready, whereas the contrary thereof being proved that the Mortgagor was not ready to pay it, therefore the Interest must run on; and decreed the Defendant to re-assign. 2 Will. 378.

A Deed was in Nature of a Mortgage, with Covenant to re-convey on paying the Money which was tendred at the Day and Place, and refused: The Money without Interest from the Tender, and to re-convey the Land, &c. was decreed; but that the Plaintiff ought to make Oath that the Money was kept, and no Profit made of it. 2 Chan. Ca. 206.

S E C T. XVII.

Of Exchanges.

(A) *Exchange what.*

AN Exchange (*Excambium*) is the mutual Grant of equal Interests, the one in Exchange for the other.

Or it is, where a Man is seised or possessed of Land in Fee-simple, Fee-tail, for Life or Years; or is possessed of Goods, and another is seised or possessed of other Lands, or possessed of other Goods in the like Manner, and they exchange their Lands or Goods the one for the other; and in this there is a double Grant, for each of them grants that which is his to the other. *Terms de la Ley, Tit. Exchange. Finch's Ley* 27. *Lit. §. 62.*

(B) *The Nature and Effect of an Exchange.*

THE Fruit and Effect of an Exchange is, that it gives the Interest, and alters the Property of the Things exchanged, to either Party, according to the Agreement. And if the Exchange be of Lands or Tenements of any Estate of Inheritance or Freehold, whether it be by Word or Deed, it has a Condition and a Warranty in Law incident and annexed to it as a Thing made by the Word *Exchange*, and *tacite* implied in every Grant of Exchange. A Condition to give a Re-entry upon all the Land given in Exchange, if he be put out of all or part of the Land taken in Exchange, and a Warranty, to enable him to vouch and to recover over in Value so much of his own Land again given in Exchange as shall be recovered from him of the Land taken in Exchange, if he be sued for it: So that upon every Exchange either Party, if he be put out of or lose by Action the Land he takes in Exchange, has a double Remedy against the other; and yet this Remedy goes only in the Privy, and shall not go to an Assignee: As if *A.* exchanges Land with *B.* and *B.* be put out of all or Part of the Land upon a Title Paramount by a Recovery in a real Action or otherwise; in this Case *B.* may either enter upon his own Land again which he gave in Exchange, or else if it be in an Action brought he may vouch *A.* upon the Warranty in Law, and shall recover as much in Value against him of the Land he gave,

as he has lost of the Land he took in Exchange. But if *B.* aliens his Land taken in Exchange to *C.* and *C.* be put out of all or Part of the Land upon a Title Paramount, *C.* in this Case can neither enter upon the Land given to *A.* in Exchange upon the Condition in Law, nor vouch *A.* to Warranty, and recover over in Value upon the Warranty in Law. And yet *A.* in this Case shall have the like Remedy against *C.* the Alienee upon the Condition and Warranty both as he had against *B.* But if *A.* himself implead *C.* for the Land he gave to *B.* in Exchange, *C.* may make use of this Warranty in Law by way of *Rebutter* against *A.* And in all these Cases where one of the Parties is put out of all or Part of the Land, or out of Part of the Estate by Entry, and the other Party enters upon the other's Land upon the Condition in Law, he may enter upon the whole Land and avoid the whole Exchange: But if he be impleaded for a Part only, or for the Whole, and a Part only be recovered from him, in this Case he shall recover so much in Value of the other Land only as he hath lost, and no more: As if an Exchange be of three Acres for three Acres, and after one of the Parties is put out of one of the Acres by the Entry of a Stranger; in this Case he may enter upon the whole three Acres he had given in Exchange, and so avoid the whole Exchange if he will. And if *A.* and *B.* be Jointenants for Life, and the Fee-simple is in the Heirs of *A.* and *A.* exchanges this Land with *C.* in Fee, and then dies, and *B.* enters and avoids the Exchange for his Life, (as he may) in this Case *C.* may avoid the whole Exchange, and enter upon his own three Acres again. So if he in Reversion disseises his Tenant for Life, and then exchanges the Land, and after the Tenant for Life enters, the other Party may defeat the whole Exchange. But in the Case of an Exchange of three Acres for three Acres, if one of the Acres were gained by Disseisin, and the Disseisee brings an Action and recovers it against the Disseisor; in this Case if he vouches over the other Party to the Exchange, he shall recover so much in Value only of the three Acres he gave in Exchange, as the Acre he has lost, and no more. 4 Co. 121. 15 E. 4. 3. 9 E. 4. 21. *Bro. Exchange in toto, & Fitz. Exchange in toto.*

(C) *When a Deed shall take Effect as an Exchange, or not.*

WHERE a Deed shall take Effect as an Exchange, there must be all the Conditions before mentioned in the Case. And yet note, that where one Thing is granted for another in the Nature of an Exchange, and for some of the Causes aforesaid the Things cannot pass by way of Exchange, there they may pass notwithstanding by way of Grant, and the Deed may take Effect to other Purposes, altho' it may not enure and take Effect as an Exchange: And therefore if two be seised of several Acres of Land, and the one of them by Deed gives his Acre to the other, and the other his Acre to him without any Word of Exchange, and each of them makes Livery of Seisin to the other; in this Case altho' the Acres will not pass by way of Exchange, yet they will pass by way of Grant: And in this Case if no Livery of Seisin be made, either of them shall hold the Lands granted at Will only. And in like Manner it is if two agree to exchange Land, and after either of them levies a Fine, or makes a Feoffment of the Land to the other; by this the Land will pass each to other, but not by way of Exchange. So if *A.* and *B.* his Wife, and *C.* and *D.* his Wife, agree to exchange Lands, and *A.* and *B.* enter into the Land they are to have in Exchange, and then they make a Feoffment of their own Land to *C.* and his Father, and not to *C.* and *D.* his Wife; this shall not enure as an Exchange, and therefore *C.* and *D.* may enter upon their own Land again, but the Feoffment is good. And if one assigns a Woman her Dower in exchange for Land; this shall not take Effect as an Exchange, but it shall enure to be a good Assignment of Dower. *Perk. §. 255, 256, 272. Fitz. Exchange 14.*

(D) *Things requisite to the Perfection of an Exchange.*

TO the Perfection of an Exchange, and to make Things pass by this Kind of Conveyance, these Things are requisite:

First, That the Parties be able to give and take, and such who may be Grantors and Grantees may make exchange.

Secondly,

Secondly, The Things exchanged must be such whereof an Exchange may be made; and an Exchange may be made of Things of the same Nature, as a Temporal Thing for a Temporal, Spiritual for a Spiritual; as a House for a House, Land for Land, &c. or Things of a different Nature, a House for Land or Rent, a Chamber in a House for Common, &c.

Thirdly, The Exchange must be in that Order and Manner as the Law requires; and here note,

1. That if all or part of the Things whereof the Exchange is made do lie in several Counties, or lie in Grant and not in Livery, tho' in the same County, the Exchange must be made by Deed indented in Writing.

2. The Word *Exchange* must be had and used between the Parties making the Exchange.

3. If any Rent, Reversion, Seignior, or the like, be granted by either Party, the Tenant must attorn to the Grant.

Fourthly, Equality of the Estate is necessary for either Party to have a like Kind of Estate; so that if one's Estate be in Fee-simple, the other's be so too; for if one grant Lands in Fee-simple, and the other in Fee-tail, or one Land in Fee-tail, the other for Life, these Exchanges are void.

Fifthly, The Exchange must be executed and perfected by Entry or Claim in the Life-time of the Parties.

Of all which more fully hereafter.

(E) Of the Parties to Deeds of Exchange.

IN an Exchange it is requisite that the Persons or Parties thereunto be able to give and take, and not disabled by any special Impediment.

And observe, that such Persons as may be Grantors and Grantees may make Exchanges, and such Persons as are disabled to grant, are disabled to make Exchanges. See Tit. *Grants*.

An Exchange made between the King and a Subject is good, altho' the King holds his Lands in one Capacity, and the Subject in another. *Co. Lit.* 51.

An Exchange made between an Infant and another, is not void but voidable only, the Infant at his full Age may affirm or avoid it at his Election. *Ibid.*

An Exchange made between a Tenant in Tail and another is not void but voidable, for it is good against himself during his Life, and his Issue at his full Age may affirm or avoid it at his Election. *Bro. Exchange* 9. *Perk.* §. 279.

An Exchange made between a Man *De non sane memorie* and another is not void but voidable, for it is good against him, but his Heir may avoid or affirm it at his Election. *Bro. Exchange* 9.

A Man that holds Land in Fee-simple, Fee-tail or for Life, in the Right of his Wife, may exchange this Land, and the Exchange will be good as long as he and his Wife do live: And he with his Wife may exchange it for longer Time, and the Exchange is good against him, but his Wife after his Death may affirm or avoid it if she will. *Bro. Exchange* 9. *Perk.* §. 279.

One Parson or Vicar may exchange his Church or Benefice with another, and this Exchange is good. *Perk.* §. 288.

The Disfeisor and Disfeisee may join together and exchange the Land whereof the Disfeisin was made with a Stranger for other Land; but if it be made out of the Land and before the Entry of the Disfeisee, it shall not bind the Disfeisee, for he may avoid it. And a Disfeisor cannot exchange the Land he has gotten by Disfeisin with the Disfeisee for other Land, for this Exchange is void unless it be by Indenture or Fine, that it may work by way of *Estoppel*. *Perk.* §. 280, 273.

The Lessor and Lessee may join together and exchange the Land leased for other Land, and this is good; for it shall be said to be the Surrender of the Lessee to the Lessor, and the Exchange of the Lessor; and therefore the Lessee shall have nothing to do with the Land taken in Exchange. *Perk.* §. 279. *sed quere.*

Jointenants for Life, the Fee to one of them, may exchange their Land with a Stranger for other Land to hold in the same Nature, and the Exchange is good. But Jointenants, Tenants in Common, and Coparceners, cannot exchange the Lands they do so hold one with another before they have made Partition. *Perk.* §. 277, 281.

If *A.* and *B.* be Jointenants for Life, the Fee to *A.* and *A.* exchanges the whole Land with another for other Land; this is good only for his Moiety, as some have said. But it seems notwithstanding it is good for the Whole, until it be avoided by the other Jointenant. *Perk.* §. 277.

(F) *Of the Things exchanged.*

IT is requisite in a good Exchange, that the Things exchanged be such as whereof an Exchange may be made.

As to this observe, that an Exchange may be made of Things of the same Nature, as of a Temporal Thing for a Temporal Thing, a Spiritual Thing for a Spiritual, as a House for a House, Land for Land, a Manor for a Manor, a Church for a Church, Rent for Rent, Common for Common, a Horse for a Horse, one Piece of Plate for another, or the like: Or it may be made of Things of a different Nature, as of a Temporal Thing for a Spiritual, as of a House for Land or Rent, a Chamber in a House for Common, or for a Reversion, Seigniorie or Advowson, of Land or Rent for a Right of Land or Release of Right, of an Advowson for Land, of a Rent for a Way, of a Horse for a Piece of Plate, of a Gown for a House, or the like. And Exchanges made of these Things, altho' the Things exchanged do lie in divers Counties, are good. *Perk.* §. 261, 262, 263, 266, 258. *Lit.* §. 62. *Co. Lit.* 51, 52.

Also a Seigniorie by Homage and Fealty, or the like, which is not valuable, may be exchanged for Land, Rent, or any other such like Thing. So may a Seigniorie by divine Service. But a Seigniorie in *Frankalmoigne* cannot be exchanged with any but the Tenant of the Land that doth hold by the Tenure. And Houses, Manors, Lands, Rents, Commons, Seigniories, Reversions, and the like, may be exchanged in Fee-simple, Fee-tail for Life or Years; so that an Exchange may be of an Inheritance for an Inheritance, of a Freehold for a Freehold, and of Chattels real for Chattels real. *Perk.* §. 258, 259, 265.

If one grants *Whiteacre* in Exchange for *Blackacre*, lying within the same or in two Counties; this is a good Exchange. So if I grant a Rent-charge issuing out of my Land in exchange to *J. S.* for an Acre of his Land, &c. this is a good Exchange. So if I have a Rent issuing out of the Land of *J. S.* and I grant this to *J. K.* in exchange for Land or other Rent; this Exchange is good when the Tenant has attorned to the Grant of the Rent. (*For Attornment see before Title Grants.*) So if one has a Rent out of my Land in Fee, and I have the Land in Fee, and I grant the Land in exchange for the Rent; this is a good Exchange. But if one grants me a Manor or Land, and I in exchange for the same Manor or Land grant unto him a Rent *de novo* issuing out of the same Land or Manor; this cannot take Effect as an Exchange. So if one releases his Estovers that he has in such a Wood, and delivers the Release in exchange for Land given to him in exchange for the same Release; this is a good Exchange. 3 *Ed.* 4. 10. 9 *Ed.* 4. 21. *Fitz. Exchange* 16. *Perk.* §. 244, 262, 263, 266.

If there be a Disfeisor and Disfeisee, and the Disfeisee releases his Right to the Disfeisor in exchange for other Land; this is a good Exchange. *Perk.* §. 271.

So if the Disfeisor of an Acre of Land enfeoffs a Stranger of the same Acre of Land, and the Feoffee gives to the Disfeisee an Acre of Land in Fee in exchange for a Release of all his Right in the Acre of Land of which he was disfeised; this is a good Exchange. *Perk.* §. 282.

But if the Disfeisee grants his Right to a Stranger that has nothing in the Land in exchange for an Acre of Land; this Exchange is not good, neither shall the Stranger take any Thing by this Grant. *Perk.* §. 271.

If there be Lord and Tenant by Fealty, and 12 *d.* Rent, and the Lord exchanges the Seigniorie with the Tenant for the Tenancy, or *e converso*, by Deed indented; this is held by some to be a good Exchange. *Perk.* §. 240.

If I have a Rent issuing out of the Land of *J. S.* and I grant or release the same Land to *J. S.* in exchange for other Land; this is a good Exchange. So if I release the same Rent unto him in exchange for a Way over his Ground; this is a good Exchange. *Perk.* §. 267.

If I be seised of Lands to which *J. S.* has a Right of Action, and I give to him other Land for a Release of his Right; this is a good Exchange.

And

And the same Law is of an Exchange of Land, and an Advowson by Deed indented, for a Release of Right in another Advowson to an Usurper when his Incumbent has been in Possession of the Church six Months. *Perk. §. 268, 269.*

If two Parsons of a Church make an exchange of their Benefices by Words of Exchange, and each of them resigns his Benefice into the Hands of the Bishop to the same Intent, and the Patrons present accordingly, and the Presentations are *per viam permutationis*; this is a good Exchange. *Perk. §. 257.*

If three Acres of Land with an Advowson appendant be given in exchange by *J. R.* to *J. S.* for a Chamber to be assigned by the said *J. S.* at the Election of *T. K.* and he assigns two Chambers, and *T. K.* chuses and enters upon one, and *J. S.* enters upon the Land; this Exchange is good notwithstanding the Incertainty. So if *J. S.* gives his Manor of *A.* to *T. K.* in exchange for his Manor of *B.* or for his Manor of *C.* and he enters upon one of these Manors, and *T. K.* enters upon the Manor of *A.* this Exchange is good. *Perk. §. 264, 265.*

From what is before mentioned these Things are worthy of Observation:

First, That the Things exchanged need not to be *in esse* at the Time of the Exchange made, for a Man may grant a Rent *de novo* out of his Land in exchange for a Manor.

And yet if I grant to another the Manor of *A.* for the Manor of *B.* which he is to have after his Father's Death by Descent, it seems this Exchange is void.

Secondly, There needs no Transmutation of Possession for a Release of Rent, Estovers, or Right of Land, for Land is good.

Thirdly, The Things exchanged need not to be of one Nature, so as they concern Lands or Tenements; for Land may be exchanged for Rent, Common, or any other Inheritance which concerns Lands or Tenements, or Spiritual for Temporal Things, as Tithes; Tenure by divine Service for Land or a Temporal Seignior. But Annuities, and such Things which charge the Person only, and do not concern Lands or Tenements, or Goods and Chattels, cannot be exchanged for Land. *Co. Lit. 50. Perk. §. 265.*

(G) *How an Exchange must be made.*

THIS Kind of Conveyance (which formerly was very common) was sometimes made by Word without any Writing, (But see the Statute of Frauds in the next Chapter) and sometimes it is made by Deed or in Writing: And which way soever it be made it must be made by the Word *Exchange*, which is a Word so appropriated to this Thing as the Word Frank-marriage is to a Gift in Frank-marriage, neither of which can be made or described by any Circumlocution. *Co. Lit. 501. Perk. §. 253.*

An Exchange must be made in the Manner and Order that Law requires; wherein these Things are to be known:

1. That by the Common Law (before the Statute of Frauds, 29 Car. 2. c. 3.) if all or Part of the Things whereof the Exchange was made did lie in several Counties, or if all or Part of the Things whereof the Exchange was made were such as lay in Grant and not in Livery, altho' it was in the same County; the Exchange was to be made by Deed indented in Writing. But where the Exchange was of Lands lying in the same County, altho' it was of any Estate of Inheritance or Freehold, yet it might be by Word of Mouth without Writing. And so also it might be if the Things exchanged lay in divers Counties, when the Exchange was made only for a Term of Years: And therefore if an Exchange was made between *J. S.* and *T. K.* of Lands lying in one and the same County in Fee, or for Life, it might be by Word of Mouth: But if all or Part of the Lands of *J. S.* lay in one County, and all or Part of the Lands of *T. K.* lay in another County, this Exchange was to be made by Deed indented. And if an Exchange was made of Rent for Land, and the Land out of which the Rent is issuing, and the Land given in exchange for it, both lie in one County; this Exchange was not good without Deed. So if an Exchange was made of the Reversion of an Acre of Land for three Shillings of Rent issuing out of another Acre of Land, and both Acres were in one County; this Exchange was to be made by Deed indented, or it would not be good. So if an Exchange was made of an Acre of Land, and a Rent out of another Acre for another Acre of Land and Common for three Beasts, and all was in one and the same County; this Exchange was to be by Deed indented, or it would not be good: But if I was seised of a Manor to which

Place or Nature.

he had Common Appendent or Appurtenant, and T. K. was seised of another Manor to which he had a Villain regardant, and both the Manors were in one County, an Exchange might be made of these Manors by Word of Mouth without Writing, and the Common and Villain would pass as Incidents well enough. And yet if J. S. had an Office whereunto Land belonged, and T. K. had Rent issuing out of the Land of a Stranger, and all the Land was in one County, and the Office was to be used and occupied in the same County; if these Things were exchanged, it was to be by Deed indented. *Perk.* §. 244. *Co. Lit.* 51, 52. *Lit.* §. 62. 9 *Co.* 14. *Perk.* §. 246, 247, 248, 249, 250.

But now by the said Statute an Exchange of Lands, &c. must be by Deed indented.

Words.

2. The Word *Exchange* must be used in making the Exchange.

As if I grant to you *Whiteacre*, To have and to hold to you and your Heirs in exchange for *Blackacre*; and in Consideration hereof you grant to me and my Heirs *Blackacre* in exchange for *Whiteacre*; for this Word is so individually requisite, as it cannot be supplied by any other Word, neither will any Averment that it was in exchange, help in this Case: And therefore if A. by Deed indented gives to B. an Acre of Land in Fee-simple, or for Life, and by the same Deed B. gives to A. another Acre of Land in the same Manner; this cannot enure as an Exchange: And therefore if no Livery of Seisin, so as it may take Effect by way of Grant, it is utterly void. But by this Means Lands may be granted from one to another, for there needs no Livery of Seisin. See of *Livery of Seisin*, *Tit. Grants*.

So if an Exchange be made by Words between two of Lands in one County, and before their Entry Indentures are made between them of the same Lands without Words of Exchange, and no Livery of Seisin is made; this shall not pass by way of Exchange. And yet it has been held by some, that *Permutatio*, or some other Word of like Effect, may supply the Word *Exchange*. *Co. Lit.* 50, 51. *Perk.* §. 252, 253. 9 *Ed.* 4. 21. *Fitz. Exchange* 12.

3. That if any Rent, Reversion, Seignior, or the like, be granted by either Party, that then the Tenant do attorn to the Grant, for that Attornment is requisite in this Case. (But see of *Attornment*, *Tit. Grants*.) And yet in the Case of the Grant of the Land in Possession in exchange, no Livery of Seisin is needful. Neither is it needful that either Party to the Exchange come to the Thing given to him in exchange by the same Means and Manner of Assurance; for if a Lessee for Life of one Acre, gives another Acre to his Lessor in Tail in exchange for a Release from him of that Acre, To have and to hold in Tail in like Manner; this is a good Exchange. *Perk.* §. 229, 263, 276, 289.

When to take Effect.

An Exchange may be made to take Effect *in futuro* as well as *in presenti*; for if an Exchange be made between me and T. K. that after the Feast of *Easter* T. K. shall have my Manor of *Dale* in exchange for his Manor of *Sale*; this is a good Exchange. *Perk.* §. 265.

Estate limited or not.

If an Exchange be made in Writing of Land, and it limits and expresses no Estate that either Party shall have in the Thing exchanged, yet this is a good Exchange. But if an Estate for Life be limited expressly to one, and no express Estate is limited to the other; this is not a good Exchange, 19 *H.* 6. 27. *Perk.* §. 275. as shall be shewed in the next Place.

(H) Of the Equality of the Estates or Interests exchanged.

ANOTHER Thing required in a good Exchange is Equality of Estate, viz. that either Party have the like Kind of Estate of the Thing exchanged, so that if one has an Estate in Fee-simple, the other has so likewise, and so for other Estates. For if one grants that the other shall have his Land in Fee-simple for the Land which he has of the other in Fee-tail; or that the one shall have in the one Land Fee-tail, and the other Land but for Term of Life; or that the one shall have in the one Land Fee-tail general, and the other in the other Land Fee-tail special; or that the one shall have in the one Land for Life, and the other in the other Land but for Years: These Exchanges are void, and cannot take Effect as Exchanges. *Fitz. Exchange* 15. *Lit.* §. 64, 65. *Perk.* §. 276. *Co. Lit.* 50, 51.

And

And therefore if the Lord releases to his Tenant his Services in Tail, in Exchange for other Lands given to the Lord in Exchange in Tail also, this Exchange is void; for by this release made by the Lord, the Services are gone for ever. *Perk. §. 283.*

So if Tenant for his own Life exchanges with him that is Tenant for Life of another; this is not a good Exchange. And yet for the same Reason it should seem, if Lessee for twenty Years of his Land, exchanges with another for other Land for forty Years; that this should not be a good Exchange. *Perk. §. 275. Finche's Ley 27.*

But if Lessee for Life be of an Acre of Land, and he gives another Acre of Land to his Lessor in Fee-tail, in Exchange for a Release of all his Right in the Acre that he holds for Term of his Life, To hold to him and the Heirs of his Body engendred; this is a good Exchange. *Perk. §. 276.*

Or if Tenant for his own Life exchanges with him that is Tenant in Tail, after Possibility of Issue extinct; this Exchange is good. *11 Co. 80.*

And yet if an Estate for Life be expressed to the one Party upon the Exchange, and no Estate is expressed to the other Party; it is said that this Exchange is not good, and yet where no Estate is expressed, the Party shall have an Estate for his own Life. *Perk. §. 275. 19 H. 6. 27.*

But in these Cases it is not necessary, that the Parties to the Exchange be seised of an equal Estate at the Time the Exchange is made; for if Tenant in Tail, or Husband in Right of his Wife, exchange their Land in Fee-simple with another for Lands he has in Fee-simple; this is a good Exchange until it be avoided by the Issue or the Wife. Neither is it necessary that both Estates be in Possession; for one may grant an Acre in Possession in Exchange for an Acre in Reversion, and this Exchange is good. Neither is it necessary, that there be an Equality in the Value or Quantity of the Lands exchanged; for if the Land of one of the Parties be worth one hundred Pounds, and the Land of the other but ten Pounds; or the Land of one of the Parties be an hundred Acres, and the Land of the other but ten Acres, if the Estates given be equal, the Exchange is good. Neither is Equality in the Quality or Manner of the Estates requisite; for if two Jointenants be in Fee of an Acre of Land, and they grant that Acre to another in Exchange for other Lands, To have and to hold a Moiety to one of them and his Heirs, and a Moiety to the other and his Heirs, which is an Estate in Common; or two of them give Land in Exchange to A. and his Heirs, for Lands from A. to them two and their Heirs, altho' the one Party has a joint Estate, and the other a sole Estate; yet the Exchange is good. The like Law is, if the Land of one of the Parties be of a defeasible Title, and the Land of the other of an undefeasible Title, this Exchange is good till it be avoided. *Co. Lit. 51. Perk. §. 280, 281, 289. Lit. §. 6.*

An Acre in Possession may be given in Exchange for the Reversion of another, expectant upon a Lease for Life or Years, where no Rent is reserved, and it shall be good; for they so took it, and no Party was deceived. *Cro. Eliz. 902. pl. 6. Moor Case 909.*

(I) Of the Execution of an Exchange.

ANOTHER Thing required in a good Exchange is, that there be an Execution and Perfection of the Exchange (*if of Land, vide 1 Mod. Rep. 91.*) by Entry or Claim in the Life-time of the Parties, *viz.* That both the Parties to the same Exchange do enter into the Things taken in Exchange, if they be such Things as they may enter into; for until the Exchange be executed by Entry, or the like, the Parties thereunto have no Freehold in Deed or in Law in the Things exchanged, altho' the same Things do lie in one County: And if either of the Parties die before he enters into the Lands by him taken in Exchange; hereby the whole Exchange is become void, if his Heir will; but if one of the Parties enters, he shall not first begin to avoid the Exchange. But if the Parties enter at any Time during their Lives it is sufficient, unless the Possession be before devested by an elder Title; as by Entry for a Condition broken, Entry by a Disseisee of his Heir, or the like, and not revested again before the Entry. As if an Exchange be had between two of Land, and before their Entry by Force of the Exchange they are, or one of them is disseised of the Land exchanged, and the Disseisor disseised thereof; and then they enter according to the Exchange, and put out the Heir of the Disseisor, this shall not be said to be an Execution of the Exchange; but if the Disseisee has recovered the same Land against the Heir of the Disseisor, this shall not be said to be an Execution of the Exchange; but

but if the Disseisee have recovered the same Land against the Heir of the Disseisor by Writ of Entry, and has Execution, then he may execute the Exchange by Entry. And in Case where a Reversion, Rent or Seignory is granted in Exchange, it must be perfected and executed by the Attornment of the Tenant in the Life-time of the Parties, otherwise the Exchange is not good; but in this Case after Attornment is made, it seems the Exchange is perfect without any Entry or Claim. *Co. Lit.* 50, 51. 1 *Co.* 98, 101, 105. *Perk.* §. 284, 286, 289, 292.

If two Parsons exchange their Churches, and resign them into the Bishop's Hands, this is not a perfect Exchange until they be inducted; and therefore if either of them die before they be both inducted, the Exchange is void. *Perk.* §. 257.

(K) *Where an Exchange shall be determined, or the Nature of it changed by Matter ex post facto, and where not.*

IF after an Exchange is made, and before or after the Parties enter, all or Part of the Land given to either Party be recovered from him upon an elder Title; as by an Entry upon a Condition broken, Alienation in Mortmain, or upon a Disseisin; in these Cases, if that Party enters again upon his own Land which he gave in Exchange (as he may) hereby the whole Exchange is determined. But if after the Exchange is perfect, one of the Parties enters upon the Land which he gives in Exchange, this does not make void the Exchange; neither may the other Party hereupon enter upon the Land he gives in Exchange, but he may have an Affise, or an Action of Trespass against the other. 4 *Co.* 122. *Bro. Exchange* 12. *Perk.* §. 286, 299.

And yet if an Exchange of a Common for a Way, or a Rent, or the like; if the one Party deny the Common, it hath been said the other Party may deny the Way, or the Rent. *Perk.* §. 299. *Sed Quære.*

If an Exchange be made in Fee between two of a Manor, whereof the one Half is in Tail, and the other Half is in Fee-simple, and the Tenant in Tail that made the Exchange dies, and his Issue disagrees to it, so that the Exchange of the tailed Land is become void; this determines the whole Exchange; for when an Exchange becomes void in Part, it becomes void in all, and until it be avoided it is good for all. As if one be seised of *Whiteacre*, and he exchanges *Whiteacre* and *Blackacre* (which is none of his) with another for two other Acres, this shall continue for a good Exchange, and may not be avoided until he that has Right to *Blackacre* evicts him that has it in Exchange. *Bro. Exchange* 8. *Perk.* §. 297.

If an Exchange be made by Tenant in Tail, and his Issue after his Death waives the Possession of all or Part of the Land taken in Exchange, and disagrees to the Exchange; hereby the whole Exchange is determined. So if the *Wife* after the *Husband's* Death, the *Infant* at his full Age, or the Heir of him that is *de non sane memorie*, disagrees to the Exchange of the Husband, the Infant, or him that is *de non sane memorie*; hereby the whole Exchange is determined, and no subsequent Agreement can make it good again. 4 *Co.* 122. *Perk.* §. 290, 294, 296, 298.

If two make an Exchange by Word of Mouth, and after, before either of them enter, they make Indentures of the Lands exchanged, and grant the same from one to another; it seems hereby the Nature of the Exchange is changed, and the Exchange determined. 15 *Ed.* 4 3.

(L) *Where an Exchange voidable at first becomes good by Matter ex post facto, or not.*

IF an Infant exchanges Lands, and after at his Age occupies the Lands taken in Exchange for his own Lands; hereby the Exchange is made good. So if Tenant in Tail exchanges his intailed Lands with another, and after his Death the Issue occupies the Lands taken in Exchange by his Ancestor, hereby the Exchange is made good for the Life of the Issue in Tail. So if the Husband and Wife exchange the Lands of the Wife for other Land, and she after her Husband's Death agrees to it, and enters into, and agrees to the Lands taken in Exchange; hereby the Exchange is made good; but if the Husband alone makes an Exchange of his Wife's Land, and she after his Death agrees to this and enters into the Land, it seems this will not make the Exchange good.

And

And if a Man seised of Land in Right of his Wife in Fee, thereof infeoffs a Stranger, and takes an Estate back again to him and his Wife, and a third Person in Fee, and they three join in Exchange of the same Land in Fee for other Lands to a Stranger in Fee; and the Exchange is executed, and the Husband dies, and she occupies the Land taken in Exchange with the other third Person; hereby the Exchange is made good.

If a Man *De non sane memorie* makes an Exchange, and his Heir after his Death enters into the Land taken by his Ancestor in Exchange, and agrees to the Exchange; hereby the Exchange is made good. And in all these Cases when the Exchange is once by Agreement made good, it can never by any subsequent Disagreement be afterwards made void. 12 H. 4. 11. Fitz. Exchange 13. Perk. §. 279, 290, 291, 293, 294, 298. Co. Lit. 51.

(M) *Who may take Advantage of a void or voidable Exchange, or not.*

THE Parties themselves, and all Privies and Strangers for the most part, may take Advantage of such Exchanges as are void for the Defects before named; but when the Exchange is only avoidable, *contra*. And therefore when an Exchange is made by an *Infant*, the Infant himself at his full Age, or his Heir, and no other, may avoid it. And when an Exchange is made by a *Tenant in Tail*, the Issue in Tail after the Death of his Ancestor, and no other, may avoid it. And when an Exchange is made by the *Husband*, or *Husband and Wife* of the Wife's Land, the Wife after the Husband's Death, or Heir of the Wife after her Death, and no other, may avoid it. And when an Exchange is made by a Man of *Non sane memorie*, his Heir after his Death, and no other, may avoid it. But in these Cases of an *Infant*, *Tenant in Tail*, *Woman Covert*, and a Man *De non sane memorie*, and where Lands are recovered by an *elder Title*, the other Party may not enter and avoid the Exchange until the Infant, Issue in Tail, Woman, or him that is *De non sane memorie*, or him that loses the Land by an *elder Title*, doth first enter. Perk. §. 285, 290, 294, 298. 1 Co. 98, 105. Dyer 285.

(N) *How an Exchange shall be construed and taken.*

IF two exchange Land by Deed, and limit no Estates, this shall be taken for Estates for Life, and the Exchange is good; But if an express Estate be limited to one, and no express Estate to the other, it is said this Estate is not good, and that Construction of Law will not help it. 19 H. 6. 27. Perk. §. 275.

If an Exchange be made between two Men of two Acres of Land by Deed, and in the *Habendum* it is set down that each of them shall have the Acres given in Exchange, with divers other Acres not expressed in the Premises; this Addition shall be taken as Surplusage, and the Exchange shall be good for the two Acres. Perk. §. 251.

S E C T. XVIII.

Of Surrenders.

(A) *Surrender what.*

A Surrender (*sursum Redditio*) properly taken, is the Yielding or Delivering up of Lands or Tenements, and the Estate a Man has therein unto another that has a higher and greater Estate in the same Lands or Tenements.

But it is sometimes improperly applied to other Things. Co. Lit. 337. b.

He who surrenders is called the Surrenderor, and he to whom it is made is called the Surrenderee.

A Surrender is a particular Sort of Conveyance that works by the Common Law. 2 Vent. 201.

(B) *Kinds of Surrenders.*

THERE are three Kinds of Surrenders:

First, A Surrender properly taken at the Common Law.

Secondly, A Surrender by Custom of Lands holden by Custom or of Customary Estates.

Thirdly, A Surrender improperly taken, as of a Deed, or Grant of a Rent-charge of a Patent, and of Land in Fee-simple to the King.

I. The Surrender properly taken is of two Sorts, expressed or implied.

1. Expressed, or in Deed, which is when it is done by apt Words, and the express Agreement of the Parties.

2. In Law, or implied, which is when it is wrought by Consequent and Operation of Law, or when the Law interprets or enures something done to another Intent, to make a Surrender of it.

And in the first Case it is sometimes by Word only, and sometimes by Writing.

And when it is by Writing, it is said to be an Instrument testifying by apt Words, that the particular Tenant of the Lands or Tenements for Life or Years consents and agrees that he who has the next and immediate Remainder or Reversion thereof, shall also have the particular Estate of the same in Possession, and that he yields the same to him. *Co. Lit.* 337, 338. 6 *Co.* 69. *Plow.* 106, 107. 1 *West's Symb.* lib. 2. c. 460.

(C) *The Nature and Effect of a Surrender.*

THE Fruit and Effect of a Surrender is, that it passes the Estate of the Surrenderor to the Surrenderee, and that hereupon the Estate of the Surrenderor is drowned and extinct in the Estate of the Surrenderee; and yet not so, but that to some Purposes it shall be said to have Continuance still. And therefore if Tenant for Life grants a Rent-charge, and after surrenders his Land; in this Case the Rent-charge shall continue notwithstanding the Surrender. So if Lessee for Life makes a Lease for Years rendring Rent, and the Lessee for Life surrenders his Estate; in this Case altho' the *primitive* Estate for Life be yielded up, yet the *derivative* Estate for Years shall continue, but the Surrenderee shall not have the Rent reserved upon the Lease for Years. So if Lessee for Life or Years breaks a Covenant with his Lessor, and after surrenders his Estate to him, his Breach of Covenant is not hereby salved, for the Lessor may have an Action of Covenant still notwithstanding the Surrender. *Co. Lit.* 338. 1 *Co.* 96. *Bro. Surrender* 47. *Perk.* § 591.

And if one seised of Land grants a Rent out of it in Fee, and this Rent is extended on a Statute, or granted for less Time to another, and then the Grantee surrenders the Deed of the Grant of the Rent to the Tenant of the Land; in this Case the Rent shall continue as to him that has Execution, and the Grantee. And if one makes a Lease for Years rendring Rent, and the Lessee surrenders his Estate to the Lessor; hereby the Rent is extinct: But if the Lessor grants the Rent to a Stranger before the Surrender, *contra*. And if one leases for Years, and the Lessee lets Parcel of his Term to his Lessor rendring Rent, and after the Lessee surrenders his whole Estate; in this Case the Rent is determined. 7 *Co.* 39. 8 *Co.* 145. *Bro. Sur.* 42.

Where there is no particular Method in the Lord's Court, or Custom within the Manor for the suffering a Recovery of Copyhold Lands for barring of an Intail, a general or common Surrender is sufficient, tho' the Intail is of a Copyhold Trust or legal Estate. 2 *Vern.* 585, 705.

(D) *What shall be said a Surrender in Law of Lands; and by what Means an Estate shall be surrendered in Law, or not.*

IF Lessee for Life or Years takes a new Lease of him in Reversion of the same Thing in particular contained in the former Lease for Life or Years; this is a Surrender in Law of the first Lease: As if Lessee for his own or another's Life in Possession or Reversion takes a new Lease for Years; or a Lessee for forty Years takes

a new Lease for fifty Years; the first Lease in both these Cases is surrendered.
 14 H. 8. 15. Plow. 194. Dyer 28. 10 Co. 67.

And this Rule holds altho' the second Lease be for a less Time than the first; as if Lessee for Life accepts a Lease for Years, or Lessee for twenty Years accepts a Lease for two Years. Perk. §. 617. 5 Co. 11.

And altho' the second Lease be voidable, as being made upon Condition; as if Lessee for twenty Years takes a new Lease for twenty Years, upon Condition that if such a Thing happens the second Lease shall be void, and the Thing does after happen; in this Case both these Leases are become void: As where the Lessor grants the Reversion to the Lessee upon Condition, and after the Condition is broken. Fitz. Surrender 3. Co. Lit. 218. 37 H. 6. 17.

Or if the second Lease be made by Tenant in Tail, or the like; as if a Man makes a Lease for Years of Land, and then makes a Feoffment to another of the Land, and then takes back an Estate to him and his Wife of the Land, and then makes a new Lease to the Lessee for ten Years; this is a Surrender in Law of the first Lease. But if the second Lease be merely void, then it is otherwise. Dyer 140, 141.

And therefore if the Lessor by Words of Covenant only promises to his Lessee that he shall have a new Lease, and never actually makes it; this is no Surrender in Law. Dyer 272.

And this Rule holds also, altho' the second Lease be to the Lessee and a Stranger, or to the Lessee and his Wife. Dyer 177, 178. 5 Co. 54, 55. Kelw. 70.

And altho' the second Lease be by Word only, and the first Lease be by Deed, if so be that the Thing granted by the Lease be such a Thing as may pass by Word without Writing. Dyer 140, 141.

And altho' the second Lease be in another's Right; as if the Husband has a Lease for Years in the Right of his Wife, and then takes a new Lease to himself in his own Name. Dyer 178. And altho' the first Lease be to begin presently, and the second be to begin at a Day to come, or *e converso*. Pas. 40 El. Co. Lit. 338. 6 Co. 69. 5 Co. 11. 10 Co. 53, 67.

And altho' there be a mean Estate between; as if Land be let to A. for Years, and after let to B. for Years, to begin after the first Term, and the Assignee of A. takes a new Lease. So if one demises Land for ten Years to one, and after demises it for ten Years to another, to begin at Michaelmas, and after the first Lessee accepts a new Lease. For in all these Cases there is a Surrender in Law of the first Leases. Dyer 93, 112.

And if there be two Lessees for Life or Years, and one of them takes a new Lease for Years; this is a Surrender of his Moiety, whereby it appears that a Surrender in Law may be made of some Estates which cannot be surrendered by a Surrender in fact; for *fortior est dispositio legis quam hominis*. And hence it is that a Corporation Aggregate may make a Surrender in Law without Deed, altho' it cannot make an express Surrender without Deed. Dyer 46. 2 Co. 60. 6 Co. 69. 10 Co. 67.

But if the Lessee only licences the Lessor to make a Feoffment, and gives Livery of Seisin; or gives Livery of Seisin for him as his Attorney; or licences him to enter into the Land, and no more; neither of these Things shall be said to be a Surrender in Law. So if the second Lease be made of another, and not of the same Thing whereof the first Lease is made; as where the first Lease is of the Land, and the second is made of a Rent or other Profit to be taken out of the Land; or the first is of a Manor, and the second of the Bailiwick or Stewardship of the Manor; or the first is of a Park, and the second is of the Keepership of the Park; in these Cases there is no Surrender of the first Lease. Also if the second Lease be not a good Lease, perhaps it shall not be construed a Surrender. Perk. §. 608. Bro. Surrender 48. 6 Co. 69. Trin. 5 Jac. adjudged. See 2 Co. 17. Lane's Case.

But if the first Lease be of the Land itself, and the second Lease is of the Vesture of the same Land; this is held to be a Surrender of the first Lease. Trin. 5 Jac. Sir Jo. Chamberlain's Case. See Dyer 200.

So if the second Lease be not to begin until the first Lease ends, the taking of this second Lease is no Surrender of the first Lease. So it has been said if one makes a Lease of Blackacre in Dale, and the Lessee accepts a second Lease of all the Lands of the Lessor in Dale, in general Words, and the Lessor that makes the Lease has divers other Lands there besides this Acre; that this is no Surrender of the first Lease. 5 Co. 11. *Sed quare* of this, for others do much doubt it.

So if one enters into Land and makes a Lease for the Trial of the Title only, and after the Lessor (he and the Lessee being both out of Possession) makes another Lease of the same Thing to the Lessee; this is no Surrender of the first Lease: But if the Lessor enters before he makes the Lease, *contra*. Per Cur' B. R. 9 Jac.

(E) *Where Copyhold Lands shall pass without a Surrender.*

A Man devised all his real Estate for the Payment of Debts, and was seised of several Freehold and Copyhold Lands, but had not surrendered his Copyhold Lands to the Use of his Will, and died, leaving three Sons; and Part of the Copyhold Lands was of the Nature of *Borough English*. Per Lord Chancellor, If the Copyhold passes, the youngest Son, who is intitled to such Part thereof as is *Borough English*, must contribute to pay the Debts; that as between the Sons it was a doubtful Case; but with Regard to the Creditors, if there was not an Estate sufficient for the Payment of Debts without the Copyhold Lands, it was his Opinion these ought to pass. 1 Will. 443.

(F) *Things requisite in a good Surrender of Lands.*

TO make a good Surrender in Deed of Lands, and to make them pass by such a Surrender, these Things are first of all required:

First, That the Surrenderor be a Person able to grant and make, and the Surrenderee capable to receive a Surrender, and that both have Estates capable of a Surrender.

Secondly, That it be made by Deed, and not by Word without Writing, unless of Copyhold or Customary Estates.

Thirdly, That it be made of such Things whereof a Surrender may lawfully be made, for a Surrender cannot be made of Lands in Fee-simple or Tail, nor of Right and Titles, but only of Estate for Life or Years.

Fourthly, That there be Words or Deeds, and Words sufficient to make the Mind of the Surrenderor appear, and that he be willing to give up his Estate in the Land to the Surrenderee.

Fifthly, The Surrenderee must agree to accept of it, for till then the Surrender is not perfect.

Of all which more fully hereafter.

(G) *Of the Parties between whom a Surrender is made, and their Estate and Possession.*

IN a Surrender it is requisite that the Surrenderor be a Person able to grant and make, and the Surrenderee a Person capable and able to take and receive a Surrender, and that they both have such Estates as are capable of a Surrender: And for this Purpose observe,

First, That the Surrenderor has an Estate in Possession of the Thing surrendered at the Time of the Surrender made, and not a bare Right thereunto only.

Secondly, That the Surrender be to him that has the next immediate Estate in Remainder or Reversion, and that there be no intervenient Estate coming between.

Thirdly, That there be a Privity of Estate between the Surrenderor and the Surrenderee.

Fourthly, That the Surrenderee must have a higher and greater Estate in the Thing surrendered than the Surrenderor has, so that the Estate of the Surrenderor may be drowned therein.

Fifthly, That he has the Estate in his own Right, and not in the Right of his Wife, &c.

Sixthly, And that he be sole seised of this Estate in Remainder or Reversion, and not in Jointenancy.

As for Examples, *Infants*, *Femes Covert*, *mad* and *lunatick* Men, and all such like Persons as are disabled to grant, are disabled to make a Surrender, and none but such as may grant their Land may surrender their Land. A Corporation Aggregate cannot

not make an exprefs Surrender without a Deed, but it may make fuch a Surrender by Deed. And fuch Persons as are difabled to take by a Grant, or difabled to take by a Surrender; and fuch as may be Grantees may be Surrenderers: And therefore a Surrender to an *Infant* is good. 10 Co. 67.

If the Husband has a Lease or Eftate for Years in the Right of his Wife, he alone, or he and his Wife together, may furrender it. But if the Husband has an Eftate for Life in the Right of his Wife, being Tenant in Dower, or otherwife, and he alone, or he and fhe together, furrender this; this Surrender is good only during the Life of the Husband, except it be made by Fine. *Bro. Surrender* 44. *Perk.* §. 612, 613.

One Executor may furrender an Eftate or lease for Years which the Executors have in the Right of their Teftator. 21 H. 7. 25.

If there be two Tenants in Common, and one of them has the particular Eftate, and the other the Fee-fimple; as where an Eftate is limited to two and the Heirs of one of them, and he that has the Eftate for Life aliens his Part to a Stranger; in this Cafe the Alienee may furrender to the other Jointenant. So if there be three Jointenants for Life, and the Fee-fimple is limited to the Heirs of one of them, and one of the Jointenants for Life releases to the other, and he to whom this Release is made furrenders to him that has the Fee-fimple; this is a good Surrender of a third Part.

A Lessee for Life or Years may furrender to him that is next in Remainder in Fee-fimple, Fee-tail, or to him in Reversion in Fee; and this is a good Surrender. And a Surrender may be made to the Grantee of the Reversion before Attornment, fo as Attornment be afterwards made. (*Vide Tit. Grants.*) And in Cafe of the Surrender of an Eftate for Life, there needs no Livery of Seifin, as in Cafe of the Grant of an Eftate for Life. A Lessee for Years of a Term to begin at a Day to come, cannot furrender it by an actual Surrender before the Day the Term begins, as he may by a Surrender in Law. *Fitz. Surrender.* *Perk.* §. 586, 587, 584, 600, 601, 602. *Co. Lit.* 338. *Bro. Sur.* 4. 4 H. 7. 10. 6 Co. 69. *Dyer* 251, 358, 280.

If Lessee for Life be diffeifed, or Lessee for Years be oufted, and before his Entry, or the getting of the Poffeffion again, furrenders his Eftate to him in Reversion; this Surrender is void. So if a Woman that has Title of Dower, furrenders it to him in Reversion before fhe has recovered it; this Surrender is void. And yet if Lessee for Years after his Term is begun and before his Entry, when no Body keeps from him the Profits, furrenders his Eftate; this is a good Surrender; but if another enters before him, and keeps him out, it feems otherwife. *Perk.* §. 600, 601, 602, 603.

If there be Lessee for Years, the Remainder for Life, the Remainder or Reversion in Fee, and the Lessee for Years be oufted, and he that oufted him dies feifed, and then the Lessee for Years enters, and then the Tenant for Life furrenders to him in Remainder or Reversion in Fee; this is not a good Surrender, for there is in this Cafe but a bare Right of Remainder for Life and in Fee; but if the Lessee for Years had not been oufted, it had been a good Surrender. If there be Lessee for Years, the Remainder for Life, the Remainder in Fee; the Lessee for Years may furrender to the Lessee for Life, and fo may the Tenant for Life to him in Remainder or Reversion in Fee; but if there be Tenant for Life, the Remainder for Life, the Remainder in Fee; in this Cafe the fecond Tenant for Life cannot furrender to him in Remainder in Fee. *Perk.* §. 605. *Dyer* 251.

If a Lease be made for Life or Years to *A.* the Remainder for Life to *B.* the Remainder in Fee-tail to *C.* and the first Tenant for Life or Years furrenders to *C.* or to the Lessor, *B.* the next in Remainder for Life being then living; this is not a good Surrender, neither can it take Effect as a Surrender in Refpect of the intervening Eftate. And fo fome fay the Law is if the middle Remainder be but for Years only: As if a Lease be made for Years, the Remainder for Years, and the first Termor furrenders his Interest to the Lessor; this is no good Surrender. *Sed quare.* *Perk.* §. 588.

For it fould feem that a future Interest will no more hinder an actual Surrender of the first Lessee than a Surrender in Law. And fo alfo it feems the Law is for a concurrent Lease, which for the latter Part of it is in the Nature of a future Interest. But if in this Cafe it happens that the middle Remainder is void; as where a Lease is made to *A.* for Life or Years, the Remainder to a Monk (who is a Person incapable) for Life or Years, the Remainder to *J. S.* in Fee; in this Cafe *A.* the first

Tenant may surrender to him in Remainder in Fee, and the Surrender is good. *Dyer* 93, 112. *Plow.* 190, 432, 433.

If Lessee for twenty Years makes a Lease for five Years, and the Lessee for five Years enters, and after the Lessee for twenty Years surrenders to him in Reversion or Remainder; this is a good Surrender. So also if the two Lessees join in the Surrender. So also if the first Lessee surrenders first, and the Lessee for five Years surrenders after; but if the Lessee for five Years surrenders to him in the Reversion or the Remainder, before the Surrender of the Lessee for twenty Years; this cannot take Effect as a Surrender for two Causes;

First, Because there is a Remnant of the Term, as an intervenient Estate to hinder the drowning of the Term.

Secondly, Because there wants a Privy between the Lessee for five Years, and him in Reversion. *Perk.* §. 604. 14 H. 7. 3. *Plow.* 541. *Bro. Sur.* 16.

If Tenant in Fee-simple surrenders to the Lord Paramount of whom the Land is held; this can never take Effect as a Surrender, unless it be in a special Case where the Lord has Cause to have a *Cessavit*. *Bro. Sur.* 9. *Fitz. Sur.* 10.

So if Tenant in Tail surrenders to him in Remainder or Reversion in Fee-simple, this cannot take Effect as a Surrender. So if Lessee for Life surrenders to him in Remainder for Years; or Tenant for the Life of B. surrenders to him that has an Estate for the Life of C. these are void Surrenders, for the Estates of them to whom they are made, are not capable of such Surrenders, for they are not greater than the Estates of the Surrenders, and therefore not able to drown the Estates surrendered. And yet if Lessee for Life of another, or for his own Life surrenders his Estate to him in Remainder that is Tenant for his own Life; this is a good Surrender; for an Estate for a Man's own Life is greater in Judgment of Law, than an Estate for another Man's Life. And hence it is, that if a Lease be made to two for their Lives, the Remainder to a third Person for his own Life, and one of the Tenants for Life surrenders his Estate to him in Remainder for Life; this is a good Surrender for a Moiety. *Perk.* §. 589, 590. *Co. Lit.* 42, 3, 61.

If Lessee for Life or Years surrenders to him in Remainder or Reversion that has no good Estate in the Remainder or Reversion, as where the Remainder or Reversion is granted by Word only, (*vide Stat. of Frauds*) or being granted by Deed, there is no Attornment of the Tenant to the Grant, or the like; this Surrender is not good. 2 *Co.* 66.

And yet if Tenant in Tail makes a Lease for Life, whereby he gains a new Reversion (but defeasible), and the Tenant for Life surrenders to the Tenant in Tail; this shall be a good Surrender. So if a Woman inheretrix has a Husband, and they have issue a Son, and the Husband dies, and she takes another Husband, and he lets the Land for Life, and the Wife dies; and the Tenant for Life surrenders his Estate to the second Husband; this is a good Surrender to most Purposes. *Co. Lit.* 338.

If a Feme Sole be seised of Land in Fee, and she makes a Lease thereof to a Stranger for Life, and then takes a Husband, and the Lessee surrenders to the Husband; this is no good Surrender, neither can it enure so, because he to whom it is made has not the Reversion in his own but his Wife's Right. *Perk.* §. 622.

(H) Of the Place where the Surrender is made.

BEFORE the Statute of Frauds 29 Car. 2. c. 3. it was requisite in every good Surrender, made by Word and without Deed, that it should be made in the same County where the Land to be surrendered lay; but by Writing a Man might make a Surrender of Lands that lay in any other County, and in what Place soever it lay. And a Surrender might be by Word or Writing of Lands lying within the same County in any Place out of the Land: And therefore if Tenant for Life surrendered to him in Reversion in any Place out of the Land within the same County, and the Surrenderee agreed to it, the Freehold was in him presently. *Bro. Sur.* 2, 8. *Fitz. Partit.* 5. *Perk.* §. 583.

But now by the said Statute §. 3. No Leases, Estates or Interests, either of Freehold or Terms of Years, or any uncertain Interest, *not being Copyhold or Customary Interest*, of, in, to, or out of any Messuages, Manors, Lands, Tenements or Hereditaments,

ditaments, shall be assigned, granted or surrendered, unless it be by Deed or Note in Writing.

(I) *Of the Things surrendered.*

CARE should be taken that a Surrender be made of such Things, of which it may lawfully be made; for Surrenders may not be made of Estates in Fee-simple, Fee-tail, nor of Rights and Titles only of Estates for Life or Years, nor of Part of an Estate for Life or Years; as if a Man has a Lease for ten Years, he cannot surrender the last seven Years, and keep to himself the three Years. But otherwise one may surrender any Kind of Estate for Life, as by Dower by the Courtesy, or as Tenant in Tail after Possibility of Issue extinct, or for Years, or Years determinable upon lives; and of any Messuages, Houses, Lands, Commons, Rents, or the like, that are grantable from one to another, and such Surrenders are good. *Bro. Sur. in toto. Perk. c. Sur. in toto. 5 Co. 11. Co. Lit. 338.*

If I have a Rent in Fee for Life or Years, issuing out of another Man's Manor or other Lands, I may surrender it, for if I deliver the Deed of the Grant of the Rent, to be cancelled to any one that has any Estate of the Manor or Land in Fee-simple, for Life or Years, in Possession or Remainder, either solely by himself, or jointly with others, this is a good Surrender, and hereby the Rent is extinct and gone. But one that is Tenant in Tail of a Rent cannot surrender it, neither will the delivering up of the Deed in this Case determine the Rent. *14 H. 7. 2. Perk. §. 585, 590, 591, 596, 598, 608.*

And if one be seised of Land out of which a Rent is issuing in Fee, and is disseised, and during the Disseisin, the Grantee of the Rent surrenders his Rent, and gives up his Deed; it seems this does not extinguish the Rent, yet the Grantee has no Remedy for his Rent when he has delivered up his Deed. *Perk. §. 594.*

And yet if one be seised of Land in Fee, out of which a Rent is issuing in Fee, and he dies without Heir, so that the Land escheats, and before the Lord enters upon his Escheat, he who has the Rent, surrenders the Deed of the Rent to the Lord; this is a good Surrender to extinguish the Rent. *Perk. 595.*

And if the Grantee of a Rent-charge in Fee, grants the same to him in Fee that is seised of the Land in Fee, this shall enure to extinguish the Rent; but if he grants it to one that has only an Estate for Life, *contra. Perk. 597.*

Before the *Stat. 4 G. 2. c. 28.* Leases for Life, &c. could not be renewed without a Surrender of all the Under-Leases, and the Under-Tenants might have refused and prevented it. But now by the said Statute, it is enacted, That if any Lease for Life or Years, where there are Under-Tenants by Lease, shall be duly surrendered in order to a Renewal, and a new Lease is made and executed by the Lessor; the new Lease shall without a Surrender of all the Under-Leases, be good and valid to all Intents and Purposes: And the Lessees, by Vertue of such new Lease, shall be intitled to the Rents of the Under-Tenants, and have like Remedy for Recovery thereof; and the Lessees shall hold the Lands as if the original Lease had been kept on Foot.

(K) *How a Surrender is made, and by what Words.*

IN a Surrender there should be Words, or Words and Deeds sufficient to make the Mind of the Surrenderor to appear that he is willing or desirous to part with, and yield up the Thing surrendered into the Hands of the Surrenderee. And herein observe, that altho' the Words *Surrender, Give, or yield up*, be the most significant and proper Words whereby to make a Surrender, yet any other Words, especially if it be in the Surrender of a Lease for Years, that do testify and declare the Will and Assent of him that is the particular Tenant; that he in the Remainder or Reversion shall have the Estate of the Tenant, is sufficient to pass the Estate by Way of Surrender. And therefore if Lessee for Life or Years by Word or Writing says, that *he will hold the Land no longer, and wishes him in Reversion or Remainder therefore to enter*; or that *it is his desire that he shall enter into the Land, and have it and his Estate therein*; or that *he is content that he shall have his Estate, or have his Lease*; such, or any such like Declaration as this made to him in Reversion or Remainder, will be a good Surrender. *Perk. §. 607, 608, 609. Bro. Sur. 1, 35, 37, 17. 21 H. 7. 7. Dyer 251.*

But see the Statute of Frauds in the last Page.

So

So if Lessee for Years delivers his Indenture to a Stranger, to deliver it and all his Estate up to him in Reversion, and appoints the Stranger to deliver and surrender it to him in Reversion, and he does so, and he in Reversion accepts thereof; this is a good Surrender: But otherwise it is of an Estate for Life; so if the particular Tenant does, by the Words *Give, Grant, or Confirm*, pass his Estate to him in Reversion, and he enters and agrees to it, this is a good Surrender: And by all these Surrenders the Estate will pass by Way of Surrender, except it be in some special Cases where the Intents of the Parties plainly appears to be that the Estate shall not pass by Way of Surrender. But if a Lessee for Life or Years, only goes from the House or Land, and carries away his Goods and Cattle, and so waives the Possession for a Time, either because the Lessor shall not distrain them for Rent behind, or the like, and thereupon the Lessor enters and enjoys it; this is no Surrender, neither is this a good Yielding up of his Estate. *Sleigh and Bateman's Case, Hill. 37 Eliz. B. R.*

And in such a Manner, and by such Words as before, any Thing that may be granted by Word without Writing, may be surrendered by Word without Writing, so as it be made within the same County where the Thing surrendered doth lie. And this holdeth true, altho' the Estate to be surrendered was created by Deed; (*but see the Statute of Frauds 29 Car. 2. c. 3.*) but such Things, as Commons, Rents, Advowsons, Reversions, Remainders, and the like, that cannot be granted without Deed, cannot be surrendered without Deed. And therefore if a Lease be made for Life, the Remainder for Life by Word of Mouth without any Writing; he in the Remainder for Life, cannot surrender his Remainder for Life without Deed. So where one has a Rent, Advowson, or the like, as Tenant in Dower, or by the Curtesy; this cannot be surrendered without Deed. *Perk. §. 581, 582, 583. Fitz. Sur. 1. Co. Lit. 338.*

And in Case where there is any special Matter to be contained in the Surrender, as Reservation of Rent, Condition, or the like; there for the most part it must be by Deed, or it will not be good. And therefore if Tenant for Life declares himself by Word of Mouth to be contented, and agreed that he in the Reversion shall have the Land and his Estate therein, rendering ten Shillings a year Rent, or paying such a Sum of Money; or upon Condition that if he survives the Lessor, he shall have it again, &c. this is no good Surrender. *Dyer 251. Bro. Sur. 16.*

And a Surrender may be made also upon a Condition precedent or subsequent, as if it be with Reservation of Rent, that if it be not paid it shall be void; but if it be an Estate for Life that is so surrendered, it must be made by Writing indented; and so likewise the Law is of the Surrender of a Lease for Years upon a Condition, or however it is most safe so to do. *Perk. §. 624, 623. Co. Lit. 218. See the Statute of Frauds.*

(L) Of the Agreement of the Surrenderee to the Surrender.

IN a Surrender it is necessary that the Surrenderee agrees to, and accepts of it; for until then the Surrender is not perfect; but if the Surrenderee once agrees to it, he cannot after disagree, for his first Agreement perfects the Surrender. But the actual Entry of the Surrenderee into the Land is not necessary. And therefore if Tenant for Life or Years surrenders to him in Reversion out of the Land, and he agrees to it, he has the Land in him presently. And yet he may not bring an Action of Trespass against any Man, for any Trespass done upon the Land until he has made his Entry. *Perk. §. 608.*

But observe, that in the Cases before where Things may not pass by Way of Surrender, either because of an intervenient Estate, or the like; if there be sufficient Words in the Deed, it may avail to other Purposes, and may enure and pass the Thing by Way of Grant; but then if it be an Estate for Life that is intended to be surrendered, there must be Livery of Seisin made upon the Deed. And therefore if there be Lessee for Years, the Remainder for Life or Years, the Remainder in Fee, and the Lessee for Years in Possession surrenders and grants all his Estate to him in Remainder in Fee; howsoever this Deed cannot enure as a surrender, yet it shall enure as a good Grant of the Estate of the Lessee for Years unto him in Remainder in Fee. *Perk. §. 588, 589.*

There must be an Agreement of the Surrenderor and Surrenderee, otherwise *Non operatur. 2 Vent. 206.*

Where

Where a Deed of Surrender is made to him in Reversion, if he be present he must either agree or disagree. 2 Vent. 206.

But it has been a great Doubt, where a Deed of Surrender is made to him in Reversion in his Absence and without his Knowledge, whether his Agreement is not intended, and that the Law shall suppose an Assent till his Disagreement appears: It was the Opinion of *Ventris* that it should; and the House of Lords, upon a Writ of Error, gave Judgment accordingly. 2 Vent. 206. 3 Lev. 284. 1 Show. 296. 3 Mod. 296, 301. *Parl. Cases* 150, 151. 2 Salk. 618. Co. Lit. 266. b. But *Pollexfen* C. J. and *Powel* and *Rokeby* Justices were of Opinion, that it was no Surrender till the Surrenderee had Notice of the Deed of Surrender, and agreed to it.

(M) *Where a Surrender in pursuance of a Bond shall be compelled in Equity.*

A. Seised of a Copyhold Estate, attempts to surrender it to the Use of his Will, with an Intent to devise it to *B.* his Sister's Son; but a Surrender not being practicable by Reason of some Accidents, he prevailed with his Sister, who was his Heir at Law, to give a Bond to her Son, conditioned to surrender at his Request upon Payment of 200*l.* *A.* died, *B.* received the Rents and Profits some time, and then died Intestate, leaving only two Sisters. The Mother administered, and having procured herself to be admitted Tenant of the Copyhold, devised it by Will to one of her Daughters and Sister of *B.* The other Sister of *B.* brought her Bill against the Devisee for a specific Performance of the Condition of the Bond, by which she would be intitled to a Moiety of the Land. And it was decreed, that the Mother should be considered as a Trustee for *B.* and that a Surrender and Conveyance should be made accordingly, upon the Payment of 200*l.* with Interest from the Death of *A.* *Lucas* 515. *Mod. Ca. Law and Eq.* 62.

(N) *Where a Feoffment, Lease, Grant or other Act made, or done by the Tenant for Life or Years, shall be deemed a Surrender, or not.*

First, *Where it is made to him in Reversion or Remainder.*

IF any Kind of Tenant for Life of Land infeoffs him in Remainder or Reversion of the Land, or grants his Estate to him in Remainder or Reversion; this shall enure as a Surrender. And if Lessee for Years before his Term begins, makes a Feoffment to him in Reversion or Remainder, or grants his Estate to him; this shall enure as a Surrender. And if Lessee for Life grants his Estate to him in Reversion, the Remainder in Fee to another; this shall enure as a Surrender, and this Remainder is void. But if such a Tenant for Life makes a Lease to him in Remainder or Reversion for the Term of the Life of him in Remainder or Reversion; this shall not enure as a Surrender because it does not give the whole Estate, but it shall enure by way of Grant. So if Lessee for Life makes a Lease to him in Remainder in Tail for Term of the Life of him in Remainder; this shall not enure as a Surrender, but as a Grant, and shall end with the Life of the Grantee. *Bro. Sur.* 3, 5, 49. *Co. Lit.* 42. *Perk.* §. 616, 620, 623.

If a Lessee for forty Years makes a Lease for thirty-seven Years on a Condition, and after grants his Estate to him in Reversion, and the second Lessee attorns; this shall enure as a Surrender. *Pasch.* 7 *Jac. B. R.*

If there be Tenant for Life, the Remainder in Tail to a Stranger, and the Remainder in Tail to another Stranger, the Remainder in Fee to the Tenant for Life, and the Tenant for Life makes a Feoffment to the first Tenant in Tail; this shall enure as a Surrender of the Estate for Life, and as a Grant of the Reversion in Fee also. *Perk.* §. 621.

If Tenant for Life takes a Husband, and then her Husband and she by Deed indented makes a Lease to him in Reversion for the Life of the Husband; this shall not enure as a Surrender, but as a Grant. *Co. Lit.* 42.

If there be Tenant for his own Life, the Remainder to *S. J.* for his own Life, and the first Tenant for Life surrenders to him in Remainder for the Life of him in Remainder; this shall enure as a Surrender, and is no Forfeiture; but if he grants it

to him for the Life of a Stranger, and makes Livery of Seisin, this is a Forfeiture. *Bro. Sur. 17.*

If Lessee for Life, the Reversion being in Jointenants, grants the Land to one or all of the Jointenants for twenty Years; this shall not enure as a Surrender, but as a Grant, for there remains an Interest in the Lessee still as a mean Estate. *Perk. §. 613.*

If Lessee for Years makes him in Reversion or Remainder his Executor; this shall not enure as a Surrender, altho' it gives him the whole Estate. *Bro. Sur. 52.*

If Lands be given to the Husband and Wife, the Remainder to *J. S.* and the Husband discontinues in Fee, and takes back an Estate to him and his Wife, the Remainder to *W. N.* and dies, and Wife claims in by the second Estate, and surrenders to *W. N.* this shall not enure as a Surrender but as a Grant. *Bro. Sur. 36.*

Secondly, *When it is done or made to him and a Stranger.*

If Lessee for Life or Years grants his Estate to him in Remainder or Reversion, and a Stranger; this shall enure as a Surrender of the one Half to him in Reversion, and as a Grant of the other Moiety to the Stranger. *Bro. Sur. 11. 2 Co. 61. 3 Co. 61.*

And yet it is said, that if Lessee for Life of Land grants his Estate to him in the Reversion and two others, that hereby they have a joint Estate, and the Survivor shall have the Whole. *Perk. §. 619.*

If Lessee for Life makes a Lease for his own Life to the Lessor, the Remainder to the Lessor and a Stranger in Fee; this shall enure as a Surrender of the one Moiety, and a Forfeiture of the other Moiety. *Co. Lit. 335.*

If Tenant for Life surrenders to the Husband of a Woman Tenant in Tail or in Fee; this shall enure as a Grant, not as a Surrender. And so also it seems in the Law when the Surrender is to the Husband and Wife. *Bro. Sur. 20, 24, 23.*

And if *B.* be Tenant for Life, the Remainder to *C.* in Tail, the Remainder to *D.* in Tail, and *B.* enfeoffs *C.* and *S.* his Wife in Fee; this shall not enure as a Surrender, but it is a Forfeiture: So that if *C.* dies without Issue, *D.* may enter. *Bro. Sur. 46.*

If there be Lessee for Life, the Reversion to two Coparceners, and one of them takes a Husband, and the Lessee grants his Estate to her and her Husband; this shall not enure as a Surrender, but as a Grant. *Perk. §. 623. 21 H. 7. 40.*

And if Tenant for Life grants his Estate to the Husband and Wife, she having the Reversion, if she be an Infant and within Age at this Time; it seems this shall enure as a Surrender, not as a Grant. *Bro. Sur. 347.*

Thirdly, *When it is done both with the Tenant and him in Reversion or Remainder.*

If Tenant for Life or Years, and he in Reversion or Remainder by Word without Deed join in a Feoffment; it shall be said the Surrender of the Estate for Life or Years to him in the Reversion, and the Feoffment of him in the Reversion.

But if he in Reversion infeoffs the Tenant for Life without any Deed; this shall enure first as a Surrender of the Lease for Life, and then as a Feoffment. *Plow. 140. Dyer 358.*

But see the Statute of Frauds in the next Chapter.

Fourthly, *When a Grant, &c. is made of the same Land, or a Thing out of the same Land, &c.*

If the Lessee of a Manor accepts of a Lease of the Bailiwick of the same Manor during his Lease; this is not any Surrender of his Term, because it is distinct, and of another Thing than what was leased before, and there appears no Intention that it should be a Surrender. *Cro. Jac. 176, 177. Noy 12. 2 Roll. Abr. 496.*

But where the Lessee for Years of a House accepts a Grant of the Custody of the same House; this is a Surrender, because the Custody of the same Thing let before is another Interest in the same Thing leased, and cannot stand with the first Lease. *Cro. Jac. 177. pl. 16. Dyer 200. pl. 62. 2 Roll. Rep. 357.*

If a Lessee for Years takes a Grant of a Rent-charge out of the same Land for Life; or if a Lessee for Life takes a Grant of a Rent-charge for Years; that is not any Surrender, because he might have the Benefit of that Rent after the Estate in the Land is determined.

But

But if Lessee for Life takes a Grant of a Rent-charge for Life out of the same Land; this is a Surrender, for otherwise the Rent-charge cannot take Effect. *Cro. Jac. 177. pl. 16. 2 Roll. Abr. 496. Cro. Eliz. 873. Moor 636.*

Where an Officer, who holds by Grant his Office for his Life, accepts another Grant of the same Office to him and another, it is not a Surrender of the first Grant. *Vide 1 Vent. 297.*

(O) *In what Cases a defective Surrender, or the Want of a Surrender, may be supplied, or not.*

A Defective Surrender of a Copyhold Estate, devised as a Provision for younger Children, Grandchildren, a Wife, or when devised for Payment of Debts, has been supplied in Equity: So has the Want of a Surrender, when grounded upon a long Possession and Enjoyment, in which Case a Surrender will be presumed; and the Surrender might be lost or mislaid, without the Default or Negligence of the Party, being kept by the Lord and his Steward, who are oftentimes changed, and not so careful as they should be. *1 Chan. Rep. 108. 1 Vern. 132, 195. 2 Chan. Ca. 195. Lucas 497. 1 Will. 61. 2 Will. 490. See Abr. Ca. Eq. 122, 123, 124.*

Altho' a Court of Equity will in all Cases supply a Surrender for Payment of Debts, yet not for a Wife against an Heir at Law, who would be disinherited thereby, or for Younger Children against an Elder, to make them in a better Condition than the Elder. *Abr. Ca. Eq. 124.*

In Case of Gavelkind Copyhold, Equity will supply the Want of a Surrender, as well for an Elder Son as a Younger. *2 Vern. 163.*

But where a Man having a Bastard Daughter is seised of Lands, which by the Custom of the Manor could only pass by Deed, Surrender and Admittance, does by Deed, in Consideration of 300*l.* therein mentioned to be paid by the Daughter, grant and convey those Lands to her and her Heirs; and she is admitted, but no Surrender is made; and at the Foot of the Admittance there is a Proviso, that her reputed Father should hold those Lands for his Life; and in the Deed there was a Covenant for further Assurance: It was decreed, that Equity could not supply this Surrender in Favour of a Bastard Daughter; that tho' her Father might be obliged by the Law of Nature to provide for her, yet she was to be considered as a meer Stranger to him; that tho' the Father might have a great Affection for her, yet that was no such Affection as would raise an Use at Law; that the Covenant for further Assurance being only auxiliary and depending on the original Conveyance, if that be void, the Covenant must be void or repugnant. *Abr. Ca. Eq. 123. Prec. Chan. 475.*

If *A.* contracts with *B.* for the Purchase of a Copyhold Estate, and pays the Purchase Money, and *B.* agrees to surrender the Premises at the next Court, but dies before the next Court, or any Surrender made; Equity will supply the want of it. *2 Chan. Rep. 218.*

So where *A.* surrenders a Copyhold by way of Sale or Mortgage, but the Surrender is not presented in Time, and *A.* becomes a Bankrupt, the Surrender shall be supplied against the Assignees. *1 Will. 280. 2 Vern. 564, 609.*

A Man being seised of Freehold and Copyhold Lands, devised both for the Payment of Debts and Legacies, but the Copyhold was not surrendered to the Use of his Will, and the Freehold was sufficient for the Debts; upon which the Question was, whether the Court would supply the Want of the Surrender, and lay the Legacies on the Freehold, and the Debts on the Copyhold, as when there are simple Contract Creditors, and Bond or Judgment Creditors, and personal Assets not sufficient to pay both: But it was held, that the Surrender could not be supplied for the Sake of Legatees, especially when they are meer Strangers, as in this Case they are. *Abr. Ca. Eq. 124.*

(P) *How a Surrender shall be construed and taken.*

A Surrender in general shall be taken most strongly against the Surrenderor, and most beneficially for the Surrenderee; and therefore if I hold by the Lease of *A.* one Acre for Life, and another Acre for Years, and I surrender to *A.* all my Lands, or all my Land I hold by his Lease; by this Surrender both the Acres are surrendered. But

But if the Surrender be of all the Lands I have or hold for Life, or of all the Lands I have or hold for Years of the Lease of *A. contra.* And if I hold one Acre for Life by the Lease of the Father of *J. S.* himself, and I hold another Acre for Life or Years by the Lease of *J. S.* himself, and I surrender to *J. S.* all the Land I hold by his Lease; by this the Land that I had by the Lease of his Father does not pass. *Perk.* §. 610, 611.

A Surrender to one Jointenant shall be construed to enure to them all. But if Tenant for Life or Years grants his Estate to one of the Jointenants in Reversion; this shall not enure as a Surrender to them all, but as a Grant to him alone. *Perk.* §. 615. *Bro. Sur.* 54. *Co. Lit.* 192.

If the Lessor makes and the Lessee takes a new Lease upon Condition; this Surrender in Law is absolute, and altho' the Condition be broken, yet the first Lease is gone. But if the Lessee surrenders or grants his Estate to the Lessor upon Condition; this Condition if it be broken may revest the Estate. *Co. Lit.* 218.

Surrenders of Copyhold Lands must be governed by the same Rules as Conveyances at Common Law. *1 Will.* 16.

S E C T. XIX.

Of Revocations and new Declarations.

(A) *What a Revocation and new Declaration is.*

A Revocation is a destroying or making void a Deed or Will, which existed before the Act of Revocation.

And a Revocation and new Declaration, is a Deed made pursuant to some *Proviso* contained in a former Deed or Conveyance, giving Power to revoke or call back something granted; and by a new Declaration to create a new Estate of the Lands; after which Revocation and Declaration the Lands shall settle accordingly.

There were no Powers of Revocation at Common Law, but a Man might have a Condition of Re-entry. But now these *Provisoes*, containing Power of Revocation, are crept into voluntary Conveyances, and are become very frequent, and pass by raising of Uses according to the *Stat.* 27 H. 8. c. 10. for being coupled with an Use, they are allowed to be good, and not repugnant to the former Estates; as if one seised in Fee covenants to stand seised to the Use of himself for Life, and after to the Use of his Son in Tail, with divers Remainders over, *provided* that he may revoke any of the said Uses; and afterwards he revokes them, he is seised in Fee again without Entry or Claim. But in the Case of a Feoffment or other Conveyance, whereby the Feoffee or Grantee is in by the Common Law, such *Proviso* would be merely repugnant and void. *Co. Lit.* 237. a. It would be void as to destroying the Feoffment, but it might be good as to revoking the Uses to which the Feoffment was made.

(B) *The Effect of a Revocation.*

THE Revoker is seised again without Entry or Claim, *1 Co.* 173. b. for he being Tenant in Possession, cannot enter upon himself.

But he cannot bring Trespass without Entry. *Carter* 78.

Where in a Trust-Term to raise Portions there is a Power for the Husband, with the Consent of the Trustees to revoke the Uses in a Settlement; this suspends the Vesting of the Portions. *2 Will.* 102.

Of two voluntary Settlements, if the first is made without a Power of Revocation against the Intent of the Party, the second shall prevail. *1 Will.* 581.

(C) *Who may revoke.*

A Man ought to be of as good disposing Memory when he revokes his Will, or his Deed, as when he makes it. *Cro. Jac.* 497. pl. 3.

(D) *What*

(D) *What may be revoked.*

SOME Things may be revoked of Course, tho' they are made irrevocable by express Words; as a Letter of Attorney, a Submission to an Award, a Testament or last Will; for these of their Nature are revocable. 8 Co. 82.

(E) *Revocation, how made, and when defective may be helped.*

THE Revoker may revoke Part at one Time and Part at another. But he can revoke one and the same Part but once, without a new Power of Revocation to the Uses newly limited. 1 Co. 173. b. 3 Salk. 316.

A Deed is not revocable because it has an immediate Effect, without a Power reserved in the Deed itself: In Revocations at Law all Circumstances must be observed, or the Power is not well executed; and there can be no Revocation in Equity that is not good in Law, unless the Party's Intention be hindered by Fraud or Accident; for the Law has been liberal in expounding Powers of Revocation; and where the Law expounds a Thing according to an equitable Construction, Equity ought not to extend it farther: Yet where there is a deliberate Intent to make a new Settlement, and a Man goes as far as he can to make it, Equity may supply a Defect; but here the Party had not done all that he could do. 3 Chan. Ca. 86, 99, 108, 126.

Equity may supply a defective Revocation, but cannot make a Revocation where there is none. 2 Vern. 69, 70.

(F) *In what Cases a Person may make a Revocation and new Declaration both, or only one of them.*

IF a Man by Indenture declares the Uses of a Fine, with a Clause to revoke and limit new Uses, he may by Deed revoke and limit new Uses at his Pleasure: But if upon such Indenture declaring the Uses he reserves a Power of Revocation, and does not also reserve a Power to limit new Uses, he can only revoke, and not limit new Uses, by Virtue of the Estate raised by the first Fine. 1 Sid. 343, 344. But see 1 Chan. Rep. 242.

A Power of Revocation once executed is at an End, unless in the Deed of Revocation and new Declaration there is a Power to revoke the Uses thereby declared. Abr. Ca. Eq. 342.

Where there is no Power of new Limitation in a Deed by Power to revoke, one may do it, for he who has Power to revoke has Power to limit. 1 Chan. Ca. 46.

The Limitation of new Uses is good where the express Power in the first Deed was only to revoke. 1 Chan. Rep. 242.

Where a Man has Power to revoke an Estate-tail, he cannot out of it create a Fee. 3 Lev. 213, 214.

By the same Conveyance, the old Uses are revoked, new Uses may be created, where the former cease *ipso facto* without Entry or Claim.

Because the antient Uses cease *ipso facto* without Entry or Claim, (but not so as to bring Trespass, Carter 78.) and the Law shall adjudge Priority of Operation of the same Deed altho' it be sealed and delivered at one and the same Instant: And therefore in Construction of Law, it shall be first a Revocation, and then a Limitation of new Uses. 1 Co. 174. a. b. Vaugh. 42.

(G) *What Act, Deed or Will, is a Revocation.*

BY a Bargain and Sale, &c. or Feoffment of Lands given by Will to Uses, the Will is revoked, because a Will cannot take Effect till after the Testator's Death. Dyer 74. 3 Lev. 108.

A. levied a Fine to the Use of B. and his Heirs for the Payment of his Debts, reserving a Power to revoke by Deed indented; and afterwards, by a Writing subscribed and sealed, he covenanted to levy (and afterwards levies) a Fine to other Uses; this

is a good Revocation: But if the Fine had been levied before the Deed extinguished, it had extinguished the Power, and so no Revocation (of that which had no Being) could have been of the Deed. *Vide Skin. 35, 52, 71. Comb. 11.*

An Uncle covenanted by Indenture with his Nephew, for the Advancement of his Blood, to stand seised to the Use of himself for Life, and afterwards to the Use of his Nephew in Tail. Proviso that if the Uncle by himself, or any other Person during his Life, should deliver or offer to the Nephew a Gold Ring, to the Intent to make void the Uses, then all the Uses should be void. And afterwards was attainted of Treason, the Queen (*Eliz.*) made a Letter of Attorney to two Persons to tender this Ring, which was done, and the Ring refused: This is a sufficient Tender, and determines the Uses. Judgment affirmed by Act of Parliament. *7 Co. 11. a. 14. b. 15. b.*

D. had a Power to revoke a Deed by Writing, subscribed by him in the Presence of two or more Witnesses: He made his Will in Writing without making any express Revocation; this is a good Revocation and Execution of the Power. *T. Raym. 295, 301. Vide Hob. 312. 2 Will. 415.*

Where a subsequent Act shall amount to a Revocation by Implication, it must be a necessary Implication, and wholly inconsistent with the former Deed or Will. If a Devise is in Fee, a Lease subsequent does not revoke it; and if a Devise be for forty Years, and afterwards the Testator grants a Lease for twenty Years of the same Premises, that is no Revocation, only *pro tanto*. A Mortgage subsequent to a Devise is no Revocation, but *pro tanto*. *2 Vern. 496.*

In 1675 *A.* made his Will, and gave the Bulk of his Estate to *B.* as his nearest Kinsman. In 1681 *A.* made a Lease and Release, reciting the Will, but with some Variance; and mentioning that the Intent of the Deed was to dispose of the Estate according as in the Will, and to confirm and not revoke it; and then the Deed disposed of the Estate, some to the *G.*'s, tho' the main Bulk be settled on *B.* In which Deed was a Power of Revocation, on Tender of a Shilling, by Writing under Hand and Seal in the Presence of six Witnesses, whereof three to be Peers, and then to limit new Uses. In 1687 *A.* made another Will, and thereby gave his Estate in a different Manner, *viz.* the Bulk to *M.* whom he supposes to be his Kinsman, instead of *B.* The Question thereupon was, whether or no the last Will had revoked the Deed in Equity, for there was no Tender of Money, and but three Witnesses to this Will, and not one of them a Peer, so that in Law it was plainly no Revocation, because the Power was not pursued. The Validity of the Deed was tried upon an Ejectment in *B. R.* by Direction of the Chancery, where the Title was found for *B.* *Holt, Treby and Powell*, who assisted the Lord Keeper, were of Opinion that the last Will was no Revocation of the Deed. And the Lord Keeper *Sommers* concurred with the Judges, that there was not sufficient Ground in Equity to set aside the Deed; therefore he decreed the Bills of *M. &c.* should be dismissed. *3 Chan. Ca. 55, &c.*

A. devised Lands in Fee to *B.* and then made a Mortgage in Fee of the same Lands: This is an absolute Revocation in Law of the Devise; *contra* if it had been a Mortgage for Years: But it is not a total Revocation in Equity. *1 Vern. 329, 330, 347, 97, 141. 1 Salk. 158. 2 Will. 334.*

A. devised six Houses to his Wife in Bar of Dower, and devised one Moiety of his real and personal Estate to his Daughter *B.* and the other Moiety to his Daughter *C.* Afterwards *A.* upon *B.*'s Marriage with *J. S.* covenanted to settle a Moiety of his real Estate to the Use of himself for Life, Remainder to *J. S.* and *B.* Tho' this is but a Covenant, and therefore at Law no Revocation of the Will, yet being for a valuable Consideration, in Equity, it is tantamount to a Conveyance, and consequently in Equity a Revocation of the Will as to the six Houses devised to the Wife; so that *J. S.* was intitled to one clear Moiety of the real Estate, and to an Account of the Rents and Profits from the Testator's Death; but it being the Testator's Intention that his Wife should have the six Houses, she should have a Satisfaction out of the remaining Moiety. *2 Will. 332, 333.*

A. mortgaged a Manor, and then devised it to *B.* for Life, Remainder to his first, &c. Son in Tail, Remainders over; afterwards *A.* (who was whimsical) fancying he should marry *C.* made a Lease and Release of the Premises to *D.* and *E.* and their Heirs, in Consideration of the intended Marriage, to the Use of himself and his Heirs till the intended Marriage took Effect, then as to Part in Trust for *C.* and her Heirs in Lieu of Dower, &c. There was no further Progress towards the Marriage, but *A.* died without altering his Will, the Honour descended to *B.* who soon after died; and his eldest Son brought his Bill for a Redemption of the Mortgage and a Con-

Conveyance of the Estate, and the Defendants, the Cousins and Co-heirs of *A.* brought a Cross Bill, that they might redeem, &c. whereupon the Question was, Whether this Lease and Release was a Revocation of the Will? Held that the Lease and Release would have been a Revocation of a Devise of a legal Estate, and that equitable Estates are governed by the same Rules; the Will is in Disinheritance of the Heir, who is always favoured. The Co-heirs decreed the Redemption. *Abr. Ca. Eq. 411, 412.*

A Father devised Lands in Trust to permit his Daughter to receive the Rents, &c. till her Marriage or Death; and if she married with Consent of her Mother, &c. then to convey the same to her and her Heirs; but if she died before Marriage, or married without Consent, then to convey to other Persons. The Daughter married in her Father's Life-time with his Consent, and he settled Part of those Lands on her and her Husband, and died. This Settlement is no Revocation of the Will as to the Devise of the other Lands. *2 Vern. 720.*

See the Case of Mr. Fitz-Gerald and Lord Fauconberge before, at p. 61, 62.

(H) *How Revocations are interpreted.*

Revocations are favourably interpreted, because many Mens Inheritances depend upon them. *Co. Lit. 237. a. Skin. 72. Fitz-Gib. 214.*

But see 27 Eliz. c. 4. whereby voluntary Estates made with Power of Revocation, as to Purchasers, are made in equal Degree with Conveyances made by Fraud and Covin to defraud Purchasers.

(I) *What is an Extinguishment of a Power of Revocation, or not.*

THE making a Feoffment in Fee, or levying a Fine, &c. of any Part extinguishes the Power *pro tanto*; but if of the Whole, all is extinct.

Where Uses are to be revoked by Deed indented and inrolled, and a Fine is levied before Inrolment, this has extinguished the Power of Revocation: So a Feoffment or Release to any one who has a Freehold in Possession, Reversion or Remainder, is a Revocation; for this Power is not merely collateral to the Land, but favours of the Interest of the Land. *1 Co. 173. b. 3 Salk. 316.*

If he who has such Power has no present Interest in the Land, nor shall have any Thing by the Ceaser of the Estate, a Feoffment or Fine of the Land is no Extinguishment of his Power, because it is merely collateral to the Land.

A Fine or Feoffment may extinguish a future Power of Revocation. *1 Co. 112. b. Vide Skin. 35, 52, 71.*

And a Power of Revocation, as well present as future, may be released by him who has such Power, to any one who has an Estate of Freehold in the Land in Possession, Reversion or Remainder. *1 Co. 113. b.*

A Man made a Conveyance to the Use of himself for Life, with Remainder over, and a Power to revoke, to which last Purpose he after levied a Fine, and by Deed revoked the former Uses, and declared new Uses; the Fine being levied before the Deed extinguished his Power. *1 Vent. 368, 371. 2 Show. 368. Vide Skin. 35, 52, 71. Comb. 11. See before (A).*

For more concerning Provisoes and Declarations, see before Chap. 5. §. 6. of Conditions; Chap. 6. §. 4, 5. of Declarations of Uses and Covenants to stand leased to Uses.

S E C T. XX.

Of Statutes.

(A) *A Statute what.*

A Statute is a Bond or Obligation on Record: But this Word is sometimes used in another Sense, viz. for a Decree made in Parliament, called an Act of Parliament.

(B) *Kinds*

(B) *Kinds of Statutes.*

THERE are three Kinds of these Obligations: 1. A Statute Merchant: 2. A Statute Staple: And 3. A Recognisance.

A *Statute Merchant* is a Bond acknowledged before one of the Clerks of the Statute Merchant, and Mayor, and the chief Warden of the City of London, or two Merchants of the said City for that Purpose assigned; or before the Mayor, chief Warden or Master of other Cities, as *Tork, Bristol*, or the like, or the Bailiff of any *Borough* or *Village*, or other sufficient Men for that Purpose appointed and authorized, sealed with the Seal of the Debtor or Recognisor, and of the King, which is of two Pieces; the greater whereof is kept by the Mayor or chief Warden, and the lesser by the said Clerk. See the Form of it in the Second Part of this Work. And altho' this at first was ordained and used for Merchants only, yet at this Day it is and may be used and given by any others, and is become one of the common *Affurances* of the Kingdom. *Stat. de Mercatoribus Acton Burnel.*

A *Statute Staple* signifies this or that Town or City, whither the Merchants by common Order and Commandment do carry their Commodities, as Wool, and the like, to utter by the Great. And the Statute Staple is either properly or improperly so called: That which is properly so called, is designed to be a Bond of Record acknowledged before the Mayor of the Staple in the Presence of one or two Constables of the same Staple, and is sealed with the Seal of the Staple, and sometimes also with the Seal of the Party, the which it seems is not necessary. And this is founded upon the Statute of 27 Ed. 3. c. 9. and was invented, and is used only for Merchants and Merchandizes of the same Staple: This is of the same Nature the Statute Merchant is: That which is improperly so called, is called a *Recognisance*, which is also a Bond on Record, testifying that the Recognisor owes to the Recognisee a Sum of Money. And of these there are divers Kinds; for there is one Recognisance founded upon the Statute of 23 H. 8. c. 6. See the Form in the Second Part of this Work. This is always to be acknowledged before the Chief Justice of the King's Bench, or of the Common Pleas, in the Term-time, or in their Absence out of Term, before the Mayor of the Staple at *Westminster*, and the Recorder of the City of London for the Time being; and it is to be sealed with the Seal of the Conusor, and with the Seal of the King appointed for that Purpose, and with the Seal of the Chief Justice, Mayor and Recorder, before whom it is acknowledged; and they before whom it is taken do subscribe their Names to it: And this was ordained, and may be, and is used by Merchants, or any other whomsoever, for Payment of Debts, or Assurance of other Things: And this also is of the same Nature of the Statute Merchant: And both this and the two former are much of the Nature of Judgments had upon Suits in the Courts of King's Bench and Common Pleas, and therefore they are called *Pocket Judgments*. Stat. 27 Ed. 3. c. 1, 2, 3, &c. 27 Ed. 3. c. 9. 22 H. 8. c. 6. Co. Lit. 289. 15 H. 7. 16. 8 Co. 153.

There are also divers other Kinds of Recognisances that are taken by and acknowledged before the Lord Keeper, Master of the Wards, (*now no such Person*) Master of the Rolls, Master of the Chancery, Justices of the one Bench or of the other, (some of which are called Bails) Barons of the Exchequer, Judges in their Circuits, Justices of the Peace, Sheriffs, and others; some whereof are by the Common Law, and some by certain Statutes. And amongst these some are without Seal, and recorded only, and some are sealed and recorded also: And some of them are in a Sum certain, as the Recognisances taken in the Common Pleas for Bail are; and some of them are *incertain*, as those Recognisances that are taken for Bail in the King's Bench, which are after this Manner, *Si judicium redditum, &c. tunc volo &c. concedo*, that the Debt recovered against the Defendant shall be levied of my Goods and Chattels, &c. And these also are much of the Nature of the former Kind of Recognisances. And all Obligations made to the King are of the Nature, and have the Force of a Recognisance. See Stat. 33 H. 8. c. 22, 39. 3 H. 7. c. 1. Dyer 315, 307. F. N. B. 251. b. 132. c. 133. a. 68. a.

Statutes and Recognisances are sometimes *single*, without any *Defeasance*, and sometimes they are *double*, i. e. with a *Defeasance* or *Condition*, upon the Performance whereof the same are to be avoided. The Debtor, or he that enters into the Statute

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or Recognisance, is called the *Recognisor* or *Conusor*; and the *Debtee*, or he to whom it is made, is called the *Recognisee* or *Conusee*.

(C) *What shall be said a good Statute or Recognisance, and what not.*

First, *With Respect of the Persons before whom it is acknowledged.*

TO make a good Statute or Obligation of Record, the Form prescribed must be pursued; 1. In Respect of the Persons before whom; and therefore the Statute Merchant or Staple, or the Recognisance founded upon the Statute of 23 H. 8. may not be acknowledged before any others besides the Persons appointed by the Statutes. Neither may any other Recognisance be acknowledged before any but such as either have Power *ex officio*, and by their Offices to take them, or have special Commission so to do; and therefore a Recognisance taken by a Constable is void. If a Recognisance be made to the Lord Keeper and two others, and if it be acknowledged before himself, this is void as to him. *Dyer* 35, 220. *F. N. B.* 267. a.

Secondly, *In Respect of the Manner of making, acknowledging and registering of it.*

If the substantial Form appointed by the Statutes be not observed, it will be void. If therefore a Statute Merchant be not sealed with the Seal of the Debtor, and there be not a Seal of two Pieces annexed to it, this is no good Statute, neither can it take Effect as a Statute; however in this Case, if it be delivered by the Party, it may take Effect as an Obligation. But if the Variance from the Statutes be only in some Circumstance, this will not hurt a Statute or a Recognisance: And therefore it is held, that altho' there be no Time set for the Payment of the Money in the Statute, yet the Statute is good, for then it is due presently. And altho' the Statute be written with another's Hand, and not with the Hand of the Clerk of the Statutes, or the like, yet is the Statute good enough. And if a Statute Staple be not sealed with the Seal of the Party that acknowledges it, it is good enough, for the Statute does not require it: But a Recognisance within the Statute of 23 H. 8. cannot be good, except the Seal of the Party be to it, for so are the Words of the Statute. *Hollingsworth v. Asugh*, *Pas.* 35 *Eliz.* C. B. adjudged *Trin.* 22 *Jac.* C. B.

If a Recognisance or a Statute be to pay Money at several Days, it is good enough; and if the Conusor fails one Day, Execution may be sued of the whole Statute. 8 Co. 153.

Every Statute Staple or Merchant not brought to the Clerk of the Recognisances within four Months next after the acknowledging to enter a true Copy thereof, shall be void against all Persons, their Heirs, Successors, Executors, Administrators and Assigns only, which for good Consideration shall, after the acknowledging of the same Statute, purchase the Land, or any Part liable thereunto, or any Rent, Lease or Profit out of it. *Stat.* 27 *Eliz.* c. 4.

By the *Stat.* 2 & 3 *Ann.* c. 4. 6 *A. c.* 35. 7 *A. c.* 20. 8 *G. 2.* c. 6. Judgments, Statutes, Recognisances, &c. shall not affect Lands in the East, West or North Ridings of *Yorkshire*, or in *Middlesex*, unless they are registred, &c. See before of *Registering Deeds*, Chap. 5. §. 12.

(D) *All the Proceedings upon a Statute or Recognisance, and the Manner and Order of Execution thereupon.*

THE Proceedings upon a Statute or Recognisance to have the Fruit and Effect thereof, is not like to the Proceedings in other Cases of Suits upon Obligations, and the like, to reduce them to Judgment; but as they are in their own Nature much like to the Nature of a Judgment, so in the Proceeding and Execution thereupon, much like to the Proceeding and Execution upon a Judgment; and therefore the Conusee may, if he pleases, bring an Action of Debt upon a Statute, and waive all other Proceeding; or otherwise, if he likes not this Course, he (or if he be dead, his Executors or Administrator; and if his Executor be dead, the Executor of his Executor) may as soon as the same is forfeited, have present Execution of it after

this Manner: He must bring his Statute to the Mayor and Clerk, and other Officer, before whom it was acknowledged, and there if they find the Record of it, and the Day to be past for the Payment of the Money, they are to apprehend and imprison the Body of the Conusor, if he be a Lay Person, and can be found within their Jurisdiction; and if he cannot be found there, they are to certify the Record into the Chancery, which also if they refuse to do, they may be compelled unto by a *Certiorari*: And if that Certificate be faulty, or Execution be not done upon it by Reason of the Death of the Conusee, or otherwise, the Conusee, or his Executor or Administrator, may have another Certificate; and thereupon, in this Case of the Statute Merchant, he shall have a Writ of *Capias* out of the Chancery, directed to the Sheriff of the County where the Conusor lives, to apprehend and imprison him (if he be not a Clergyman) and this is to be returned in the Common Pleas or King's Bench: And when the Conusor is taken, he shall have Time for a Quarter of a Year to make his Agreement with the Conusee, and to sell his Lands or Goods to satisfy the Conusee: And for that Purpose he may sell his Lands or Goods altho' he be in Prison, and his Sale is good and lawful: And if in that Time he does not satisfy the Conusee, or if upon the *Capias* the Sheriff returns a *Non est inventus*, then by another Writ (or by divers Writs, if the Lands or Goods lie in divers Counties) called *Extendi Facias*. And in the Case of a Statute Staple, presently after the Certificate into the Chancery, the Conusee shall have a Writ to take his Body, and extend his Lands and Goods, returnable in Chancery. And this Writ is a Commission directed to the Sheriff of the County where the Lands and Goods lie, for the valuing of the same, whereby all the Lands, Goods and Chattels of the Conusor, shall be appraised and valued at a reasonable Rate by a Jury of sworn Men, charged by the Sheriff for that Purpose; which Inquisition so taken is to be returned by the Sheriff, and thereupon the Lands, Goods and Chattels, are to be taken into the Sheriff's Hands, and by him to be delivered to the Conusee (which the Sheriff may do if he will without any Writ, to hold unto the Conusee until he be satisfied his Debt and Damages). And if the Sheriff refuses so to do, the Conusee shall have a Writ out of the Chancery, called a *Liberate*, to compel him to deliver to the Conusee the Lands, Goods and Chattels so found by Inquisition, and taken into his Hands upon the Extent, which the Sheriff needs not to return: Or the Conusee may enter upon the Land himself, and take the Goods out of the Sheriff's Hand; and this Act of the Sheriff and Jury upon this Writ is called an Extent: And if the Jurors or Appraisors upon the *Extendi Facias* overvalue the Lands or Goods in Favour to the Debtor, the Conusee has no Remedy but by Motion in that Court where the Writ is returnable, to desire that the Appraisors may take the Lands or Goods at the Rate they have valued them, in the same Manner as the Conusee is to have them. But if the Conusee accepts of the Lands and Goods from the Sheriff, or suffers the Term to pass wherein the Writ is returnable, he is too late, and has no Remedy at all. And if the Appraisors do undervalue the Lands or Goods in Favour to the Debtee, it seems the Conusor has no Remedy at all, for he may at any Time pay all or the Residue of the Debt and Damages unlevied, and have his Land again if he pleases. And in Case where the Inquisition or Extent taken and made is insufficient, as if Part of the Land only be extended in the Name of all the Lands, or it is found the Conusor died seised of Land, and it is not said of what Estate, or the like, the Conusee shall have a new Extent, and this is called a *Re-Extent*: And this he may have altho' the Lands or Goods be delivered to the Conusee by a *Liberate*, if the Conusee has not entered upon and accepted it; but if he once accepts it, he can never after have a *Re-Extent*: And when the Conusee is in Possession of Lands by such an Extent as before, then he is *Tenant by Statute*; and after the Conusee is once settled in Peace in the Lands extended, he shall hold it until he be satisfied his Debt, and his reasonable Costs and Damages for Travel, Suit, Delay and Expence. But it seems the Time shall not run out nor be said to begin until the Entry of the Conusee into the Land; for if the Land be extended and remains seven Years without a *Liberate* made, yet he may have a *Liberate* at the End of the seven Years; and as soon as the Conusee shall be satisfied his Debt and Damage by the Goods and Chattels of the Conusor, and by the ordinary and certain, or extraordinary and casual Profits of the Land, the Conusor shall have his Land again: And for that Purpose, if the Conusee refuses to give him an Account, and to yield up his Land to him the Conusor, however he may not enter, yet may compel the Conusee thereunto by a Writ called a *Venire facias ad computandum*, in the Nature of a *Scire facias*, by which

which the Conusor shall call the Conusee, his Executors or Administrators, to account; and if upon the Account it shall appear he is satisfied, the Conusor shall have his Land again; and if it appears he is over-satisfied, he shall answer the Overplus to the Conusor. But the Conusor may not enter upon the Conusee until he has brought this Writ, and made it thereupon to appear that the Conusee is satisfied. And if in Case the Conusee be dead, his Executor or Administrator may have Execution of the Statute without any *Scire facias*, upon the shewing of the Statute and the *Testament* in Chancery. And if the Sheriff returns that the Conusor is dead, the Execution shall be made of his Lands only in the Hands of his Heir, or the Purchaser; but if the Heir be under Age, the Execution cannot be done until he be of full Age: And if the Conusor dies in Prison, the Execution shall be of his Lands, Goods and Chattels: And if the Gaoler that has him in Prison suffers him to escape, he must answer the Debt; and if it falls out that the Conusee, his Executor or Administrator, be ousted or disturbed of his Execution by the Conusor himself, or any other during the Time of the Extent, he may relieve himself against the Disturber by Assise, or other Action, as another in the like Case may do: And if he be rightfully ousted or disturbed by one that has better Right, as by one that has a former Statute, or the like; or by the Act of God, as by Fire, Water, or the like; in these Cases the Conusee shall hold the Land over after the Time of his Extent until he be satisfied. But when it is thro' his own Neglect only that he is unsatisfied, as where the Lands are delivered to him by the *Liberate*, and he after his Entry into them makes a conditional Surrender of them; as if Lands of the Value of 10*l.* by the Year, be delivered to him in Execution for 40*l.* and he within four Years makes a conditional Surrender of them to the Conusor, and after he enters for the Condition broken; in this Case he shall not hold the Land over the four Years, for he must take the Profits upon his Extent presently: The Proceeding in Execution of the Statute Staple, and the Recognisance founded upon the Statute of 23 H. 8. is after the same Manner throughout as the Proceeding in Execution of Statute Merchant is, with these Differences only, that upon the Execution of the Statute Merchant there issues forth a *Capias* against the Body before any Execution be to be made of the Lands, or Goods and Chattels, and the Lands and Goods cannot be extended until a Quarter of a Year be past after the Body is taken, or the Sheriff has returned a *Non est inventus*; but upon the Execution of the Statute Staple and the Recognisance, the Body, Goods and Lands may be taken together at the first; this therefore is a more speedy Remedy than the former. Also upon a Statute Merchant one may have an Action of Debt; but otherwise upon a Statute Staple; and the *Capias* upon the Statute Merchant may be returnable in the King's Bench, or Common Pleas, but the Writ of Execution upon the other is to be returned in the Chancery. *Fitz. Accompt* 97. *Execution in toto. Bro. Stat. in toto. Stat. Acton Burnel de Mercatoribus. 27 Ed. 3. c. 9. F. N. B. 133, 131, 132. Dyer 180. 15 H. 7. 15. 4 Co. 67. 7 H. 7. 12. Plow. 61, 62, 82. Co. Lit. 290. Stat. 23 H. 8. c. 6. 5 H. 4. c. 12. 2 R. 3. 7. 14 Ed. 3. 11. Lit. Broo. 294, 123, 126. Dyer 299. 5 Co. 87. 4 Co. 82, 57, 66. Stat. 11 H. 6. c. 10. Kitch. 116. and Butler v. Wallis, Pasf. 38 Eliz. B. R. 15 H. 7. 16. F. N. B. 130, 131.*

The Proceedings upon the other Sort of Recognisances are after another Manner; for upon Recognisances at the *Common Law*, if the Money be not paid at a Day, the Conusee, his Executor or Administrator, is to bring a *Scire facias* against the Conusor, or if he be dead, against his Heirs when they be of full Age; or if the Lands the Conusor had at the Time of entering into the Recognisance be sold against the Purchasers of these Lands which the Conusor had at any Time after the Recognizance entred into, to warn them to come into the Court whence the *Scire facias* comes, and to shew Cause why Execution should not be done upon the said Recognisance; or if the Party and Parties cannot be found to be warned, or being warned do not appear at the Time, or appearing shew no Cause why the Debt should not be levied, and then the Conusee shall have Execution of a Moiety of his Land by *Elegit*; or if the Conusor be living, of all his Goods by *Levari* or *Fieri facias* at his Election; but he cannot have Execution of his Body unless he brings an Action of Debt upon the Recognisance, or it be by Course of the Court, as it is in the King's Bench upon a Bail, in which Case a *Capias* lies. *Dyer 360, 315. Kelw. 100. 2 West. 2. chap. 18. Bro. Execution 129. 3 Co. 11. 15 H. 7. 16. Kitch. 117.*

Proceeding against the Sureties in Statutes shall be as the Proceeding against the Principal; but in Case where there are moveables of the Principal to satisfy the Debt, the Surety (as it seems) shall not be charged. *Stat. de Mercatoribus.*

(E) *What*

(E) *What Things are subject and liable to Execution upon a Statute or Recognisance.**First, In Respect to the Nature and Quality of the Things themselves.*

WHEN a Man enters into a Statute or Recognisance, the Land of the Conusor is not the Debtor, but the Body; and the Land is liable only in Respect that it was in the Hands of the Conusor at the Time of acknowledging of the Statute, or after; and the Land is not charged with the Debt, but chargeable only at the Election of the Conusee; but the Person is charged, and the Land is chargeable in Respect of the Person, and not the Person in Respect of the Land. And therefore altho' the Conusor aliens his Land to another, yet he remains Debtor still, and his Body and his Goods shall be taken in Execution: And yet when Execution is sued upon the Land, the Land is charged and becomes Debtor also. *Plow. 72. 10 Co. 50, 51. Bro. Stat. Merchant. See the Statutes before concerning Registering Statutes, &c.*

The Body of the Conusor himself, but not the Body of his Heir, Executor or Administrator, is liable to Execution, and may be taken altho' there be Lands, Goods and Chattels to satisfy the Debt, and all the Demefne and Copyhold Lands, Tenements or Hereditaments, corporeal and incorporeal of the Conusor that are grantable over, as his Manors, Messuages, Lands, Meadows, Pastures, Woods, Rents, Commons, Tithes, Advowsons, and the like: Also all his Goods and Chattels, as Leases for Years, Wardships, Emblements, Cattle, Household-Stuff, and the like, are liable to Execution upon a Statute. *Stat. de Mercatoribus. 3 Co. 12. Plow. 72. 2 Co. 59. Lit. §. 358. Dyer 7, 205. Bro. Stat. Merchant 44. Co. Lit. 374.*

And therefore if a Man makes a Lease for Life or Years, and after enters into a Statute or Recognisance; this Reversion *cum acciderit* shall be subject to Execution, and the Conusor cannot by any Sale thereof prevent it. And yet the contrary has been held for Law. *Lit. Broo. §. 227. Dyer 373.*

And if one makes a Feoffment in Fee, or Lease for Life, reserving a Rent; this Rent is extendable, and the Conusee may distrain for it. *Doct. & Stud. 53. Bro. Stat. Merchant 44. Dyer 205.*

So if the Lessee for Life makes a Lease for Years rendring a Rent, and then the Lessee for Life enters into a Statute; this Rent is subject to Execution; and it seems the Conusee may bring an Action of Debt against the Lessee for Years for it. *Harvington's Case, Pas. 9 Jac.*

And altho' the Rent becomes extinct by the Purchase of the Conusor, or otherwise, yet as to the Conusee it shall be said to be *in esse*, and subject to Execution still. And therefore if a Rent be granted unto one for my Life after the Death of my Wife, and after I do acknowledge a Statute, and then my Wife dies, and then I release the Rent to the Terretenant; this Rent shall be liable to Execution. *7 Co. 38.*

But Annuities, Offices in Trust, Seigniories in *Frankalmoign*, Homage, Fealty, Rights, Things in Action, and such like Things, are not liable to Execution upon Statutes or Recognisances. Also a Remainder in Tail, or in Fee, after an Estate-tail in Possession, is not liable to Execution in these Cases, except it happens to come into the Possession of the Conusor. *Dyer 7. Co. Lit. 374. Doct. & Stud. 53. 2 Co. 59. 1 Co. 62.*

Secondly, In Respect of the Estate, Property and Possession of the Conusor in the Things.

The Lands, Tenements and Hereditaments that are Copyhold, altho' the Conusor has the Fee-simple of them, yet they are subject to Execution only for the Life of the Conusor; but his Demefne Lands, wherein he has an Estate in Fee-simple, are liable to Execution for ever, if Need requires. The Lands the Conusor has in Jointtenancy with another, are subject to Execution during the Life of the Conusor, and no longer, for after his Death the surviving Jointtenant shall have all; but if the Conusor survive his Companion, then all the Land shall be subject to Execution: And the Lands the Conusor has as Tenant in Tail, are liable to Execution only during the Life of him, being the Tenant in Tail; for afterwards they shall go to his Issue in Tail. And yet if the Tenant in Tail, after he has entred into a Statute, suffers a Recovery

Recovery of the Land intailed; in this Case the Land shall be subject to Execution as if it were Fee-simple Land. And the Lands the Conusor has in the Right of his Wife shall be charged and subject to Execution only during the Lives of the Husband and Wife together, and no longer. *Stat. de Mercat. Dyer 299. Plow. 82. 7 Co. 39. 3 Co. 12. Bro. Recog. 7. 1 Co. 62. 13 H. 7. 22. Bro. Stat. Merchant.*

If a Feoffment be made on Condition to make an Estate to another by a Day of the same Land, and before the Day the Feoffee enters into a Statute or Recognisance; this Land shall be subject to Execution until the Feoffor re-enters, for the Breach of the Condition. *Lit. §. 358.*

If one be disseised of Land, and then enters into a Statute; this Land shall not be subject to Execution: And yet if the Conusor after recovers the Land by Entry or Action, it shall be liable to Execution. *2 Co. 59.*

The Goods and Chattels whereof the Conusor is solely possessed, and possessed in his own Right, and the Goods and Chattels of which he is jointly possessed with another, and the Goods and Chattels he has in the Right of his Wife, are liable to Execution. But the Goods or Chattels that he or his Wife has as Executor or Executrix to another, or as pledged only, it seems are not subject to Execution. And if the Conusor delivers Goods to another to deliver over to *J. S.* these Goods before they be delivered over are liable to Execution. And if he has Leases for Years in the Right of his Wife, and he dies before Execution be done, these Leases are liable to Execution. *Sed quere.* But if the Conusor has Goods in his Custody of another Man's, or has Goods he has distrained in the Nature of a Distress; these are not liable to Execution. *Stat. de Mercat. 3 Co. 11, 12. Plow. 514. 8 Co. 271. 5 Co. 90. Dyer 67.*

All the Lands, Tenements and Hereditaments which the Conusor had at the Time of the Statute or Recognisance entred into or at any Time after, into whose Hands by what Means soever the same are betide and come at the Time of Execution, are subject and liable to the Execution. But the Lands the Conusor had and did put away before the Time of the Statute or Recognisance entred into, are liable to Execution. And all the Goods and Chattels the Conusor has and are found in his Hands at the Time when the Execution is to be made by the *Extendi facias*, are liable to the Execution. But the Goods and Chattels he had and did *bona fide* do away before the Time of Execution done, are not liable to the Execution. *3 Co. 12. Stat. de Mercator.*

Thirdly, In Respect of the Quantity.

And of all these Things before subject to Execution, the Conusor may take all or part at his Pleasure. And therefore if the Conusor has sold his Lands to divers Persons, or has sold some of his Lands to divers Persons, or to one Man, and keeps the Rest in his Hands, or it descends to his Heir, the Conusor may sue Execution upon the Lands in either of their Hands at his Election; so that if the Conusor, after the Statute entred into and before Execution, purchases Part of the Land of the Conusor, he may notwithstanding have Execution upon the Residue in the Hands of the Conusor, or in the Hands of his Heir; and yet so that in some of these Cases his Execution may be afterwards avoided, and be compelled to sue Execution again. *Bro. Stat. 10, 48, 25. Plow. 72. See post.*

The Conusor upon other Recognisances shall have the same Things in Execution that a Man shall have after a Judgment in a Suit in the King's Bench or Common Pleas by *Fieri facias*, or *Levari facias*, all his Goods and Chattels, and by *Elegit* the Moiety of his Lands, and his Chattels, besides the Cattle of his Plough and Implements of Husbandry. But in these Cases he cannot take the Body of the Conusor in Execution, unless it be upon a new Suit, or in Case of Bail in the King's Bench. *Westm. 2. c. 18. Plow. 72. 3 Co. 12. Dyer 306. Kelw. 100.*

(F) Where a Man shall have a Re-extent or new Execution, or not.

BY the Common Law, after a full and perfect Execution, and by Extent returned and of Record, there shall never be any Re-extent; yet by a special Act of Parliament it is provided, That if after Lands, &c. be had in Execution upon a just or lawful Title wherewith all the said Lands, &c. were liable, tied or bound at such

Time as they were delivered or taken in Execution, they shall be taken or recovered away from him before he has received his Debt and Damages; in this Case after a *Scire facias* had against the Conusor, his Heirs, Executors, Administrators or Purchasors, he (or his Executors or Administrators if he be dead) shall have a new Execution to levy the Residue of the Debt and Damages then unsatisfied. *Stat. 32 H. 8. c. 5.*

Wherein these Things are to be observed:

First, In Case where the Conusee is unlawfully and wrongfully disturbed either by the Conusor, or by a Stranger, in the taking of the Profits of the Land delivered to him in Execution; there he may and must bring his Action and recover Damages, and these Damages shall go towards his Satisfaction; for in this Case and for this Disturbance he shall not hold the Land a Day the longer. And where he is hindred by his own Neglect or Act in the taking of the Profits of the Land, as where his Debt is 40 *l.* and he has 10 *l.* a Year delivered to him, by which he may satisfy himself in four Years, and within the Time he makes a conditional Surrender to the Conusor, and enters for the Condition broken; in this Case he shall not hold the Land over, neither shall he have any Re-extent. And where the Let or Disturbance is such as wherein the Conusee has Remedy given him by the Common Law to hold the Land over after the Disturbance removed; in this Case he shall have no new Execution nor Re-extent within this Statute, for where the Conusee has Remedy *in presenti* for Part, or *in futuro* for all or Part, this Statute extendeth not to it. And therefore where the Conusee is hindred in the taking of the Profits of the Land by the Act of God, as by Fire, Overflowing of Water, or the like; or the Act of the Party Conusor, or any by or under him; as when one is bound to *A.* in a Statute of 100 *l.* and after to *B.* in a Statute of 200 *l.* and *B.* extends the Land first, and then *A.* extends the Land and takes it away from *B.* or the Wife of the Conusor claims her Dower, and puts out the Conusee; or one disseises his Lessee for Life, or ousts his Lessee for Years, and then acknowledges a Statute, and after Execution is sued against him, and then the Land is delivered to the Conusee, and after the Lessee for Life or Years enters; in all these Cases, because by the Common Law the Conusee may hold over the Land after the Time given him by the Extent, and after the Impediments removed, until he be satisfied his Debt and Damages; therefore he shall have no Aid of this Statute by Re-extent, for he is then only to be relieved by this Statute when he is evicted and disturbed, and is wholly and clearly without any Remedy at the Common Law.

Secondly, Where the Statute saith, *until he, &c. or his Assigns shall fully and wholly have levied the whole Debt and Damages*; if he has assigned several Parcels to several Assigns, yet they all shall have the Land but until the whole Debt be paid.

Thirdly, Where the Words be, *for the which the said Lands, &c. were delivered in Execution*. If a Disseisor conveys the Lands to the King who grants the same over to *A.* and his Heirs, to hold by Fealty, and 20 *l.* Rent, and after grants the Seigniorie to *B.* *B.* acknowledges a Statute, and Execution is sued of the Seigniorie, *A.* dies without Heir, and the Conusee enters, and is evicted by the Disseisor; in this Case he shall have the Aid of the Statute.

Fourthly, Where the Words be, *delivered and taken in Execution*, yet if after the Liberate the Conusee enters (as he may) so as the Land is never delivered, yet it is within the Remedy of this Statute.

Fifthly, Altho' the Statute speaks only of the Recoveror, Obligee, &c. and not of their Executors, Administrators or Assigns, yet the Statute shall extend to them.

Sixthly, Where the Statute speaks of a *Scire facias* out of the same Court, &c. if the Record be removed into another Court, and be affirmed, he may have a *Scire facias* out of that Court.

Seventhly, Where the Statute gives a *Scire facias* against such Person or Persons, &c. that were Parties to the first Execution, their Heirs, Executors or Assigns, &c. this must not be taken so generally as the Letter is; for if the first Execution was had against a Purchasor, &c. so as nothing in his Hands was liable but the Land recovered; if this Land be evicted from the Tenant by Execution, no *Scire facias* shall go against him, his Executors, &c. but if he has other Lands subject to Execution, then a *Scire facias* lies against him or his Assigns, but not against his Executor; neither in that Case can he have a *Scire facias* upon this Statute against the first Debtor or Recognisor; but if there be several Assigns of several Parcels of Lands subject to the Execution, one *Scire facias* will lie against all the Assigns. 4 Co. 66, 82. *Plow. 61. 15 H. 7. 15. Co. Lit. 299. Kitch. 116.*

(G) *Where the Conusor or his Heir, or an Alienee or Purchasor, shall have Contribution upon a Statute or Recognisance, or not.*

IF the Conusor, after he has entred into a Statute or Recognisance, conveys away his Land to divers Persons, and then the Conusee sues Execution of the Statute upon the Lands of one or some of them, and not of all; in this Case he or they whose Lands is or are taken in Execution, may by an *Audita Querela*, or *Scire facias*, have Contribution from the Rest, wherein these Differences must be observed, that one Purchasor shall have Contribution from another: And therefore if the Conusor sells some Lands to *J. S.* and other Lands to *J. D.* and the Conusee sues Execution only of the Lands of *J. S.* *J. S.* shall have Contribution against *J. D.* And the Feoffee of the Purchasor, the Feoffee of the Heir of the Conusor, the Feoffee of the Feoffee, and another Feoffee, shall have Contribution of the Heir of the Conusor: But the Conusor himself shall not have Contribution from a Purchasor; and therefore if he sells Part of his Lands, and keeps Part in his Hands, and the Conusee sues Execution only of the Lands in the Hands of the Conusor or his Heirs; in this Case neither he nor his Heirs shall have any Contribution from another. And therefore if one be seised of two Acres, the one in *Borough English*, and the other of other Land, and enters into a Statute, and dies, and he has but two Daughters, and the Execution be sued upon the Land of one of them, she shall have Contribution from the other. So where some Land descends to the Heir of the Part of the Father, and some to the Heir of the Part of the Mother. If one be seised of Lands in Fee in the County of *A.* and *B.* and enters into a Statute or Recognisance, and the Conusor dies, and then the Conusee dies also, and his Executor sues Execution of the Lands in *B.* only, and has Execution, and after the Heir sells these Lands; in this Case the Vendee shall have no Contribution. So also the Law is if the Heir sells the Land to divers, and one of the Purchasors appears to the *Scire facias*, and the Judgment is given against him, and he afterwards sells the Land, his Vendee shall have no Contribution. And in all these Cases, where it is said the one Purchasor shall have Contribution, it is not intended that the Rest shall give or allow him any Thing by way of Contribution, but that the Party whose Lands are extended, may by *Audita Querela*, or *Scire facias*, as the Case requires, defeat the Execution, and thereby shall be restored to all the mesne Profits, and force the Conusee to sue his Execution upon all the Land, that the Land of every one of the Terretenants may be equally extended. *Plow. 72. 3 Co. 12. 6 Co. 13.*

(H) *Where and by what Means a Statute or Recognisance, and the Execution thereof, shall be discharged, suspended or avoided in all or in Part, and where not.*

A Statute or Recognisance, and the Execution thereupon, may be discharged divers Ways, as by Defeasance, Release, Payment of the Money, Debt and Damages, or the Residue thereof unlevied, delivering up the Statute, Purchase of Part of the Land by the Conusee, or the like. And therefore if there be a Defeasance to the Statute or Recognisance, and it be to pay Money at a Day, or to perform some other Thing, and the Money be paid, or the Thing be done accordingly; this is a Discharge of the Statute. And therefore if such a Statute or Recognisance be afterwards sued against the Conusor, he may be relieved by an *Audita Querela*. And if *A.* binds himself to *B.* by a Statute of 20 *l.* and *B.* sues Execution, and the Lands of *A.* are delivered to him in Execution until he levies the Money, and after *B.* makes a Defeasance to *A.* by Indenture, that if *A.* pays 10 *l.* by a Day certain, that then the Statute or Recognisance shall be void; if this be done accordingly, the Statute and Execution thereupon is defeated and discharged. *Dyer 297, 315. 6 Co. 13. 20 Aff. pl. 7. see Defeasance.*

And if the Conusee before Execution or after releases to the Conusor the Statute or Recognisance, or the Debt; this is a perpetual Discharge of the Statute, and the Execution thereupon. But if the Conusee before Execution releases to the Conusor all his Right in or to the Land; this will not discharge the whole Execution; for if he

he may not sue Execution of the Land afterwards, (as it seems he may, this notwithstanding) yet he may sue Execution of his Body and Goods. But such a Release after Execution made of the Land, will no Doubt discharge the Land. And if the Conufee releases all his Right in the Land to the Feoffee of the Conufor of a Parcel of the Land; this will discharge the Land of Execution, altho' it be before the Execution sued that this Release is made. *Co. Lit.* 76. 10 *Co.* 47, 50, 51. *Co. Lit.* 265. *Bro. Stat. Merchant* 25. And so it is said it was resolved *Mich.* 26 & 27 *Eliz.*

If the Conufee assigns the Statute or Recognisance to the Conufor, or to the Terretenant, by way of Discharge of the Debt or Land; this is a good Release and Discharge of it in Law. And if the Conufee purchases any Part of the Land of the Conufor after the Statute or Recognisance entred into; this is no Discharge of the Statute or the Recognisance, but the Conufee may have Execution notwithstanding of the Lands that are left in the Hands of the Conufor, or of his Body or Goods, or all. But if the Conufee purchases Parcel of the Lands, and a Stranger another Parcel; in this Case the Lands that are purchased by the Stranger shall be discharged of Execution. And if the Conufee after Execution sued purchases any Part of the Land, or the Fee-simple of all or Part of it descends to him; by this the whole Execution is discharged. And if the Conufee purchases all the Lands of the Conufor; by this the Execution as to the Land is suspended, but this is no Discharge as to the Body and Goods of the Conufor, for they are subject to Execution still. And if the Conufee reinfcoffs the Conufor again, the Execution may be revived again against the Lands of the Conufor, so that they will be subject to Execution again whether they do continue in his Hands, or be sold away to others. So also if the Conufee infcoffs a Stranger after he purchases the Land, and the Stranger infcoffs the Conufor; in this Case also the Execution is revived, and the Lands shall now be subject thereunto as they were before. *Plow.* 72. *F. N. B.* 104. *Lit.* §. 293. 11 *H.* 7. 4. *Bro. Audita Querela* 49. *Stat. Merchant* 25, 42. *Co. Lit.* 150. 25 *Aff. pl.* 7. *Lit.* §. 441. 5 *H.* 7. 25.

If a Lessee for Life makes a Lease for Years rendring Rent, and after enters into a Statute to *J. S.* and then enters into another Statute to *J. D.* and after he grants his Estate to *J. S.* by this the Execution of the Statute made to *J. S.* is suspended, and therefore during the Suspension, it seems *J. D.* altho' he be after in Time, may sue and have the Rent in Execution. *Harrington's Case, Pas.* 29 *Jac. B. R.*

S E C T. XXI.

Of Obligations or Bonds.

(A) An Obligation what.

AN Obligation is a Deed in Writing, whereby one Man binds himself to another to pay a Sum of Money, or to do or suffer some other Thing.

He that makes this Deed is called the *Obligor*, and he to whom it is made is called the *Obligee*.

(B) Kinds of Obligations.

AN Obligation is sometimes *simple* or *single*, *i. e.* when it is to pay a Sum of Money, or to do some other Thing, and when it is without any Defeasance or Condition in or annexed to it, which also is sometimes with a Penalty, called a *penal Bill*, and sometimes without a Penalty: And this is that which is most properly called an *Obligation*, and sometimes also it is called a *single Bill*, or *single Bond*; and sometimes it is *double* or *conditional*, which is when it is attended upon and accompanied with a Condition; and then it is said to be a Bond containing a Penalty, with Condition to pay Money, or to do or suffer some Act or Thing, &c. And this Condition is sometimes called a *Defeasance*, and then especially when it is (as sometimes is the Case) in another Deed or Instrument; for most commonly it is inserted in the same Deed wherein the Obligation, being the other Part of it, is contained: And then

then also it is either subscribed under the Obligation, or included within the Body of it, or indorsed upon the Back of it. And *quacunq̃ue via* if the Condition be performed the Penalty is saved, if not, the Penalty is forfeited.

(C) *What is a good Obligation or not, as to its original Creation; and where an Accident or Fraud in the Writing of it, has been relieved in Equity.*

First, *As to the Manner and Form of making it.*

AN Obligation may be made upon Parchment or Paper, and in loose Parchment or Paper, (*Bro. Obl. 67, 33.*) or in a Piece of Paper or Parchment sewed in a Book, and either way is good. *Trin. 49 Eliz. B. R.* On what to be written.

Which Paper or Parchment must be first stamped with a treble Sixpenny Stamp.

But if it be made on a Talley, Piece of Wood, or any other Thing but Paper or Parchment, altho' it be sealed and delivered, yet it is void. *Trin. 49 Eliz. B. R.*

And it may be made in the first or in the third Person, (notwithstanding the *38 Ed. 3. c. 4.* which intends only Obligations made beyond the Sea) and therefore an Obligation so made, as *Memorandum, That A. of B. owes C. of D. 10l. In Testimony whereof, &c.* is good. *Co. Lit. 229. Fitz. Obl. 9.* In what Person.

An Accident or Fraud in the Writing of a Bond has been relieved in Equity; as when the Writer had left out the Name of one of the Obligors, but his Hand and Seal was to the Bond. *3 Chan. Rep. 100.*

Altho' the best Manner and Form of an Obligation is that which is most usual, (which see in the Second Part) yet any Words in a Writing sealed and delivered, whereby a Man proves and declares himself to have another Man's Money, or to be indebted to him, will make a good Obligation; and therefore if a Man by Deed says but this, *Memorandum, That I A. of B. do owe to C. of D. 20l. to be paid at Easter next.* Or *Memorandum, That I A. of B. have had of C. of D. 20l. of which there is 10l. behind, [or of which I owe him 10l.]* Or *Memorandum, That I A. of B. have received of C. of D. 20l. to be repaid him again.* Or *Memorandum, That I A. of B. do grant to owe [or to pay] C. of D. 20l.* Or *Memorandum, That I A. of B. do promise to pay C. of D. 20l.* Or *Memorandum, That I A. of B. will pay to C. of D. 20l.* Or *Memorandum, That I A. of B. have had 20l. of the Money of C. of D.* Or *Memorandum, That I A. of B. have borrowed of C. of D. 20l.* Or *Memorandum, That I A. of B. do bind myself to C. of D. that he shall receive of me 20l.* All these and such like are good Obligations. *Dyer 12, 21, 23. 9 Co. 53. 35 H. 6. 9. 21 E. 4. 39. 22 E. 4. 22. 11 H. 7. 6. Ketw. 34.* Words;

So if one says, *Memorandum, That I A. of B. bind myself to C. of D. that he shall receive 20l. by the Hands of J. S. when K. comes to his House, and at Michaelmas then next following 5l.* this is a good Obligation, and the Words [*by the Hands of J. D.*] are void. *Bro. Obl. 56.*

So if one bind himself thus: *Memorandum, That I A. of B. owes to C. of D. 20l. for Payment of which I bind myself and my Goods;* this is a good Obligation, and will bind the Person but not his Goods. *Bro. Obl. 16.*

So if one by Deed covenants or promises to do a Thing, and then uses these Words, *Ad quam quidem promissionem perimplendam obligo me in 20l.* this is a good Obligation for 20l. *Bro. Obl. 52. Dyer 6.*

So if one binds himself thus: *Memorandum, That I A. of B. am bound to C. of D. to deliver him twenty Quarters of Corn by a Day, Ad quod performandum obligo me,* without more Words; this is a good Obligation. *Bro. Obl. 40.*

So if one binds himself thus: *Memorandum, That I A. of B. bind myself to pay C. of D. 10l. at Easter, and if I fail to pay him then, I do grant to pay him 20l.* this is a good Obligation for the 20l. if he fails to pay the 10l. *Bro. Obl. 79.*

And some say he may recover both the 20l. and the 10l. *Foxall's Case, 9 Jac. B. R.*

So if one binds himself thus: *Memorandum, That in Consideration of a Bill of 50l. wherein J. S. is bound for me to J. D. for Payment of 20l. I do bind myself in 20l. to the said J. S. to save him harmless from all Actions of the same;* this is a good Obligation; and if J. D. sues J. S. the Bill is forfeited. *Fox v. Wright, Trin. 40 Eliz. B. R.*

Or if one binds himself thus: *Be it known, &c. That I A. of B. do owe unto C. of D. the Sum of 14l. to be paid at the Feast of, &c. together with 6l. which I owe him*

upon Bills and Recognisances, subscribed with my Hand; this is a good Bill, but it is good for no more but the 14 l. and not for the 6 l. for the Words do only import the Time of Payment of the 6 l. Adjudged Parret and Woolward's Case, M. 38 & 39 Eliz. in Scacc'.

If one makes a Writing in the Form of a Statute, which the Party seals, and afterwards legally delivers, but it is not sealed by the King's and the Mayor's Seal according to the Statute; altho' this be not a good Statute, yet it may be a good Obligation. Trin. 37 Eliz. B. R. Fitz. Accompt 79.

If one binds himself to pay Money, or to do any other Thing, and afterwards adds this Clause in the Deed: *Et ad maiorem huius rei securitatem inveni A. de B. & C. de D. fidejussores, quorum unusquisque obligat se in toto & in solida*, and these two do also seal and deliver the Deed; this is a good Obligation to bind them altho' there be no other Words in the Deed. Perk. §. 158. Fitz. Obl. 1.

If an Obligation be made to J. D. to the Use of J. S. this is a good Obligation for J. S. in Equity; and some have said he may release it; but this is much to be doubted: For it is certain J. S. cannot sue the Obligor in his own Name, but when he has Cause of Suit he may compel J. D. in Chancery to sue the Obligor. Bro. Obligor 72. Cromp. Jur. 63.

If A. of B. binds himself to C. of D. to pay 20 l. and says not when, yet the Obligation is good, and the Money is due presently. So if the Obligation be *solvendum nunquam*, or *solvendum at Doomsday*; the Obligation is good, and the *solvendum* void, and the Money is due presently. So if A. of B. binds himself to C. of D. in 20 l. *solvendum A. de B.* [where it should be *solvendum C. de D.*] the Obligation is good, and the *solvendum* void. Bro. Obl. 47. 14 H. 8. 29. 21 Ed. 1. 46. 4 Ed. 4. 29.

If the Obligation be made thus, [*obligo me, &c.*] leaving out these Words following [*Heredes, Executores & Administratores*] this is a good Obligation, and the Executors and Administrators, but not the Heir, are bound by it. And if it be made thus, [*solvendum to the Obligee & Successoribus suis*] and not [*Executoribus, &c.*] this is a good Obligation, and the Executors and Administrators, and not the Successors, except it be in Case of a Corporation, shall take Advantage of it. Dyer 13. Bro. Obl. 15, 68.

By the Stat. 33 H. 8. c. 39. All Obligations and Specialties must be made to the King thus, *Domino Regi*, and to no other for his Use, *Solvendum Domino Regi, Heredibus vel Executoribus suis*. And these will have the Effect of a Statute Staple, &c. and if unpaid at the King's Death, he may dispose of them accordingly, either to his Heirs or Executors.

Language.

An Obligation may be good altho' it contains false or incongruous Latin or English, or Latin be put for English, or *econtra*, if the Intent of the Parties may sufficiently appear: And therefore if one be bound by the Name of *Johannes* for *Johannem*; or one binds himself in *octoginta* for *octoginta libris*; or in *septungentis* for *septuagintis libris*; in *wiginti* for *viginti libris*; in *sewteen* for *seventeen Pounds*; in *quingentis* for *quingentis libris*; (10 Co. 133. Fitz. Obl. 12. 2 H. 4. 14.) in *septuagesimo* for *septuaginta libris*, (adjudged Vernon's Case, M. 13 Jac. C. B.) *sexingentis* for *sexcentis libris*; in *quingagesimis*, or *quinque decies*, for *quingaginta libris*; in *octogenta* for *octoginta libris*; or in *viginta livers* for *viginti libris*; in *viginti nobilibus* for *twenty Nobles*; (Gray's Case, 5 Jac. B. R. M. 10 Car. B. R. adjudged) or in *octiginta libris* for *octoginta libris*; or *quinginta libris* for *quingaginta libris*; or the like: These Misprisions will not hurt the Obligations, for they are good notwithstanding. Fitzbugh v. Bridges, 3 & 4 Eliz. C. B.

But if one by the Obligation binds himself in *quinqueagentis libris*, or in *quinqueagentis libris*, or in *quinagentis libris*, or in *segintis libris*; these Obligations are void; for in these Cases the Meaning is so uncertain, that it cannot be discerned, and no Averment will serve to supply it in this Case. Paris's Case, M. 4 Jac. B. R.

So if an Obligation be dated 23 *die Aprilie* instead of *Aprilis*; this is a good Obligation. Trin. 21 Jac. Nowel's Case.

And if an Obligation have no Date, or a false and impossible Date, or have but half the Date, as the Year of our Lord only; or if it wants these Words, *In cujus rei, &c.* or the like, if it be sealed and delivered it is a good Obligation. 2 Co. 5.

But now by Stat. 4 G. 2. c. 26. all Bonds must be in the English Language.

Secondly,

Secondly, *As to the Matter and Substance of an Obligation.*

A single Obligation may be to pay Money, or to do any other Thing that is lawful and possible, and such Obligations are good. But if the Obligation be to bind a Man to do a Thing unlawful or impossible, it is void: And therefore if one binds himself in an Obligation to kill a Man, burn a House, maintain a Suit, or the like, it is void. So if the Obligation be made for Maintenance, or to that End, or if it be made pursuant to and in Execution of an usurious Contract, or the like, it is void. So if an Obligation be made against the Statute of 23 H. 6. it is void. So if one binds himself in an Obligation, and the Matter thereof is altogether uncertain or insensible, it is void; but if there be any reasonable Certainty in it, it is good enough. So if one binds himself to go to Rome in three Days under Pain of 20 l. this is void. 10 Co. 110.

A Bond was drawn in common Form for Payment of Money; but in Fact it was made on an Agreement, that the Plaintiff should either marry such a Person, or by way of Forfeiture pay the Defendant the Sum mentioned in the Condition of the Bond. The Court granted Relief against this Bond, it being contrary to the Nature of Marriage, which ought to be free and without Compulsion. 2 Vern. 102.

So if A. being a Widow, gives a Bond to B. for 100 l. if she marries again, and B. gives a Bond to the Widow to pay her Executors the like Sum if she should not marry again, and the Widow soon after marries, her Bond shall be delivered up. 2 Vern. 215.

A Bill to be relieved against a Bond to a House-keeper for secret Service, was dismissed; for Equity will not relieve in these Cases unless it appears that the Woman be a common Strumpet, and used to draw in young Gentlemen, &c. And if a Man gives a Bond to his Mistress for Payment of Money; this is deemed a free Gift, and no Relief can be had against the Bond. 2 Vern. 242. 1 Vern. 483, 484.

A Bill was brought to be relieved against a Bond given by a Son to the Father (on the Father's settling Lands upon him in Tail) that the Son shall not dock the Intail. *Per Cur'*, The Bond is good, for had not the Son agreed to give the Bond, the Father might have made him only Tenant for Life. 2 Vern. 233.

If a Son in plentiful Circumstances gives a Bond to his Father for the Payment of 120 l. Annuity for Life; this (if done freely and without Coercion) is good. 1 Will. 607.

(D) *What is a good Condition of an Obligation, or not.*

First, *As to the Manner and Form of making it.*

The Condition of an Obligation may be either in the same or in another Deed, and it may be indorsed on the Back of the Obligation, subscribed under it, or contained within it; but the best way to make it is the usual way, *viz.* **The Condition of this Obligation is such, &c.** and yet if it be otherwise it may be good; for if an Obligation be made from A. to B. and on the Back of the same these Words are indorsed, [That whereas the within bounden A. is bound to B. in 20 l. yet B. willeth and granteth, that if A. pays to B. 10 l. at Easter, that then the Obligation shall be void]; this is a good Condition. So if in the Close of an Obligation of 20 l. these Words be added, *That if A. (the Obligor) pays 10 l. to B. (the Obligee) at Easter, the Obligation shall be void*; this is a good Condition. So if an Obligation be made from A. to B. of 20 l. and these Words are subscribed, *Now therefore if the Obligor pays 5 l. Quarterly for four Years, then it is agreed that the Obligation shall be void*; this is a good Condition. So if a single Obligation be made from A. to B. of 20 l. and after the Obligation is made, B. by another Deed grants, *That if A. pays to him 10 l. at Easter, the Obligation shall be void*; this is a good Condition or *Defeasance*. But if A. binds himself in an Obligation to B. of 20 l. and after B. binds himself in another Obligation to A. to perform the Covenants of an Indenture, and in this second Obligation there is a Proviso, *That B. shall not sue upon the first Obligation till such a Time*; this is not a good Condition. *Plow.* 141. 21 H. 6. 51. *Fitz. Bar.* 157, 265. *Bro. Obl.* 89. *Paf.* 8 *Jac.* *Simpson's Case.* 21 H. 6. 51. 26 H. 8. 9.

IF

If *A.* be bound to *B.* in 20 *l.* with Condition, *That if B. does not bring A. a Horse before Easter, that the Obligation shall be void*; this is a good Condition: And if the Obligee will have Advantage of it, he must perform the Thing: *Et sic de similibus.* 26 H. 8. 8.

So if *A.* be bound in an Obligation to *B.* in 20 *l.* with Condition, *That if B. shall bring twenty Loads of Wood to the House of A. that A. shall pay him the 20 l. or that A. shall pay him 20 l. when B. shall bring him twenty Loads of Wood to his House*; these are good Conditions, and the Thing must be done before the Money is to be paid. Bro. Count 69.

If the Condition of an Obligation be, *That if A. (the Obligor) do not pay to B. (the Obligee) 10 l. that the Obligation shall be void*; this is a good Condition, but it shall be taken according to the Words, and therefore the Obligor is not to pay it: And if he be sued, he may plead Performance of the Condition in the not paying of it. Bro. Obl. 42.

If these Words be omitted in the Close of the Condition, *That then the Obligation to be void*; the Condition is void, but it does not hurt the Obligation, for that remains single: But if the next Words, *viz. Or shall stand in Force*, be omitted, the Condition is never the worse; for as the Addition of them adds nothing to, so the Omission of them detracts nothing from the Strength of the Obligation. Pas. 9 Jac. B. R. *Trueman and Parram's Case.*

Secondly, *As to the Matter and Substance of the Condition of an Obligation.*

The Condition of an Obligation may be to do any *lawful or possible* Thing, as to pay Money, deliver Goods or Cattle, acknowledge a Statute, enter into an Obligation, make a Release, make an Estate, surrender an Estate, make Reparations, for quiet enjoying, to save harmless, to defend a Title, to perform Covenants, to abide by an Award, to perform a Will, to give so much Land or Money in Legacy, to purchase Lands, to appear in a Court, to marry another, not to sue, not to meddle with an Executorship, not to revoke a Letter of Attorney, not to be Surety, not to play at Cards or Dice, or any such Thing; and such a Condition is good. So also it seems a Condition that a Man shall not sell his Goods, is good. But when the Matter or Thing to be done by the Condition is *unlawful or impossible*, or the Condition itself is *repugnant, insensible or incertain*; the Condition is void, and in some Cases the Obligation also. Pas. 8 Jac. C. B. *Vide West's Symb.*

As to these Matters, these Things are to be observed:

Against Law, *First*, When the Thing enjoined or restrained to be done, or not to be done by the Condition, is such a Thing in its own Nature as the Commission or Omission thereof is *malum in se*; there not only the Condition, but the whole Obligation also is void *ab initio*: And therefore if one be bound in an Obligation, with Condition that he shall kill a Man, burn a House, do any other Felony, commit any Trespasses, maintain any Suit unlawfully; or (being an Officer) that he shall take Fees by Extortion; or that he (being a Sheriff, &c.) shall let a Prisoner escape, or that he shall save the Obligee harmless against an unlawful Deed, or that he shall not save his Land; or that he (being a Tradesman) shall not use his Trade; and yet it seems a Condition that a Man shall not use his Trade in one Place, and at one Time, or if he does, that he shall pay so much by the Year unto another, is not a Condition against Law; (or that a Man being an Officer, and an Officer *pro bono publico*) shall not exercise his Office, or the like; this Condition is void, and makes the Obligation, and so the whole Deed void. But when the Thing to be, or not to be done by the Condition, is such a Thing as the Omission or Commission thereof in its Nature is not *malum in se*, but only against some Maxim of Law, as that a Man shall make a Feoffment to his own Wife; or is but *malum prohibitum* only, as that a Man shall erect a Cottage contrary to the Statute of 13 Eliz. or is *repugnant* to the State, as that a Feoffee of Land shall not alien it, or take the Profits of it; or that a Tenant in Tail shall not suffer a Recovery of his Land, or the like; in these Cases the Conditions only are void, and the Obligations remain single and without a Condition. And yet perhaps if the Obligors be sued upon these Obligations, they may have Relief in Equity. 10 Co. 101. 11 Co. 53. Co. Lit. 206. Dyer 304. Plow. 64. Fitz. Obl. 13.

Impossible.

Secondly, When the Matter or Thing to be done by the Condition, is such a Thing as in its Nature is *impossible* to be done at the Time of the making of the Obligation, there the Obligation is good, and the Condition only is void. And therefore if I be bound

bound in an Obligation with Condition, *That I shall stand to the Award of certain Persons, &c. provided that the Award be made before the tenth Day of May next, and provided that I have Warning fifteen Days before the tenth of May*, and this Obligation is made the ninth Day of May; this is a void Condition. And so if I be bound in an Obligation with Condition, *That I will go to Rome within three Days, or that I will make an Estate of Whiteacre in Dale worth 10 l. per Ann. when re vera it is worth but 5 l. per Ann. or that I will be Nonsuit in such an Action, or assure such a Piece of Ground*, when in Truth there is no such Action or Piece of Ground; this Condition is void, and the Obligation remains single and good. So if the Condition be, *That whereas A. had a Judgment against B. the Obligor for 20 l. and the Obligee hath acknowledged Satisfaction; if therefore the Obligor shall before such a Day get a Warrant from A. whereby the Obligee may be saved harmless for the same Acknowledgment, that then, &c.* This Condition is void, and the Obligation also, for that it is not only impossible but against Law also. But when the Thing to be done by the Condition is a Thing possible at the Time of the making the Obligation, and after by Matter *ex post facto* by the Act of God, the Act of the Law, or the Act of the Obligee, it is become impossible; in this Case the Obligation and Condition both are become void. And therefore if a Man be bound with Condition that he shall appear the next Term in such a Court, and before the Day the Obligor dies; hereby the Obligation is saved. So if A. be bound to B. that J. S. shall marry Jane G. by such a Day, and before the Day B. himself marries Jane G. hereby the Obligation is discharged, and B. shall never take Advantage of it. *Perk. §. 735. Co. Lit. 207. Fitz. Obl. 17. 27 H. 8. 29. 21 Ed. 4. 54. 42 Ed. 3. 6.*

Thirdly, When the Condition of an Obligation is so *insensible and incertain* that the Meaning cannot be known, there the Condition only is void, and the Obligation good: As if an Obligation be made by A. to B. with Condition, *That A. shall keep B. without Damage against J. S. for 10 l. in which the Obligee is bound to the Obligor*; this Condition is void, and the Obligation single. So if the Condition be, *That A. shall pay his Part of the Sums of Money that shall be levied for the trying the Customs of M. unless the Word levied be used for taxed in that Country*, the Condition is insensible and void. If A. be bound to B. with Condition to save him harmless, and says not *for what or against whom*; this Condition is void, and the Obligation single; but if any Sense or Certainty may be made of it, the Obligation and Condition shall be both good. *Pas. 9 Jac. B. R.*

Fourthly, When the Condition of an Obligation in the Matter of it is repugnant to the Obligation itself, there the Condition is void, and the Obligation good. And therefore if the Condition of an Obligation be, that the Obligee shall not have Benefit by the Obligation, or that he shall not sue for the Money in the Obligation, or the like; this Condition is void, and the Obligation single. And yet at this Day by a *Defeasance* made after the Obligation it may be done. *7 H. 6. 44. 21 H. 7. 24, 30.*

Fifthly, When the Thing to be done by the Condition is to be done *beyond Sea*, it has been held that the Condition is void, and the Obligation single, because the Thing was not triable here. *10 H. 6. 14. 21 Ed. 4. 10.*

But the Law is otherwise now, and that the Matter is triable here, and the Condition good. *Trin. 7 Jac. B. R.*

And in all other Cases where a Deed in general is void for Misnomer, Disability, or otherwise, there an Obligation is void. *Fitz. Obl. 2, 11.*

All Bonds with Conditions for the enjoying of Spiritual Livings contrary to the Statute of 13 Eliz. c. 20. are void by the Statute of 14 Eliz. c. 11.

If any Person be drawn by Flattery or Threatning to enter into any Obligation simple or conditional to pay any Money not truly due, they may be relieved in Chancery, for which see the Statute of 31 H. 6. c. 39.

See of Conditions before, p. 280, &c.

(E) What Bonds or Obligations are void by the Statute Law.

FIRST, By the Stat. 23 H. 6. c. 10. No Sheriff or his Officers shall take any Obligation by Colour of their Offices of any Person in their Ward, but only to themselves, and in the Name of their Office with Condition, with Sureties sufficient, and the Prisoner shall appear at the Day in the Writ; and all others taken in any other Form shall be void. And Persons that are in his Ward by Execution, Condemnation,

When void not being made to the Sheriff.

Capias Utlegatum, Excommunication, Surety of the Peace, or some other special Case, being sent for by a Justice for Felony, or the like, may not be bailed. And others that are arrested on a *Capias* for Debt, or any Indictment, or otherwise by Writ, Bill or Warrant that are mainpernable, must be bailed.

For the better Understanding of which Statute observe these Things:

That such Obligations as differ and vary from the Form of this Statute in Words and Circumstances only, are good notwithstanding this Statute. And therefore if a Prisoner makes an Obligation with a Condition to appear and answer in a Plea of Debt, and says no more, nor does set down the Cause of the Debt; this is a good Obligation: *Villar's Case*, *M. 9 Jac. B. R.*

And if the Sheriff takes an Obligation with one Surety only, or with two Sureties that are insufficient, or with two Sureties of another County; this is a good Obligation. So if the Debt for which the Party is arrested be 300 *l.* and the Sheriff takes an Obligation of 100 *l.* for his Appearance; this is a good Obligation, and it concerns him only. *10 Co. 101.*

So if the Condition of the Obligation be for Appearance *Mense Paschæ*, omitting *proxime futur*; yet it is a good Obligation. *Villar's Case.*

So if the Party was arrested by an Attachment out of the Star-Chamber upon a Contempt, and the Condition of the Obligation was, *That if the Oblige shall appear, and then and there shall answer a Contempt by him committed against the King and his Council*; this was a good Obligation. And if the Party that makes the Obligation be not in the Sheriff's Custody, altho' the Obligation be made in any other Manner essentially differing from the Form prescribed in the Statute, if it be not against the Common Law it is a good Obligation. *Dyer 364.*

And therefore if when a *Capias Utlegatum* be delivered to the Sheriff against a Man, the Sheriff takes a Bond of him for his Fees and his Trouble; this Bond if it be not within the Statute, yet it is against the Common Law, and therefore void, because it is by Colour of Extortion. But where the Obligation, whether it be single or double, made by a Prisoner, essentially differs by Addition, Alteration or Diminution, from the Form prescribed in the Statute; there the Condition and Obligation are both void. *Antley's Case*, *Hil. 7 Jac. C. B.*

And therefore if such a Prisoner makes an Obligation to any other besides the Sheriff, altho' he to whom it be made be called Sheriff; or if he makes an Obligation to him by the Name of his Office, and does not rightly name him; as if he makes it to *J. S. Vicecomiti in Comitatu prædicto*, whereas it should be *De Comitatu prædicto*; all these Obligations are void by the Statute. And if the Sheriff takes an Obligation of a Prisoner for his Appearance in Case where he is not bailable by the Statute, and so lets him go free; or if he takes an Obligation of a Prisoner that is bailable for his Appearance, and inserts other Things in the Condition, as to pay Money for Meat, Drink or Fees, or the like; or if he delivers a Man in Execution, and takes a Bond of him to save him harmless, or to be true Prisoner; all these and such like Obligations as these are void by the Statute. *Nowel's Case*, *Trin. 21 Jac.*

If a Man be a Prisoner in *Ludgate* upon a *Capias Utlegatum*, and the Gaoler takes an Obligation of him with two Sureties, with Condition to save him harmless, and to discharge his Fees, and to yield his Body at all Times upon Summons, &c. this is a void Obligation as well against the Sureties as against the Principal. *Dyer 118, 119.*

If the Under-Marshall of the King's Bench takes an Obligation of one in Execution, and a Stranger, with Condition to save him harmless of all Escapes, and so suffer the Prisoner to go at large; this is a void Obligation. *Dyer 324.*

If the Sheriff of *Bedford*, having a Prisoner by Force of an Execution, lets him go at large, and takes an Obligation of him, with Condition that he shall keep the Sheriff without Damage against the King and the Plaintiff, and be at all Times at the Commandment of the Sheriff as a true Prisoner, and appear before the Justices of the King at *Westminster*, &c. this is a void Obligation. *Plow. 61, 62.*

If a Man be a Prisoner to the Sheriff for Suspicion of Felony, and after a Writ comes to him to have all his Prisoners at a certain Day before the Justices of Gaol-Delivery of the same County, and thereupon the Prisoner makes a single Obligation to the Sheriff to appear before the Justices the Day of the Writ; this is a void Obligation, because it is single and not with Condition. And if the Sheriff bails not one bailable by a single Obligation; this is a void Obligation. *Fitz. Obl. 4.*

Secondly, By Stat. 5 & 6 Ed. 6. c. 16. Bonds that concern the Buying and Selling of Offices are void.

Thirdly, By Stat. 13 Eliz. c. 5. Bonds, &c. made to avoid the Debt or Duty of others, shall (as to the Party whose Debt or Duty is endeavoured to be avoided) be void.

Fourthly, By Stat. 14 Eliz. c. 11. All Bonds with Conditions for enjoying Spiritual Livings contrary to the 13 Eliz. c. 26. are made void.

Fifthly, By Stat. 16 Car. 2. c. 7. All Securities obtained by Gaming are void.

Sixthly, By Stat. 7 & 8 W. 3. c. 7. All Contracts and Securities given to procure a Return of a Member of Parliament, contrary to the last Determination in the House of Commons of the Right of Election for such Place, or of more Persons than are required by the Writ, &c. shall be adjudged void.

Seventhly, By Stat. 4 & 5 Ann. c. 14. All Instruments and Agreements for farming or purchasing Charity Money upon Briefs are declared void. And the Purchaser is to forfeit 500 l. for the Use of the Sufferers, to be recovered by Action, &c.

Eighthly, By Stat. 12 Ann. Sess. 2. c. 11. Bonds upon excessive Usury are void.

(F) *How a single Obligation shall be construed.*

A Single Obligation is always taken most in Advantage of the Obligee and against the Obligor; but it is otherwise of the Condition of an Obligation, for this is always taken most in Advantage of the Obligor and against the Obligee. 10 H. 7. 1. 16.

If two, three or more bind themselves in an Obligation thus, *Obligamus nos*, [we oblige (or bind) us], and say no more, the Obligation is and shall be taken to be joint only, and not several; but if it be thus, *Obligamus nos & utrumque nostrum*, [we oblige (or bind) us, and both of us]; or *Obligamus nos & unumquemque nostrum*, [we bind us, and every one of us]; or *Obligamus nos & quemlibet nostrum*, [we bind us, and every of us]; or *Obligamus nos & alterum nostrum*, [we bind us, and each of us]; in all these Cases the Obligation is both joint and several, so as the Obligee may sue all the Obligors together, or all of them apart, at his Pleasure; but he may not sue some of them, and spare the Rest, but he must sue them all together or all apart by several *Præcipes*; and in this Case he may have several Judgments and several Executions against the Obligors, and take their Bodies in Execution; but he shall have Satisfaction but once, or from one of them only, for after he has been satisfied by one, the Rest shall be discharged. But in the first Case where the Obligation is joint and not several, the Obligee must sue all the Obligors together, for he cannot sue one alone with Effect without the Rest, unless it be in some special Cases; as where one of the Obligors alone doth seal the Deed, or where all of them seal, but one of them is an Infant, a Woman Covert, or the like, or where one of them is dead; for in these Cases one or some of them may be charged without the Rest. But otherwise the Plaintiff cannot proceed in his Suit against one or some of them without the Rest, except the Defendant gives him Advantage, for howsoever the Suit be well begun, when one or some of them alone is or are sued, (*Hil. 39 Eliz. B. R. adjudged*) it shall not be intended that the Rest are living until it be shewed by the other Party, yet the Defendant is not bound to answer unless the Rest be sued also; and therefore in this Case he or they that is or are sued alone are thus to take the Advantage of it, viz. to shew the Matter to the Court, and to plead in Abatement of the Writ; for if he appears and shews it not, but pleads *Non est factum*, or the like, to the Obligation, the Jury must find against him, and he will be charged with the whole Debt; and so also if one appears, and the other makes Default and is outlawed, he that appears must answer all. *Dyer* 19, 310. 5 Co. 119. 9 Co. 53. *Old Nat. Br.* 62. *Bro. Jointenancy* 4, 16.

Executors and Administrators shall be bound by the Obligation of the Obligor altho' they be not named; but the Heir of the Obligor shall not be bound by the Obligation unless he be named in the Obligation, viz. *Obliggo me, Heredes, &c.* *Dyer* 14, 27.

If an Obligation be made to one and his Heirs, or to one and his Successors, the Executors and Administrators, not the Heir or Successor, shall take Advantage of it. If one binds himself in an Obligation of 200 l. to A. and B. *solvendum* 100 l. to A. and 100 l. to B. and A. dies, the Executors of A. shall have 100 l. but B. shall have the whole 200 l. *Sed quære.* *Dyer* 350.

If one binds himself by Obligation to J. S. to pay him 100 l. when K. comes to his House, and at Michaelmas then next following 100 l. more; Michaelmas then next following

following shall be taken for next following the making of the Obligation, and not next following the coming of K. to his House. *Bro. Obl. 59.*

If one binds himself to pay Money upon a single Obligation, and does not say when; in this Case it must be paid presently. *Dyer 128. Per three Justices, Trin. 22 Jac. C. B.*

If one binds himself by Obligation to pay Money at *Michaelmas*, and does not say which *Michaelmas*; this shall be taken for *Michaelmas* next after the Date of the Obligation; and so also it shall be taken in the Condition of an Obligation. *Cur' Marches of Wales, T. 8 Car.*

If one binds himself to pay 20 l. in the Year of our Lord which shall be 1599. in and upon the 13th of *October* next ensuing the Date of the Obligation; this shall be taken to be due the 13th of *October* 1599. and not next after the Obligation. *M. 9 Jac. B. R.*

(G) *How an Obligation with a Condition, or the Condition of an Obligation shall be construed, and how it must and ought to be performed.*

First, *With Respect to the Persons that are to do the Thing.*

THE Condition of an Obligation when it is doubtful is always taken most favourably for the Obligor, in whose Advantage it is made, and most against the Obligee, yet so as an equal and reasonable Construction be made according to the Minds of the Parties, altho' the Words sound to a contrary Understanding. *Hil. 37 Eliz. B. R. Sharplus v. Hauckington. Dyer 14, 51.*

If something be by a Condition to be done, and it is set down indefinitely, and not set down who shall do it, if the Obligee has more Skill to do the Thing than the Obligor, it shall be done by him, otherwise it shall be done by the Obligor; as if a Taylor be bound to me in an Obligation, with Condition that if I bring him three Yards of Cloth, which shall be measured and shaped; and if he makes me a Cloak of it, &c. and it is not said by whom it shall be shaped, this must be done by the Taylor. *Perk. §. 785.*

Secondly, *With Respect to the Time of doing the Thing.*

If the Condition of an Obligation be to pay Money, or to do any other transitory Act to the Obligee himself, and no Time is set for the doing thereof, but a Place only; this regularly must be done in convenient Time, and that without Request. So also in Case where the Thing to be done is in its Nature local, but yet such a Thing as may be done as in the Absence of the Obligee and without his Concurrence; as to acknowledge Satisfaction on a Judgment, make a Lease for Years, or the like, it must be done in convenient Time, and that without Request. So also in Case where the Thing to be done is local, and the Concurrence of both Parties necessary thereunto, yet when it is to be done to a Stranger, and not to the Obligee, as if the Condition be that the Obligor shall make a Feoffment to J. S. it must be done in convenient Time without Request: But where the Thing to be done is local, and the Concurrence of both Parties necessary thereunto, and the Act is to be done by the Obligor himself, or by a Stranger, to the Obligee himself; as where the Condition is that the Obligor or a Stranger shall infeoff the Obligee; in this Case the Obligor, or the Stranger, shall have Time to do it during his Life, unless the Obligee hastens it by Request; and if he requests it sooner, then it must be done in convenient Time after Request made: And yet if the Thing to be done be to be done wholly by the Obligor, or a Stranger, and doth nothing concern the Obligee; as where the Condition is that the Obligor shall go to Rome, or that J. S. shall preach at *Paul's Cross*, or the like; in the first Case it may be done at any Time during the Life of the Obligor, and in the last Case it may be done at any Time during the Life of J. S. and Request in this Case shall not hasten it. *Co. Lit. 208. 2 Co. 79, 80. 9 H. 7. 16.*

If an Obligation be with Condition to grant a Rent or an Annuity to the Obligee during his Life, to be paid at *Easter*, and no Time is set for the doing of it; this
Rent

Rent must be granted before *Easter* next after the Obligation, or else the Obligation will be forfeited. And if the Condition be to grant an Advowson, and no Time is set for the doing thereof, it must be done before the Church becomes void, or otherwise the Obligation shall be forfeited. 2 Co. 80. Co. Lit. 208.

If the Condition be to do a Thing upon a Day in the Year, and there be two Days of that Name in the Year; in this Case it seems it must be done that Day that is furthest off from the Time of making of the Obligation, especially if that Day be the more notorious of the two Days. *Dyer* 77.

If the Condition be to pay 10*l.* the 11th of *May* next following, and the Obligation is dated the 5th of *May*; in this Case the Money must be paid the 11th Day of the same Month of *May*, and not of the next Month of *May*. Adjudged *M. 20 Jac. Prescot's Case*.

If the Condition be to stand to the Award of *J. S.* and *J. S.* awards Money to be paid, but sets no Time for the Payment of it; this must be paid in convenient Time, else the Obligation shall be forfeited. 22 *Ed. 4. 25.*

If one be bound to me in an Obligation, with Condition that if I infeoff him of *Whiteacre* he will pay me 10*l.* but does not say when; this must be done as soon as I make him the Feoffment. So if one be bound to me that if the Goods I have delivered to *B.* shall be lost, that *C.* shall satisfy me for them, and does not say when; this shall be presently after the losing. *Perk. §. 797, 799.*

If the Condition be to pay *J. S.* Money when he shall come to the Age of twenty-one Years; in this Case it must be paid the very Day *J. S.* comes to his full Age, and Payment after is not sufficient Performance of the Condition. *M. 2 Jac. B. R. Crausdenet Morfe's Case.*

If the Condition be to come at a Day to such a Place to do a Thing, and the Thing cannot be done without the Concurrence of the other Party; in this Case the Obligor must stay for the very last Instant of the Day for his coming, and it seems also he must stay at the Place all the Day long. 39 *Eliz. B. R. Fitz. Bar 92.*

If the Condition be to pay Rent at *Michaelmas*, or within twenty Days after, the Obligation is not forfeited before the twenty Days be past. Adjudged *Pas. 39 Eliz.*

If one be to do a Thing on a Day certain, he may do it any Part of the Day whilst the Light doth last; and if the Condition be to do a Thing by or before a Day, it may be done the last Instant of the Day before, and it is sufficient. *Bro. Condition 145. Dyer 17. 7 Ed. 4. 3.*

Thirdly, *With Respect to the Place where the Thing is to be done.*

If the Condition of an Obligation be to pay Money, or do any like transitory Act, to the Obligee, on a Day certain, but no Place is set down where it shall be done; in this Case it must be done to the Person of the Obligee wherever he be; and for this Purpose the Obligor must at his Peril seek out the Obligee, if he be *intra quatuor maria*, otherwise the Obligation is forfeited; but if the Obligee be not within the Kingdom at the Time when the Thing is to be done, he is not bound to seek him; so neither is the Obligation forfeited for not doing of the Thing. So if one grants an Annuity to another, and does not set down where it shall be paid, and gives a Bond with Condition for the Payment thereof; in this Case it must be done to the Person of the Obligee wherever he be; and the like Law is where the Thing to be done by the Condition is to be done by or to a Stranger; but when the Thing the Party is bound by the Condition to do is *local*, he is not bound to go any further or to any other Place but to the Place itself; and therefore if the Condition be to make a Feoffment of a Piece of Land, the Party that is bound to do it is not bound to go to any other Place but to the Piece of Land to do it. And if a Man makes a Feoffment in Fee, or Lease for Life or Years of Land, rendring Rent generally, and gives an Obligation with Condition for the Payment of Rent, the Feoffee or Lessee is not bound to go to any Place from the Land to seek the Feoffor or Lessor to pay him this Rent. *Perk. §. 780, 781. 7 Ed. 4. 4. 22 Ed. 4. 25. Lit. §. 340, 341.*

If the Condition be to deliver twenty Quarters of Corn such a Day to the Obligee, and no Place is set down where it shall be delivered; in this Case it is sufficient, if the Obligor when the Corn is ready gives Notice thereof to the Obligee, and desires him to appoint a Place whereunto the Obligor may bring it, and if he refuses to appoint a Place, it is at his own Peril; or the Obligor may bring the Corn to the
10 D House

House of the Obligee, (and this is the safest way) and if the Obligee refuses it the Condition is performed, and the Obligation is discharged. *Perk. §. 785.*

Fourthly, *In Respect of the Thing itself to be done.*

To perform
Covenants.

If the Condition be to perform all the Covenants in an Indenture; this shall be taken as well for the Covenants in Law as for the Covenants in Deed. *4 Co. 80. Dyer 257.*

If a Lease be made of a Manor excepting a Close, and the Lessee makes an Obligation to the Lessor, with Condition that the Lessee shall perform *omnia & singula in scripto predicto contenta*; by this the Close shall be taken to be within the Condition; so that if the Lessee disturbs the Lessor in the Close excepted, this shall be a Breach of the Condition. *Plow. 67.*

To make a
Feoffment,
Lease, &c.

If the Condition be to make a Feoffment to the Obligee of Land; in this Case the Feoffment may be made with or without Writing; and if it be made by Writing, it may be made without any Warranty or Covenants, and this will be a sufficient Performance of the Condition. *But now Feoffments must be in Writing.*

If the Condition be that the Obligor shall make a Lease to the Obligee for twenty Years, and it is not set down when the Lease shall begin, it shall begin presently. *6 Co. 33.*

To make a
Release or
other Assu-
rance.

If the Condition be that the Obligor shall do any Act upon Request that the Counsel of the Obligee shall think reasonable; as for Example, shall do any Act, &c. for the Releasing of an Obligation wherein the Obligee is bound to the Obligor; and the Obligee, by Advice of Counsel, deviseth and requesteth a Release of all Demands to the Obligee and to *J. S.* In this Case the Obligor may refuse to seal it altho' it be devised by the Counsel of the Obligee, because it is unreasonable; for it must be a reasonable Act that the Obligor by this Condition is bound to do. *Dyer 218.*

To pay Mo-
ney or Rent.

If the Condition be to pay *10 l.* at *Michaelmas* next, and *10 l.* yearly after, until *J. S.* be made a Knight; in this Case altho' *J. S.* be made a Knight before *Michaelmas*, yet the first *10 l.* at *Michaelmas* must be paid. *Adjudged H. 39 Eliz. C. B.*

If the Condition be thus, That if the Obligor shall for ever pay yearly to the Obligee, &c. *10 l.* at the two usual Feasts, by equal Portions; or if his Heirs shall at any Time hereafter pay *100 l.* at one Payment to the Obligee, that then the Obligation to be void; in this Case altho' the Obligor has Election which of these two Things to do, yet because the Intent is apparent that one of these Things should be done, if therefore the *100 l.* be not paid before the first Feast, the *10 l.* must be paid yearly. *Adjudged M. 18 Jac. B. R. Harbert v. Rocksey.*

To warrant
Land, and for
quiet enjoy-
ing.

If the Condition of an Obligation from *A.* to *B.* be thus, *That whereas A. hath sold to B. certain Meadow in Dale, that the said A. shall warrant the same against Lord and King, and all others, if the said B. shall peaceably enjoy it to him and his Heirs of the Lord of the Manor of M. by the Services due after the Custom, &c.* in this Case the Substance being for quiet enjoying, it shall be extended that way; and altho' it be not said what he shall warrant, yet it shall be taken the Land in Question; and the Warranty shall be construed to last only for the Life of *B.* and not to extend to any new Titles after the Covenant, especially such as are by the Act and Default of the Obligee himself; as if he commits a Forfeiture, and the Lord enters, or the like. *Dyer 42, 43.*

To prove a
Thing.

If the Condition be, that the Obligor shall sufficiently prove such a Thing; this shall be taken for Proof by Inquest, and accordingly it must be done: But if the Condition be, that it shall be done by such a Time, or before such Persons, as when or where Proof cannot be had, then it is otherwise. Where the Word *Proof* is put generally, it shall be understood of Proof by Justice; but when the Parties agree upon another Form of Proof, that shall prevail against that which is but Instruction of Law. *Perk. §. 791. 10 Ed. 4. 11. & Gold's Case, Hob. 127.*

To suffer a
Wife to make
a Will.

If one be bound in an Obligation with Condition to suffer his Wife to give to her Kinsfolks, Children or others, Portions of his Goods to the Value of *100 l.* and that he will perform it, and she gives Part to one and Part to another; in this Case the Husband must perform it accordingly: But if the Condition be to suffer her to give *A.* and *B.* *100 l.* and that he will perform it, and she gives *100 l.* to *A.* he is not bound to perform this. *Trin. 7 Jac. C. B.*

If the Condition be, that he shall perform his Wife's Will, so it does not exceed *20 l.* and she makes a Will, and devises *100 l.* in this Case he is not bound to perform the Will for the *20 l.* *Hil. 7 Jac. B. R. adjudged.*

Fifthly,

Fifthly, *In Respect of the Manner and Order of doing the Thing, &c.*

If the Condition of an Obligation be, that the Obligor shall infeof the Obligee and such others as he shall name by a Day; in this Case the Obligee must do the first Act, viz. name the others, otherwise the Obligor doth not forfeit his Obligation by the not doing of it; but if the Condition be to infeof me, or such others as I shall name before such a Day; in this Case if I do not name others, he must infeof me before the Day at his Peril. *Kelw.*

If the Condition be, that the Obligor shall make such an Estate of Lands as *J. S.* shall advise; *J. S.* must first advise, and this must be made known unto the Obligor ere he is bound to do any Thing; and if he never advises, he is never bound to do any Thing; for it is in this Case as if one be bound to stand to the Award of *J. S.* and *J. S.* never makes any, or makes a void Award, which is all one. *5 Co. 25. 7 Ed. 4. 13. Perk. §. 775.*

If the Condition be, to make such a Discharge in such a Court as the Obligee or his Counsel shall advise; in this Case the Obligee must do the first Act, viz. advise, and give Notice of the Advice to the Obligor before he be bound to do any Thing: But if the Condition be, to make such a Discharge in such a Court such a Day as the Judge of that Court shall advise; in this Case the Obligor must at his Peril procure the Judge to advise a Discharge, and it must be done that very Day, or the Obligation will be forfeited. *5 Co. 23.*

If the Condition be, to pay 20*l.* to the Obligee when he comes to *London*; in this Case the Obligee must do the first Act, viz. make known to the Obligor when he first comes to *London*, for otherwise it seems the Obligor is not bound to pay the Money. *Per Just. Nichols, M. 13 Jac. C. B.*

If the Condition be, that the Obligor shall levy a Fine to the Obligee before such a Day, the Obligee must do the first Act, viz. sue out the Writ of Covenant. *5 Co. 127. Dyer 371.*

If the Condition be, that the Obligor shall deliver twenty Cloths to the Obligee such a Day, the Obligee paying for every Cloth immediately after the Delivery 20*l.* in this Case the Cloths must be delivered altho' the Obligee refuses to pay the Money; but if immediately after be left out, it seems the Obligor is not bound to deliver the Cloth unless the Obligee first pays the Money. *21 Ed. 4. 52.*

If the Condition be, that the Obligor and his Heirs shall at any Time upon Request made do any Act, &c. that the Obligee shall require, &c. and the Obligee tenders a Release or other Deed to seal; in this Case if the Obligee, or his Heirs, that is to seal the Deed be an illiterate Man, he may refuse to seal it until he can get Somebody to read it unto him; but he may not refuse or delay to seal it until he can have a Lawyer's Advice upon it, but he will forfeit his Obligation. *2 Co. 3, 4. Dyer 337.*

If the Condition be, to do any Thing upon Request, the Obligor until Request be made is not bound to do any Thing towards it, neither can he forfeit his Obligation till then. And yet if in this Case the Obligor disables himself to do the Thing he has undertaken to do upon Request, before the Request made, the Obligation may be forfeited without any Request made. *Perk. §. 773. 5 Co. 21.*

If the Condition be, that the Obligor shall within a certain Time surrender such Land of his for an Annuity of so much as they shall agree upon, and they agree upon 10*l. per Annum*; in this Case the Obligor is not bound to make the Surrender until the Annuity be made and tendred unto him. *14 H. 8.*

If the Condition be, to deliver to the Obligee an Obligation wherein the Obligee is bound, &c. or to seal and deliver to the Obligee such a Release of it as shall be devised by the Counsel of the Obligee before *Michaelmas*, and the Counsel do not advise any Release before *Michaelmas*; in this Case the Obligor is discharged of the Obligation, for the Obligee is to do the first Act. *Adjudged H. 37 El. C. B. Greeng-bam's Case.*

If *A.* be bound to *B.* in an Obligation, with Condition that *A.* and his Wife shall levy a Fine of Land to *C.* and *D.* and their Heirs, and at their Costs and Charges; this shall be construed to be at the Costs of the Obligor, and not at the Costs of the Conusees; but if the Word [and] be omitted, perhaps it may be otherwise. *Trin. 4 Jac. B. R.*

If

If the Condition be thus, that if the Wife dies before *Michaelmas* without Issue of her Body then living, that the Obligation shall be void; in this Case *then living* shall relate *ad proximum antecedens*, and not to the Death of the Wife; and therefore if she has Issue, and dies, and after before *Michaelmas* the Issue dies also, the Obligation is void. *Dyer* 17.

If the Condition be, that if the Obligor shall waste the Goods of the Obligee (his Master), and this Waste within three Months after due Proof, either by Confession or otherwise, be notified on the Obligor, that the Obligor shall satisfy the Obligee for it, and the Obligor confesses the Waste under his Hand and Seal; in this Case this Proof, tho' it be extrajudicial, is sufficient. *Gold's Case*, *M.* 13 *fac.*

Conditions
impossible.

When the Condition of an Obligation is to do two Things by a Day, and at the Time of making of the Obligation both of them are possible, but after and before the Time when the same is to be done, one of the Things is become impossible by the Act of God, or by the sole Act and Laches of the Obligee himself; in this Case the Obligor is not bound to do the other Thing that is possible, but is discharged of the whole Obligation: But if at the Time of the making of the Obligation one of the Things is and the other of the Things is not possible to be done, he must perform that which is possible. And if in the first Place one of the Things become impossible afterwards by the Act of the Obligor, or a Stranger, the Obligor must do the other Thing at his Peril. And when the Condition of an Obligation is to do one single Thing, which afterwards before the Time when it is to be done becomes impossible to be done in all or in Part, the Obligation is wholly discharged; and yet if it be possible to be done in any Part, it shall be performed as near to the Condition as may be. *5 Co.* 22. *Co. Lit.* 207. *Dyer* 262. *15 H.* 7. 2. *4 H.* 7. 4.

If the Condition be to do one of two Things, as to make a Feoffment to me, or pay me 20 *l.* in this Case if the Obligor does either of them, it is sufficient. But if the Condition be in the Copulative, as to infeoff me, and pay me 20 *l.* in this Case the doing of one of them will not suffice, but he must do both. *21 Ed.* 3. 29.

If the Condition be to pay to *A. B.* and *C.* 30 *l.* a-piece within a Week after they come to eighteen Years of Age, or within forty Days after their Days of Marriage, after Notice given thereof, which shall first happen; in this Case this Notice must go to both the Parties, so that Notice must be given when they are eighteen Years of Age, otherwise and until Notice given the Obligor is not bound to pay the Money. *Per Just. Dodridge*, *M.* 2 *Car.* B. R.

(H) *When the Condition of an Obligation shall be said to be performed, and the Obligation saved or satisfied, or not.*

See before of Conditions, p. 280, &c.

THE Matter of a Condition of an Obligation is sometimes *Affirmative* and *Compulsory*, and consists of something to be done; and sometimes it is *Negative* and *Restrictive*, and consists of something not to be done; the not doing in the first Case, and doing in the latter Case, causeth the Obligation to be forfeited; and the doing in the first Case, and not doing in the latter, saves the Obligation.

To make a
Feoffment.

If one be bound in an Obligation to me, with Condition to infeoff me of Land, and the Obligor does first make a Lease to me of it, and afterwards he makes a Release of it to me and my Heirs; this is a good Performance of the Condition. *Co. Lit.* 207. *Plow.* 67. *17 Ed.* 4. 3.

If a Condition be to make me a Feoffment of Land, and he tenders me a Feoffment, and I refuse it; by this the Condition is performed. So if the Condition be, to make a Feoffment to my Use, and when it is made I refuse it; this is a good Performance of the Condition. But if a Man binds himself in an Obligation to me, with Condition to make a Feoffment to a Stranger, and he tenders the Feoffment to the Stranger, and he refuses it; this is no good Performance of the Condition, but the Obligation is forfeited. If the Condition be, to infeoff me and my Wife, and he tenders it to me, and I refuse it; this is a good Performance. *Perk.* §. 784. *Fitz. Bar* 82. *Perk.* §. 758. *15 Ed.* 4. 5.

If one binds himself in an Obligation to me, with Condition to make me a Feoffment of the Manor of *Dale* by a Day, and he before the Day grants a Rent-charge out of the same Manor to a Stranger, and afterwards and before the Day also he makes

makes me a Feoffment of the Land; this is a good Performance of the Condition, and the Grant of the Rent is no Breach thereof. But if the Obligor sells Part of the Manor before, or makes a Feoffment to me but of one Moiety, or a third Part of the Manor; this is no good Performance of the Condition. And if in this Case the Obligor before the Day takes a Wife, and before the Day makes his Feoffment according to the Condition, but the Marriage continues until after the Day; in this Case the Condition is broken. 3 H. 7. 4. 4 H. 7. 4. Perk. §. 757.

If the Condition be, that the Obligor shall infeoff me of the Manor of *Dale*, and he makes a Feoffment of the Manor of *Sale*, and I accept thereof; this is no Performance of the Condition, and that my Acceptance in this Case will not help. So if the Condition be, to make me a Feoffment of Land, and he gives me Money, a Horse, or the like, in Recompence of this, and I accept thereof; this is no good Performance of the Condition: And the like Law is in all Cases where the Condition is to do any collateral Thing, as to account, build a House, enter into a Recognisance, or the like, and the Obligor gives and the Obligee accepts some other Thing in Lieu thereof. And so it is where the Condition is to make a Feoffment to a Stranger, and the Obligor gives and the Stranger takes another Thing in Lieu thereof. But if the Condition be, to infeoff me of Land such a Day, and he makes and I take the Feoffment before the Day; this is a good Performance of the Condition. Perk. §. 749, 751, 759. Dyer 1. 9 H. 7. 17. 3 H. 7. 4. 27 H. 8. 1. 14 H. 8. 15. 10 H. 7. 14.

If the Condition be, to infeoff me or my Heirs in the Disjunctive, and the Obligor infeoff me and my Heirs; this is a good Performance of the Condition, for it is impossible to infeoff my Heirs whilst I live. And when two Things are to be done by a Condition, whereof the one is possible at the Time of making the Obligation, and the other not; in this Case it is sufficient if he does the Thing which is possible. 14 H. 8. 15. 5 Co. 112.

If the Condition be, to make me a Feoffment, or pay me 20 l. if the Obligor does either of them, it is sufficient: But if the Condition be, to infeoff me, and pay me 20 l. in this Case the Obligor must do both, or the Condition will not be performed; Et sic de similibus. 21 Ed. 3. 29.

If the Condition be, that the Obligor shall make me a sufficient Estate of Land by the Advice of *W.* and *S.* and they advise an insufficient Estate, and the Obligor makes the Estate according to that Advice; this is a good Performance of the Condition. But if the Condition be, that the Obligor shall make a good and sure Estate, and he by Advice of Counsel makes an Estate that is not good and sure; this is no good Performance of the Condition. Perk. §. 776. Kelw. 95.

If the Condition be, that the Obligor shall make me an Estate of Land, and makes the Estate to another by my Appointment; this is no Performance of the Condition. Fitz. Bar 55.

If the Condition be, that the Obligor or his Feoffees in Trust shall make an Estate to the Obligee such a Day, and the Feoffees do it without the Consent of the Obligor; this is no Performance of the Condition. Trin. 17 Jac. B. R.

If the Condition be, to make further Assurance, and the Obligor makes further Assurance upon Condition without the Agreement of the other Party; this is no good Performance of the Condition. Pas. 8 Jac. C. B.

If the Condition be, to save me harmless from an Annuity wherewith my Land is charged, and the Obligor pays the same yearly, and gets me an Acquittance for the same from the Party; this is a good Performance of the Condition. But if the Condition be, to discharge me of such an Annuity; in this Case Payment and procuring me a Release is no good Performance of the Condition. 37 H. 6. 18. Perk. §. 792.

If the Condition be, that the Feoffees or Lessees of the Obligor, or such Lands which they have in Trust, shall grant me a Rent-charge, or release their Right to me before such a Day, and there be three Feoffees or Lessees, and two of them only grant this Rent, or make this Release; this is no good Performance of the Condition. Perk. §. 790. Fitz. Bar 70.

If the Condition be, that the Obligor shall purchase and procure to me and my Heirs a Rent of 5 l. per Ann. and a Stranger has such a Rent out of my Land, and he gets him to release this to me; this is a good Performance of the Condition. Dyer 15.

And if one be bound with Condition to grant me the Rent and Farm of such a Mill before *Michaelmas*, to be had and received until I be paid 10 l. and before that

To deliver a
Horse.

Tender and
Refusal.

To pay Mo-
ney.

Time he leases the Mill to me at a Rent, and then suffers me to detain so much of the Rent; this is a good Performance of the Condition. *Fitz. Bar 77.*

If the Condition be, to deliver me a Horse, and the Obligor tenders the Horse to me, and I refuse him, hereby the Condition is performed; and so in all such like Cases where the Obligor is to do any collateral Thing, as stand to an Award, or the like; if the Obligor offers to do it, and the Obligee refuses, the Condition is performed, and the Obligation discharged for ever. *Co. Lit. 207.*

If the Condition be, to pay Money at a Day certain, and the Obligor pays a little before Night, Time enough for the Receiver to see and number his Money by Daylight; this is a good Performance of the Condition. And if the Condition be, to pay Money by or before a Day; Payment the last Instant of the Day before, is a sufficient Performance of the Condition. *Dyer 17. Co. Lit. 202. Bro. Condition 145.*

If the Condition be, to pay me a Sum of Money at a Day certain, and the Obligor pays me less Money before the Day, or all the Money before or at the Day, or gives me something else before or at the Day of Payment in Lieu thereof, or pays me all the Money, or a lesser Sum at the Day appointed, but in another Place, and not the Place mentioned in the Condition, and I accept thereof; in all these Cases the Condition is well performed. *Perk. § 7, 48. 34 H. 6. 17. 21 Ed. 3. 13. 5 Co. 117. 9 Co. 79. Bro. Obl. 64.*

But if a Stranger to the Condition does so, and I accept thereof; this is no good Performance of the Condition. *Adjudged Trin. 36 Eliz.*

And if the Obligor pays less than the whole Money at the Day of Payment, and the Obligee accepts thereof; this is no good Performance of the Condition: And if the Thing to be done be a collateral Thing, as to account, or the like, and the Obligor gives to the Obligee Money, or a Horse in Lieu thereof, and the Obligee accepts it; this is no good Performance of the Condition. And if the Obligor pays the Money to the Obligee after the Day of Payment; this is no Performance of the Condition, but the Obligation is forfeited, and the Money paid shall go in Part towards the Forfeiture: And yet in this Case the Defendant at this Day being sued upon this Obligation, usually adventures to plead Conditions performed, and gives the special Matter in Evidence to the Jury, who for the most part finds against the Obligee. *Adjudged 27 Eliz.*

And yet if the Condition be, to pay me Money at a Day certain, or to pay another Money at a Day certain, and the Obligor pays me or the Stranger at several Times before the Day, and I or the Stranger accept thereof; this is a good Performance of the Condition. *Dyer 18.*

But if the Obligee only promises to accept of a Horse for his Money at the Time of Payment, and when the Time of Payment comes, and a Tender of the Horse is made to him, he refuses him; this Tender is not a sufficient Performance of the Condition. *18 Ed. 4.*

If the Condition be, to pay Money at a Day and Place certain, and the Obligor tenders it at the Time and Place, and the Obligee is not ready to receive it; or being ready, refuses to receive it; this is a good Performance of the Condition to save the Forfeiture of the Obligation: And yet if the Obligor be afterwards sued for this Money, he must say in his Pleading that he is still ready to pay it, and he must tender it in Court. But if one be bound by a single Obligation to pay Money, and after at the same or some other Time he has a Defeasance from the Obligee, that upon Payment of a lesser Sum the Obligation shall be void, and the Obligee refuses the Money when the same is tendred at the Time when by the Defeasance it is to be paid; in this Case the Obligor is not bound to tender the Money in Court, neither hath the Obligee any Remedy for it. *Co. Lit. 208, 209. 27 H. 8. 10. Perk. §. 784.*

If the Condition be, to pay me Money at a Day and Place certain, and the Obligor tenders it to me the same Day in another Place; this is no Performance of the Condition, and therefore in that Case I may refuse it. *41 Ed. 3. 25.*

If the Condition be, to pay Money between two Days; Payment of the Money upon either of those Days, is not a good Performance of the Condition; but the Payment must be between the two Days. *Dyer 17.*

If the Condition be, to pay me Money at a Day certain, and I bid the Obligor pay the Money to one that I do owe so much more unto, or I bid him lay out the Money for me, or I bid him keep it for such a Debt I owe unto him, and he does so, and I accept thereof; this is a good Performance of the Condition. If the Con-

dition be, to pay me Money, and I appoint another to receive it, and the Obligor pays it unto him; this is a good Performance of the Condition. *Perk. §. 748.*
27 H. 6. 6. Fitz. Bar 43.

If the Condition be, that a Stranger shall pay to the Obligee 10*l.* and the Obligee Acceptance. accepts a Horse for it; this is a good Performance of the Condition. But if the Condition be, that one Stranger shall pay to another Stranger 10*l.* and the one gives and the other takes a Horse in Lieu of this; this is no good Performance of the Condition. *Co. Lit. 208, 209. Dyer 56.*

If the Condition be, to pay me 20*l.* of lawful *English* Money, and the Obligor pays me in *Spanish*, or in any other Money current in this Realm; this is a good Performance of the Condition. But Payment in Farthings is no good Payment. If the Condition be, to pay me 20*l.* and the Obligor pays me some of the 20*l.* in counterfeit Pieces, which I not perceiving at the Time do put up and accept; but after upon a Review I do perceive some of them to be naught, and thereupon I do send it back to him again; in this Case the Condition is well performed, and therefore the sending back of the Money again will not cause a Breach afterwards. *Vide Terms de la Ley, Tit. Coin.*

If neither the Principal nor Interest upon a Bond has been demanded in twenty or thirty Years, it will be presumed in Equity that the Bond is satisfied; and a perpetual Injunction has been granted to stay all Proceedings on such Bonds. *1 Ch. Rep. 78. Finch's Rep. 78.*

If the Condition be, that I shall stand to the Award of *J. S.* and he awards me to pay 20*l.* to *W. S.* by a Day, and at the Day I tender him the 20*l.* but he refuses it; in this Case I have sufficiently proved the Condition, and the Obligation is saved. *To stand to an Award.*
22 Ed. 4. 2.

If the Condition be, that I shall stand to the Award of *J. S.* and he awards that I shall enter a *Retraxit* in a Suit depending between me and the other Party, and I do not so, but am nonsuited, or discontinue my Suit; this is no good Performance of the Condition. *22 Ed. 4. 25.*

If the Condition be, that the Obligor shall come such a Day to such a Place, and shew me a Release, and he comes to the Place the latter Part of the Day, and stays there till the Light of the Day be gone, ready to shew his Release, but I come not thither; this is a good Performance of the Condition. *To shew a Release.*
22 Ed. 4. 42.

If one makes a Lease of Land to me, and binds himself in an Obligation, with Condition to suffer me quietly to enjoy the Land without the Let of him or any other; in this Case if he himself, nor any other by his Incitement, disturbs me, the Condition is performed; and if a Stranger that has Title enters without his Procurement or Occasion, this is no Breach of the Condition. *For quiet enjoying.*
Dyer 255. 17 Ed. 4. 3.

If the Condition be, to appear in the King's Bench such a Day to answer *J. S.* and at the Day the Obligor appears, but the Plaintiff is effoined, so that the Defendant cannot answer him, or the Suit is discontinued by the Demise of the King before the Day of Appearance; in these Cases the Condition is performed, and the Obligation saved. But if the Obligor in this Case when he appears does not cause his Appearance to be entred of Record, the Obligation is forfeited. *To appear.*
Perk. §. 760, 758.
2 Ed. 4. 3.

If the Condition be, to appear *Coram Domino Rege*, and the Obligor appears before the King's Person; this is no Performance of the Condition. And if the Condition be, to appear *Coram Justiciariis Domini Regis*, and the Obligor appears before them out of Court; this is no Performance of the Condition. *8 H. 4. 6.*

If the Condition be, that a Stranger shall make an Obligation to the Obligee, and the Stranger tenders it, and the Obligee refuses it; this is a good Performance of the Condition: But if the Condition be, that the Obligor shall make an Obligation to a Stranger, and the Obligor tenders it, and the Stranger refuses it; this is no Performance of the Condition. *To make a Bond.*
Co. Lit. 208, 209. 10 H. 6. 16. 27 H. 8. 1.

If the Condition be, that the Obligor shall marry the Daughter of the Obligee by a Day, and he tenders himself, and she refuses; in this Case the Obligation is forfeited notwithstanding this Tender and Refusal. *To marry a Woman.*
Perk. §. 756. 4 H. 7. 3.

If the Condition be, to deliver the Key of a House and the quiet Possession to *J. S.* to the Use of the Obligee; and the Obligor (the House being cleared, and every one out of the House, and the Door locked) delivers the Key to *J. S.* this is no good Performance of the Condition, but *J. S.* or the Obligee or his Deputy, ought to come and receive the Possession. *To quit Possession.*
Dyer 219.

(1) When

(I) *When a single Obligation shall be said to be broken and forfeited, or not.*

IF an Obligation that is single be not performed, as when it is to pay Money at a Day, and the Money is not paid, the Obligation is broken; but if a Man be bound by an Obligation to pay Money at several Days, the Obligation is not forfeited, nor can be sued until all the Days be past. And yet if the Condition of an Obligation be, to pay Money at several Days, and the Obligor fails to pay the Money the first Day; in this Case the Obligee may sue for the Money due by the Obligation presently. 8 Co. 153. Co. Lit. 292. F. N. B. 267.

If one be bound to pay Money at a Day certain by a single Obligation or Bill, and the Obligor tenders the Money due at the Day to the Obligee, so as he will give him his Bill, or give him a Release for the Money, and the Obligee refuses so to do, and thereupon he refuses to pay the Money; in this Case the Obligation is not forfeited, for the Obligor is not bound to pay the Money unless the Obligee will give up his Bill, or give him a Release. But otherwise it is in Case where one is bound to pay Money by the Condition of an Obligation, for there the Obligor must pay the Money at his Peril, altho' the Obligee refuses to deliver up the Obligation, or to give a Release. Bro. Obl. 62. Fait 105. Fitz. Verdict 13.

If one be bound to pay Money on a single Bill at a Day, and the Obligor tenders the Money at the Day to the Obligee, and he refuses it; in this Case he has no Remedy for his Money. *Sed quære.*

(K) *When the Condition of an Obligation shall be said to be broken, and the Obligation forfeited, or not.*

IN all Cases when the Condition is not performed, or is broken, the Obligation is forfeited, and till then it cannot be forfeited; and therefore if one be bound in an Obligation with Condition to pay me 10*l.* at *Easter*, before the Day comes the Obligation cannot be forfeited; but if it be not paid at the Day the Obligation is forfeited; and yet if the Obligee himself be the Cause of the Breach of the Condition, or the Thing to be done by the Condition is now become impossible by the Act of God, the Obligation is now become without Penalty; as if in old Time I had been bound in an Obligation to an Abbot that should infeoff him before *Christmas*, if *A.* enters into Religion, my Bond had been presently forfeited; but otherwise it had been if *A.* had been professed under the Obedience of the Obligee himself. Bro. Obl. 17. 4 H. 7. 4.

If a Condition be, to make a Feoffment of Land to me such a Day, and he be not upon the Land ready to make the Feoffment, altho' I come not there to receive it, yet the Condition is broken. Perk. §. 768, 769.

If a Condition be, that when the Obligor shall come to his Aunt, he will infeoff the Obligee, or the Heirs of his Body; in this Case he must do it as soon as he comes to her, and the Obligee shall request the Feoffment, or the Obligation is forfeited. 21 Ed. 3. 29. 5 Co. 112.

If a Condition be, to infeoff me of a Manor by a Day, and before the Day the Obligor makes a Feoffment of it to another; hereby the Condition is broken, and the Obligation forfeited; and tho' the Obligor re-purchases it again before the Day, and then makes the Feoffment, yet this will not cure the Breach. 21 Ed. 4. 55.

If a Condition be, to infeoff *B.* and *C.* and one of them dies before the Time be past wherein it should be done; he must infeoff the Survivor of them, or the Condition is broken. 4 H. 7. 4.

If a Condition be, that if the Obligor before *Michaelmas* makes a Lease to the Obligee for thirty-one Years, if *A.* will assent, and if he will not assent, then for twenty-one Years; that then, &c. if *A.* does not assent, and the Lease for twenty-one Years be not made before *Michaelmas*, the Obligation is forfeited. Dyer 347.

If the Condition be, that the Obligor shall make me an Estate upon Request, and he tenders me an Estate before I request it, and afterwards I do request it, and he refuses it; the Condition is broken, and the Obligation forfeited. 7 H. 6. 24.

If the Condition be, that the Obligor shall make a good Estate of Land, (being Copyhold Land) and he surrenders it absolutely, and the Homage when they pre-

To make a
Feoffment.

To make a
Lease.

To make an
Estate.

sent it do present it conditionally; this is no Breach of the Condition. *Paf. 8 Jac. C. B.*

If the Condition be, to make a good Estate of Land in Fee-simple to *A.* (a Woman) before such a Time, and before such a Time the Obligor takes a Wife, and the Day passes, and no Estate is made; the Condition is broken, and the Obligation forfeited: But if the Obligation be made to the Woman herself, then it is dispensed with by the Intermarriage. *4 H. 7. 4. Kelw.*

If the Condition be, that the Obligor and his Son shall do all such Acts for the better assuring of Land as the Obligee or his Counsel shall devise, and the Obligee devises and tenders a Release to the Obligor and his Son to seal, and they delay and refuse to seal it, until they can shew it to their Counsel to be advised upon it; this is a Breach of the Condition; but if they be illiterate, and refuse to seal it until they can get it read, this is no Breach of the Condition. *2 Co. 3. Dyer 337.*

If the Condition be, that the Obligor shall save the Obligee harmless from such a Debt for which the Obligee is Surety for the Obligor, and the Obligee comes at the Time and to the Place when and where the Money for which he is engaged is to be paid, and finding Nobody ready to pay the Money, he pays it himself to save the Forfeiture of the Obligation; hereby the Condition to save harmless is broken, and the Obligation forfeited; and therefore much more if the Obligee be sued, arrested, outlawed or taken in Execution for the Debt of the Principal. So also if the Obligee be put in Fear of an Arrest for the Debt of the Principal, and therefore dares not go about his Business; by this the Condition is broken. But if the Obligee be sued unjustly, either because he is sued before the Money is due, or otherwise; or if the Bond in which he is bound be against Law and void, and he suffers himself to be unjustly vexed thereupon, and does not take Advantage of it; this is no Breach of the Condition of the Bond to save harmless. *Dyer 186, 187. 18 Ed. 4. 27, 28. 5 Co. 24. Old Book of Entries 12.*

If a Bailiff distrains Beasts on a *Withernam*, and afterwards redelivers them to the Party of whom he had them, and takes a Bond from him, with Condition to save him harmless from him for whom the Beasts were taken; and after he brings a *Detinue* against the Bailiff for the Beasts; the Condition is not broken, for that Action will not lie in this Case. *2 H. 4. 9.*

If the Condition be, to pay Money to me at a Day and Place certain, and the Money is not tendred at the Time and Place, altho' there be Nobody ready to receive it; if it be tendred, yet the Condition is broken. *Kelw. 60.*

If the Condition be, to pay Money to me at a Day and Place, and the Obligor in his going to the Place is robbed of the Money, so as he cannot pay him; in this Case notwithstanding the Condition is broken and the Obligation forfeited, this will not excuse it. *Bro. Obl. 9.*

If the Condition be, to pay Money to me at a Day and Place, and I seeing him going to the Place to pay the Money, desire him to forbear, and thereupon he does so, and does not pay it; the Obligation is forfeited, and this will not excuse. But if I do violently and actually detain and hinder him so that he cannot pay it, this will excuse him. *Kelw. 60.*

If the Condition be, to pay me the Rent reserved on such a Lease at the Times limited by the Lease, and it be not paid accordingly; hereby the Condition is broken altho' I do never demand the Rent. *Hil. 4 Jac. Molineux's Case.*

If the Condition be, to pay me the Rent reserved on such a Lease, and I enter upon all or Part of the Land demised, so as the Rent is suspended so long as I keep the Possession; in this Case the Non-payment of the Rent during the Time of the Suspension of the Rent, is no Breach of the Condition. *Bro. Obl.*

If the Condition be, that I shall enjoy Land without the Interruption of any Person whatsoever, and afterwards I do forfeit it myself by Non-payment of Rent, or the like; this is no Breach of the Condition. *Dyer 30.*

If the Condition be, that the Obligor shall suffer the Obligee to enjoy Lands, &c. and that without the Let of him, &c. or any other Person or Persons, &c. and one that has an elder Title enters; this is no Breach of the Condition. But if he procures this Entry and Disturbance; this is a Breach of the Condition. *Dyer 255. 17 Ed. 4. 3.*

If the Condition be, that *B.* and others shall quietly enjoy Land, and *A.* the Obligor and *B.* the Obligee disturb the others; it seems by this Disturbance the Condition is broken. *Kelw. 60.*

If the Condition be, that the Obligor shall not disturb me in the keeping of my Courts, and he keeps the Courts and takes the Fees himself; this is a Breach of the Condition. 9 Co. 51.

If one makes a Feoffment of Land, and makes me an Obligation with Condition to defend the Land for twelve Years, &c. and I am entred by a Stranger but never impleaded; in this Case the Condition is broken. Co. Lit. 384.

To stand to
an Award.

If the Condition be, to stand to the Award of J. S. and the Obligor afterwards countermands the Submission made to J. S. this is a Breach of the Condition. *Factum non dicitur quod non perseverat.* 4 Co. 61. 8 Co. 83.

To give a Li-
cence.

If the Condition be, that I shall have Licence to carry Wood seven Years, and the Obligor gives me a Licence for seven Years, and then revokes it again; this is a Breach of the Condition. 8 Co. 82, 83. 18 Ed. 4. 20.

To appear.

If the Condition be, that J. S. shall give me Licence to go over his Ground, and J. S. does so, but another interrupts me; this is no Breach of the Condition. And yet if the Condition be, that I shall have Licence to go over that Ground, there perhaps such an Interruption may be a Breach of the Condition. 18 Ed. 4. 23.

If an Obligation be made to me with Condition to appear in such a Court such a Day, and at the Day he is kept in Prison at my Suit so as he cannot appear; in this Case his Non-appearance is no Breach of the Condition, for his Imprisonment shall excuse him. But if his Imprisonment be for Felony, or any other such like Cause of his own, *contra.* Fitz. Bar 60.

To ride to
Dover.

If the Condition be, to appear in such a Court such a Day, and before the Day a *Superfedeas* comes to the Sheriff; yet if the Obligor does not appear, the Obligation is forfeited. Dyer 25.

If the Condition be, that the Obligor shall ride with J. S. to Dover such a Day, and J. S. does not go thither that Day; the Condition is broken, and he must procure J. S. to go thither and ride with him at his Peril. Perk. §.

Not to alien.

If I make a Lease for Years, and the Lessee enters into an Obligation with Condition that he shall not alien the Land demised without my Licence, and I die, and then he aliens it; this is a Breach of the Condition. Per Justice Nicholas, M. 13 Jac.

To serve.

If the Condition be, that J. S. shall serve me in all my honest and lawful Commands; or that J. S. shall be a good and honest Servant to me one Year; in the first Case if I command him nothing, the Condition is not broken altho' he never tenders his Service; but in the last Case he is to tender his Service to me, or otherwise the Condition will be broken. But if I refuse his Service when it is tendred, or he dies within the Time, the Obligation is discharged; and yet if he departs away within the Time, the Condition is broken. Perk. §. 772. 6 Ed. 4. 2.

To marry a
Woman.

If the Condition be, that A. shall marry B. by a Day, and before the Day the Obligor himself marries her; the Condition is broken. But if the Obligee marries her before the Day, the Obligation is discharged. 4 H. 7. 4. Perk. §. 799.

To perform
Covenants.

If the Condition be, to perform the Covenants and Payments of a Deed, and the Deed contains a Feoffment, and this is one Condition, that if the Feoffor pays such a Sum of Money, he shall re-enter, and he does not pay it; this Non-payment is no Breach of the Condition. But if A. lets Land by Indenture to B. for Years rendring Rent, and B. binds himself in an Obligation with Condition to perform all the Covenants contained in the Indenture, and the Rent is unpaid; this is a Breach of the Condition, and Cause of Forfeiture of the Obligation. Adjudged 5 Jac. B. R. Int. Griffin and Scot.

To keep Pri-
soners.

If the Condition be, for the safe keeping of Prisoners, and one escapes that is in Execution and in Prison under Colour of an Execution, or the like, but in Truth and in Judgment of Law is no Prisoner; this Escape is no Breach of the Condition. Cur' Trin. 37 Eliz.

(L) *In what Cases an Obligation, altho' good in its original Creation, is void or discharged by Matter ex post facto, or not.*

IF the Condition of an Obligation consists of two Parts in the *Disjunctive*, or be to do one of two Things before or at a Day certain, and both the Things are possible at the Time of the making of the Obligation, and before the Time of Performance one of the Things is become impossible to be done, by the Act of God, or

by the Act of the Obligee himself; in this Case the Obligation is discharged for ever.
Co. Lit. 207.

And therefore if the Condition be, *That the Obligor shall sell his Wife's Land; if then he shall either in his Life-time purchase to his Wife, and her Heirs and Assigns, Land of as good Right and Value as the Money by him received or had by or upon the said Sale shall amount unto, or else do and shall leave unto her the said J. as Executrix, by Legacy or otherwise, as much Money as shall be by him received from such Sale, that then, &c.* and the Obligor sells his Wife's Land, and then his Wife dies before him, so that he cannot leave her the Money; in this Case the Obligation is discharged, and the Husband is not bound to purchase Land to her and her Heirs. 5 Co. 22. 15 H. 7. 2.

So if the Condition be, that if *J. S.* does not prove the Suggestion of a Bill depending in the Court of Requests before the *Utas* of *Hilary*, that then he shall pay 20*l.* &c. and *J. S.* dies before the *Utas*; hereby the Obligation is discharged for ever, and he is not bound to pay the 20*l.* So if the Condition be, that if the Obligor appears in the King's Bench in *Easter* Term, or pays 20*l.* to the Obligee at *Michaelmas*, and the Obligor dies before *Easter* Term; hereby the Obligation is discharged; but if he does not appear in *Easter* Term, and outlives the Term, and dies after; then the 20*l.* must be paid at *Michaelmas*, or the Obligation is forfeited. So if the Condition be, that the Obligor shall marry *A.* before *Easter*, or pay 20*l.* to the Obligee at *Michaelmas*, and *A.* dies or becomes mad before *Easter*, or the Obligee marries *A.* himself, and the Marriage continues between them until *Easter* be past; in all these Cases the Obligation is discharged for ever. But when the Thing is become impossible by the Act or Laches of the Obligor, the Law is otherwise. And therefore if the Condition be, that *A.* shall marry with *B.* before *Easter*, or that the Obligor shall pay unto the Obligee 20*l.* at *Michaelmas*, and the Obligor himself marries with *B.* and the Marriage continues until after *Easter*; hereby the Obligation is not discharged. So if the Condition be to deliver an Obligation before *Easter*, or give a Release at *Michaelmas*, and the Obligor loses the Obligation, or the Obligation is burnt; hereby the Obligation is not discharged, for if he does not make the Release at *Michaelmas* he forfeits the Obligation. *Dyer* 262. 15 H. 7. 4. 4 H. 7. 4. 9 *Jac. Bathurst's Case*.

If the Condition of an Obligation consists of one Part only, or be to do one Thing at a Time certain, and that Thing at the Time of the Obligation made is possible to be done, but afterwards and before the Time when it is to be performed it becomes impossible by the Act of God, or the Act of the Obligee; in this Case also the Obligation is gone and discharged for ever. And therefore if the Condition be, to appear in Person such a Day in such a Court, and before the Day the Obligor dies, or at the Day the Water rises so high that he cannot travel to the Place without Danger of Life; in these Cases the Obligation is discharged. So if the Condition be, that *A.* shall marry *B.* before *Easter*, and before the Time *A.* or *B.* dies, or becomes mad, or the Obligee marries *B.* and the Marriage continues until after the Day; in all these Cases the Obligation is discharged. But if the Thing becomes impossible by the Act of the Obligor, *contra*. And therefore if the Condition be, that the Obligor shall appear such a Day, and before and at the Day he is imprisoned thro' some Default of his own, so that he cannot appear; this will not excuse him, no more than in Case where he is so sick that he cannot appear without Peril of his Life, (so held in *Seaccario*, 3 Car.) So if the Condition be, that *B.* shall marry *C.* before *Easter*, and the Obligor himself marries her, and the Marriage continues until after the Time; in this Case the Obligation is forfeited. So if the Condition gives the Obligor all his Life-time to do the Thing, the Obligation is not discharged by his Death, (*Hil. 37 Eliz. C. B.*) but in this Case he must do it during his Life-time at his Peril. *Vide* 8 Ed. 4. 21. 5 Co. 22. *Perk.* §. 769, 767. 4 H. 7. 4. 22 Ed. 4. 27.

If the Condition be, that the Obligor shall deliver to the Obligee an Obligation, or such a Release as the Counsel of the Obligee shall devise before *Michaelmas*, and the Counsel of the Obligee devises no Release before *Michaelmas*; hereby the Obligation is gone for ever. *Adjudged* 37 *Eliz. C. B. Greening v. Ewre*.

If the Obligation depends upon or be necessary to some other Deed, and that Deed becomes void; in this Case the Obligation is become void also; as if the Condition of the Obligation be to perform the Covenants of an Indenture, and afterwards the Covenants be discharged, or become void by this Means; the Obligation is discharged and gone for ever. And if one makes a Lease for Years rendring Rent, and the Lessee enters into an Obligation with Condition to pay the Rent to the Lessor, and

and after it falls out so that the Lessee is evicted out of the Land by an elder Title, whereby the Rent in Law is gone; in this Case and by this Means the Obligation is discharged and gone also: But if the Eviction be but of a Part of the Land, *contra. Bro. Obl. 6, 88, 29. 4 H. 7. 6.*

If an Obligation be made to me, and delivered to *J. S.* to my Use, and when it is tendred to me I do refuse it and disagree to it; hereby it is become void, and cannot afterwards be made good again. So if an Obligation be made to my Wife, and I disagree to it; hereby it is become void. *5 Co. 119.*

By a Release made from the Obligee to the Obligor, or to one of the Obligors, if there be more than one, the Obligation may be discharged; and therefore if an Obligation be made to me with Condition to pay Money, and I by my Deed release it, or acknowledge myself satisfied the Debt, altho' I receive none of it, or that I receive but Part of it in full Satisfaction of the Debt; by this the Obligation is discharged for ever. *Fitz. Bar 37.*

If the Obligee makes the Obligor, or one of the Obligors, or all the Obligors, his Executor or his Executors; hereby the Obligation is discharged for ever. But the granting of Letters of Administration to one or more of the Obligors, is no Discharge of the Obligation. And if the Obligor makes the Obligee his Executor; this is no Discharge of the Obligation. *Bro. Obl. 61. 8 Co. 136. 8 Ed. 4. 3. 21 Ed. 4. 2. 1 H. 7. 4.*

If the Obligee be a Woman, and takes the Obligor to Husband; hereby the Obligation is discharged. *Bro. Obl. 61.*

If the Condition be, to infeof *K. S.* (a Woman) before such a Time, and before the Day the Obligor marries the Woman; this does not discharge the Obligation. *Fitz. Bar 133.*

If the Condition be, to serve me seven Years, and within the Time I licence him to depart; it seems that hereby the Obligation is discharged. And yet if the Condition be to stand to an Award, and it is awarded that one of the Parties shall pay five Pounds a Year for seven Years towards the Education of *J. S.* and *J. S.* dies within the seven Years; the Obligation is not discharged by his Death, but the Money must be paid during the Time notwithstanding. *Dyer 371.*

If the Condition be, to do two Things, or stand upon divers Points, and the Obligee, supposing the Breach of one of them, sues the Obligor, and the Issue being joined upon that Point, it is found against the Plaintiff, and he is barred; hereby the whole Obligation is discharged, and so long as that Judgment is in Force, he can never sue the Obligation upon any other Point within the Condition. If the Condition be, to satisfy me for Goods I have delivered to *J. S.* if they be lost, and afterwards they be lost, and I sue *J. S.* and have him in Execution for them; by this the Obligation is not discharged; but perhaps when I have Satisfaction of *J. S.* being in Execution for the Goods, the Obligation may be gone. *Fitz. Bar 64.*

And in all other Cases by which a Deed in general may become void by Matter *ex post facto*, as by Rasure, or the like, an Obligation may become void.

(M) *Where a Bond is extinguished at Law; and where after Extinguishment at Law it is good in Equity.*

IF the Condition be, to do an Act at the Request of the Obligee, and he dies without making any Request, the Bond is extinguished at Law; so where the Obligor is made Executor or Administrator to the Obligee. *Vide 2 Bac. Abr. 379, 380.*

A Bond was given to the Wife by the intended Husband before Marriage, to leave her 1000 *l.* if she survived him; tho' this Bond was extinguished and released at Law by the Marriage, yet it is good in Equity; and it was decreed, that the Wife after her Husband's Death should be admitted as a Bond-Creditor to redeem a Mortgage and hold over his Estate until she should be satisfied what he should pay for the Redemption, and also the Bond-Debt. *2 Vern. 481.*

(N) *What*

(N) *What shall be recovered on a Bond in Law or Equity.*

UPON a Bond for Performance of Covenants, &c. the Obligee shall recover no more in Equity than he is really damaged by the Breach of Covenants: But in an Action at Law the whole Penalty of the Bond shall be recovered from the Obligor. 2 Chan. Rep. 199.

But Chancery gives Relief against the Penalty of a Bond; and tho' the Principal and Interest Damages sustained exceed the Penalty, yet the Obligee shall not recover beyond the Penalty. 2 Vern. 509. 1 Chan. Rep. 95. 1 Salk. 154. Abr. Ca. Eq. 92.

For where an Obligee is Plaintiff a Court of Equity will not carry the Debt beyond the Penalty, because he has chosen his own Security; but it is otherwise as to the Obligor, for he who seeks Equity from him must do it to him. Abr. Ca. Eq. 92.

And therefore if Lands are extended on a Statute or Judgment at much less than the real Value, and the Conusor will come into Equity to make the Conussee account according to the real Value, he shall not be relieved without paying the Conussee all that is due to him for Principal, Interest and Costs, tho' they exceed the Penalty. 1 Vern. 350. So if the Obligee be delayed by Injunction.

So where the Plaintiff came to be relieved against the Penalty of a Bond, tho' it was so decreed, yet it was on the Payment of Principal, Interest and Costs; and tho' they exceeded the Penalty, yet the Decree was affirmed in the House of Lords. Show. P. C. 15. Vide Abr. Ca. Eq. 92.

By Stat. 4 & 5 Ann. c. 16. In Debt upon Bond, if the Defendant before Action brought has paid the Principal and Interest due by the Condition or Defeasance, he may plead Payment in Bar. And pending an Action on such Bond, the Defendant may bring in Principal, Interest and Costs in Law and Equity, and the Court shall give Judgment to discharge the Defendant.

(O) *In what Cases Obligees have Remedy in Equity where Bonds are lost or clandestinely taken away.*

IF a Bond be taken away fraudulently and cancelled, the Obligee shall have the same Benefit thereby as if it had not been cancelled. Finch's Rep. 184.

So where an Obligee loses his Bond, he shall have his Remedy against the Obligor in Equity. 1 Chan. Ca. 77, 78.

And when a Bond is lost, the Money may be recovered of the Surety, on Proof that he had sealed and entered into the Bond. 1 Chan. Ca. 77, 78.

Sed quære, for these Matters are discretionary. Vide Abr. Ca. Eq. 93.

J. S. a little before his Death entered into a voluntary Bond to his House-keeper for the Payment of an Annuity of 30 l. per Ann. and the Bond being lost, his Representatives were decreed to pay the Annuity, or the Penalty of the Bond, tho' it appeared there were no Wages due to her. Abr. Ca. Eq. 93.

By Stat. 2 G. 2. c. 25. §. 3. Stealing a Bond is made Felony.

S E C T. XXII.

Of Defeasances.(A) *Defeasance what.*

A Defeasance (from *Defaire*, to defeat or undo) in a large Sense sometimes signifies a Condition annexed to an Estate, and sometimes the Condition of an Obligation made with and annexed to the Obligation at the Time of making thereof; but it is more peculiarly and properly applied to such conditional Instruments as are made in Defeasance and Avoidance of Statutes and Recognisances at the Time of entering into the same Statutes or Recognisances, and to such conditional Instruments as are made in Defeasance of Statutes, Obligations, and the like, after the Time of

the same Statutes entred into and Obligations, &c. made; and it is therefore thus defined:

A Defeasance is a Condition relating to a Deed, as to an Obligation, Recognisance, Statute, or the like, which being performed by the Obligor or Recognisor, the Act is disabled and made void as if it had never been done. *Co. Lit. 236. b. 237. a.*

(B) *The Difference between a Condition and a Defeasance.*

THE Difference between a *common Condition* and a *Defeasance* is, that the Condition is annexed to or inserted in the Deed; and a Defeasance is generally a Deed by itself, concluded and agreed upon between the Parties, and having Relation to another Deed: And therefore if a Man acknowledges a Statute, and enters into a Defeasance, that if his Lands in the County of D. should be extended, the Statute should be void; the Defeasance will be good and not repugnant, because it is in another Deed: But the Condition of a Bond not to sue the Obligation, is void for Repugnancy, being in the same Deed. *Moor 1035.*

See before concerning Conditions, p. 280, &c.

(C) *In what Cases a Defeasance may be made, and what Things may be defeated and avoided thereby, and what not.*

THERE is no Inheritance executory, as Rents, Annuities, Conditions, Warranties, Covenants, and such like, but may by a Defeasance made with the mutual Consent of all those which were Parties to the Creation thereof, at the same, or any Time after, be annulled, discharged and defeated: And so is the Law of Statutes, Recognisances, Obligations, and the like; yet so as in all these Cases regularly the Defeasance must be made *eodem modo*, as the Thing to be defeated was and is created, *viz.* if the one be by Deed, the other must be so also; for it is a Rule, that in all Cases when any executory Thing is created by a Deed, that the same Thing by the Consent of all Persons which were Parties to the Creation of it, may be by their Deed defeated and annulled; and therefore that Warranties, Recognisances, Rents, Charges, Annuities, Covenants, Leases for Years, Uses at Common Law, and such like, may by a Defeasance made with the mutual Consent of all those that were Parties to the Creation of it, by Deed be discharged and avoided. *Nil est tam conveniens naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatur.* And therefore by a Defeasance, not only the Covenant which doth create a Power of Revocation, but the Power itself created, may be utterly defeated and avoided; but Estates of Inheritance, and other Estates in Tail or for Life executed by Livery, &c. cannot be avoided by Defeasance made after the Time of their Creation and first making. And yet by another Deed of Defeasance made at the same Time, a Feoffment, Release, Lease for Life, or other executed Thing, may be avoided as well as if it were by Condition within the same Deed; as if a Disseisor releases to the Disseisor; this Release cannot be defeated by an Indenture of Defeasance made afterwards, but it may be defeated by an Indenture of Defeasance made at the same Time. *Quæ incontinenti sunt inesse videntur.* *Co. Lit. 236, 237. 1 Co. 111, 113. Plow. 157, 193. 21 H. 7. 23. Bro. Defeasance in toto.*

(D) *Things requisite in a good Defeasance.*

As to the
Manner of it.

TO make a good Defeasance these Things are requisite:
First, That the Defeasance be made *eodem modo*, as the Thing to be defeated is created: For if the Oblige by Word only discharges the Obligor, or grants not to sue him; this will not defeat the Obligation; it must be by Deed therefore as the former was. *1 Co. 113.*

But whether the Deed of Defeasance be indented or Poll is not material. *Bro. Defeasance 12. Fitz. Bar 95.*

Secondly, That if it recites the Statute or the Obligation (as for the most part it does) that it be done truly; for if a Defeasance be made of a Statute or an Obligation which is recited to be made the 10th Day of May, whereas in Truth it bears Date the first Day of May; this Defeasance is void. *Plow. 393.*

Thirdly, That it be made between the same Persons that were Parties to the first Deed, &c. and therefore if *A.* be bound in an Obligation to *B.* in 20 *l.* and *B.* makes a Defeasance to *C.* that if *C.* pays him 20 *l.* the Obligation made by *A.* shall be void; this is no good Defeasance, because it is not made between the same Parties. 14 H. 8.

10. *Bro. Estrang al Fait* 10:

And yet if a Statute be made to the Husband and Wife, and the Husband alone joins in making a Defeasance; this is a good Defeasance. *Bro. Defeasance* 3.

Fourthly, That it be made after the making of the Recognisance, Obligation, &c. and not before; for if *A.* grants to *B.* that if *B.* will be bound to him in 20 *l.* by Obligation, that the Obligation shall be void; and after *B.* binds himself to *A.* in an Obligation of 20 *l.* this Defeasance is not good, because it is before the Obligation. *Bro. Defeasance* 5.

And yet if the Date of the Defeasance be before the Date of the Recognisance, &c. and it be delivered after, it is good enough. *Dyer* 315.

Fifthly, That it be made of a Thing defeasible; for if a Disseisee releases his Right to the Terretenant, and after there is a Defeasance made between them, that if the Releasee shall pay 20 *l.* to the Releasee, the Release shall be void; this is a void Defeasance. *Plow.* 137. *Bro. Defeasance* 11.

And yet a Release may be avoided by a Condition or Defeasance made at the Time of making of a Release, as well as of a Feoffment. *Bro. Defeasance* 6, 9. *Co. Lit.* 236.

If the Defeasance of a Recognisance, Obligation, &c. be, that if the Cognisor or Obligor, &c. pays a Sum of Money, or does not disturb the Execution of the Will of *J. S.* or does make a Lease for Years to *J. S.* or the like; these are good Defeasances. As if the Grantee of a Rent-charge grants to his Grantor, that if he shall pay him 20 *l.* such a Day, the Grant of the Rent shall be void. Altho' the Condition of an Obligation that is repugnant to the Obligation itself is void, and the Obligation single, yet it is otherwise in Case of a Defeasance made after the Obligation, for this is good notwithstanding it be repugnant. And therefore if the Oblige, after the Obligation made, grants by Deed to the Obligor, that the Obligation shall be void, or that he will not sue the Obligation at all, or that he will not sue the Obligation until such a Time, or that the Obligation shall be discharged; these Defeasances are good to avoid the Obligation. 2 *West. Symb.* §. 2. *Bro. Defeasance in toto.* 20 H. 7. 24. 21 H. 7. 32. *Fitz. Bar* 71.

If the Feoffee with Warranty grants that neither he nor his Heirs shall take Benefit of the Warranty of the Feoffor or his Heirs; this is a good Defeasance of the Warranty; and if he grants not to vouch, this will Discharge the Voucher; and if he grants not to bring a *Warrantia Chartæ*, this will bar him of that Remedy. In like Manner it is if the Grantee of a Rent-charge grants to the Grantor, that he will not take any Benefit by the Grant; this is a total Discharge; and if he grants that he will not bring an Annuity; this is a Discharge of the Person; and if he grants that he will not distrain the Land for the Rent; this is a Discharge of the Land. *Bro. Defeasance* 4. 7 H. 6. 43. 21 H. 7. 23. *Perk.* §. 69.

If one makes a Lease for Life by Deed, and after by another Deed grants to his Lessee that he shall not be impeached for Waste; this is a good Discharge: And if the Lessee afterwards grants by Deed to the Lessor, that if he shall bring an Action of Waste against the Lessee, that he will not make Use nor take Advantage of the Deed of Discharge; this is a good Discharge of the Discharge. So that hereby it seems a Defeasance may be of a Defeasance, and one Defeasance after another, and regularly the last shall stand. And therefore if a Lease for Years be made on Condition to pay 20 *l.* at *Easter*, and the Lease to be void; and before *Easter* the Lessor and Lessee agree, that if the Lessor pays it at *Easter* following, the Lease shall be void; and before that Time they make the like Agreement for another Year; these are good Defeasances, and the last shall stand. *Bro. Defeasance* 11. *Condition* 120. *Agreed Pas.* 8 *Jac. C. B.*

If the Defeasance after Execution made upon a Statute be thus, That if the Cognisor pays so much Money, the Statute shall be void; the Statute and Execution thereupon is void; however it is best to add these Words in the Defeasance, *And the Execution thereupon.* *Bro. Defeasance* 7.

S E C T. XXIII.

Of Wills and Testaments.(A) *Wills, Testaments and Devises, what.*

A Testament is the full and compleat Declaration of a Man's Mind, or last Will of what he would have to be done after his Death.

It is in Latin *Testamentum*, i. e. *Testatio mentis*, the Witness of a Man's Mind; and to devise by Testament is to speak by a Man's Will what his Mind is to have done after his Death; and this is sometimes called a *Will*, or *last Will*, for these Words are *Synonyma*, and are promiscuously used in our Law; howsoever by the Civil Law it is only said to be a Testament when there is an Executor made and named in it, and when there is none, but a Codicil only; for a Codicil is the same that a Testament is, excepting that it is without an Executor; and a Man can make but one Testament that shall take Effect, but he may make as many Codicils as he will.

And by the Common Law where Lands or Tenements are devised in Writing, altho' there be no Executors named, yet there it is properly called a last Will; and where it doth concern Chattels only, a Testament.

He who makes the Testament is called the Testator; and when a Man dies without a Will, he is said to die Intestate. *Terms of the Law. Co. Lit. 111. a. Swinb. 24.*

(B) *Kinds of Wills and Testaments.*

TH E R E are two Sorts of Wills or Testaments: *First, In Writing*, which is where the Mind of the Testator in his Life-time, by himself, or some other by his Appointment, is put in Writing. Or *Secondly, By Word, or without Writing*, which is where a Man is sick, and for fear that Death, or want of Memory or Speech, should surprize him that he should be prevented if he stayed the Writing of his Testament, desires his Neighbours and Friends to bear Witness of his last Will, and then declares the same presently by Word before them; and this is called a Nuncupative or Nuncupatorie Will or Testament: And this being after his Death proved by Witnesses, and put in Writing by the Ordinary, is of as great Force for any other Thing but Land, as when at the first in the Life of the Testator it is put in Writing. *See of Nuncupative Wills, post.*

A Codicil is also in Writing or by Word, as a Will or Testament is.

The Civilians have other Divisions of Wills and Testaments, as solemn and unsolemn, privileged and imprivileged, whereof the Common Law makes no mention. *Perk. § 476. Co. Lit. 111.*

(C) *The Parts of a Will or Testament.*

E V E R Y compleat Testament consists of two Parts: 1. The making of Devises, or giving of Legacies. 2. The Making and Ordination of an Executor; for a Will or Testament can be no more without, than a Codicil can be with an Executor.

(D) *A Devise or Legacy what, and a Devisor and Devisee or Legatee who.*

A Devise or Legacy is where a Man by his Will gives any Thing to another; the first of these Terms is properly applied to a Gift of Lands, and the last to a Gift of Goods or Chattels; and therefore,

A Devise is strictly where a Man by his Will gives his Lands to another after his Decease. And a Legacy is where a Man by his Testament gives any Chattel to another to have after the Death of the Testator; but the Word is promiscuously applied to the one and to the other.

And he who gives by such a Will is called the Devisor, and he to whom the Thing is given, the Devisee or Legatee.

(E) *Kinds*

(E) *Kinds of Devises or Bequests.*

A Devise is sometimes *simple* and *without Condition*, as where I give my Land to another and his Heirs, or I give 20 l. to another without more Words.

And sometimes it is *with a Condition*, which is when there is a Quality added to the Devise or Legacy whereby the Effect of it is suspended or hindered, and it is thereby made to depend on some future Event.

And this Condition may be made almost by any Words; as if I give to one my Land if he pays 20 l. to my Daughter; or so as he pays 20 l. to my Daughter; or paying 20 l. to my Daughter; or I give one 20 l. if he marries my Daughter, or when he shall marry my Daughter; or I give my Wife 20 l. a Year whilst she shall live unmarried; or I give to him, or to whomsoever shall marry my Daughter, 20 l. or the like; in all these Cases the Devise is conditional. The first Kind of Devise is called by the Civilians a *simple Assignment*, and the latter a *conditional Assignment*. Dyer 317, 74. Co. Lit. 217. Swinb. 132, 134, 136.

(F) *Executor and Administrator who.*

A N Executor, in a large Sense, is taken for any one that is appointed to have the Disposition and Ordering of the Goods and Chattels of a Man that is dead.

And an Administrator is he that has the Goods and Chattels of a Man dying Intestate, committed to his Charge by the Ordinary for want of an Executor.

And his Power, Benefit and Charge, is in all Things equal to the Power, Benefit and Charge of an Executor. *Vide Terms de la Ley.* 8 Co. 135. 9 Co. 40. Co. Lit. 209. Plow. 288. But now as to his Benefit, see the Statute of Distribution of the Intestate's Estate.

(G) *Kinds of Executors and Administrators.*

THERE are three Kinds of Executors: The first is *à Lege Constitutus*, who is therefore called *Legitimus*, and such a one is the Ordinary of the Diocese, who has ordinary Jurisdiction in Matters Ecclesiastical. The second is *à Testatore Constitutus*, who is therefore called *Testamentarius*; and he is strictly and properly called an Executor, and is defined to be one appointed by a Man's last Will and Testament to have the Disposing and Administration of all or Part of a Man's Goods or Chattels, and to perform a Man's last Will and Testament according to the Contents thereof. The third is *ab Episcopo Constitutus*, who is therefore said to be *Dativus*. *Vide ut supra.* And such a one is an Administrator.

And an Executor or Administrator is sometimes *universal* or *total*, *i. e.* one that has the Power and Disposition of the whole personal Estate committed to him.

And sometimes he is *particular* or *partial*, *i. e.* one that has the Power and Disposition of some Part of the Estate, or of all the Estate, for a Time only committed to him.

And sometimes he is *absolute*, *i. e.* such a one that has an absolute Power of the Estate as Executor or Administrator: And sometimes he is *conditional*, *i. e.* one that has a limited and conditional Power of the Estate only. Dyer 4. Bro. Executor 155. 6 Co. 19.

And in both Cases he shall be charged and chargeable for so much as is committed to him as the Testator or Intestate himself; for this Cause the Executor is said to represent the Person of the Testator, for as to the Estate committed to his Trust, he may charge others, and be charged himself, sue and be sued, as the Testator himself might. And the Estate he has by his Executorship is said to be in him to the Use of the Testator, and in his Right; and what he does in the Disposition of his Estate is said to be in the Right and to the Use of the Testator also; and the Administrator has the same Power and Property over and in the Goods and Chattels, the same Remedy by Suit, and so far shall be charged as the Executor, for they differ not in Nature but in Name only. And yet the Administrator is but the Ordinary's Deputy, and he may revoke the Administration, or call the Administrator to an Account. Co. Lit. 209. Stat. 31 Ed. 3. c. 11. 8 Co. 135. 9 Co. 40.

(H) *The Nature and Effect of a Will or Testament, and of a Codicil.*

A Will or Testament is of that Nature that it differs much from other Acts and Deeds that Men do and execute in their Life-time; for altho' it be made, sealed and published in never so solemn a Manner, yet it has no Life nor Virtue in it until the Testator's Death; for it is a Maxim in Law, *Omne Testamentum morte consummatum est, & voluntas ambulatoria usque ad extremum vitæ exitum*; it is therefore resembled until Death to the Interlocutory Sentence, and after Death to the Definitive Sentence of a Judge. And hence it is said, *Sed Legum servanda fides, suprema voluntas Quod mandat fierique jubet parere necesse est.* Swinb. 12. Dyer 143. Co. Lit. 112. Lit. §. 168. 4 Co. 61.

And for this Reason a Man may alter or make void his Will at his Pleasure; and he may make as many new Wills and Testaments as he will, and there is no way to bar a Man of this Liberty.

And the latter Testament always revokes and overthrows the former; but otherwise it is of a Codicil, (Lit. §. 168. Perk. §. 478.) for a Man may make as many of these as he will, and make no Testament at all, (Swinb. 13, 14.) or if he makes a Testament, he may afterwards make as many Codicils as he will, and one of them will not overthrow the other; for in the first Case they must be all annexed to the Letters of Administration, and the Administrator must perform them; and in the latter Case they must be all annexed to the Testament, and the Executor must take Care to perform them. Bro. Testament 20.

A Testament therefore is said to have three Degrees: 1st, An *Inception*, which is the making of it. 2dly, A *Progression*, which is the Publication of it. 3dly, A *Consummation*, which is the Death of the Testator. Plow. 343, 344.

In Grants therefore the first is of greatest Force, but in Testaments the last is of greatest Force. Co. Lit. 112.

But when a Testament is perfect by the Death of the Party, it as effectually gives and transfers Estates, and alters the Property of Lands and Goods, as Acts executed by Deeds in the Life-time of the Parties; for hereby Descents of Lands are prevented; and a Man may make Estates in Fee-simple, or Fee-tail, for Life or Years of Lands, Tenements, Rents, Reversions or Services, as effectually as by Deed, and these Estates also will be good without any Livery of Seisin or Attornment. And hereby also Rents, and Power to distrain for them, may be referred, Conditions created and annexed to Estates, or Things devised. Lit. §. 167, 168.

And if therefore they that take by Devises of Land are said to take in the Nature of Purchasers. Perk. §. 505.

And if therefore a Tenant in Tail makes a Feoffment to the Use of himself in Fee, and after devises the same Land to his Wife in Fee, and dies, the Son is not remitted tho' the Father dies seised, for the Devise prevents the Discent. Dyer 221.

(I) *Things requisite in making a good Will.*

IN making a good Will these Things are requisite:

First, That the Testator be capable to make a Will relative to his Person.

Secondly, That the Testator at the Time of making his Will, have *animum testandi*, i. e. a Mind to dispose or make a Will.

Thirdly, That the Mind of the Testator in making a Will be free, and not moved by Fear, Fraud or Flattery.

Fourthly, That the Will be made in the Form prescribed by Law.

See post. for Things requisite in a good Devise.

(K) *Who are capable of making Wills.*

AS it is observed before, to the making of every good Will or Testament it is requisite that the Testator be a Person able to make a Testament, and not disabled for any special Cause, either in Respect of his Person, Mind or Condition, or in Respect of the Thing whereof the Testament is to be made. Therefore observe,

That

That an Infant until he be of the Age of twenty-one Years can make no Will of Infant.
his Lands by Statutes of 32 & 34 H. 8. But by special Custom in some Places where
Land is devisable by Custom, he may devise it sooner. And of his Goods and Chat-
tels, if he be a Boy, he may make a Will at fourteen Years of Age, and not before;
and if a Maid at twelve Years of Age, and not before; and then they may do it
without and against the Consent of their Tutor, Father or Guardian. Stat. 32 &
34 H. 8. c. 5. Perk. §. 503, 504. Bro. Custom 50. Swinb. 37, 38.

And yet some say an Infant cannot make a Will of his Goods and Chattels until
he be eighteen Years of Age. Co. Lit. 89.

It has been agreed in Equity, that a Female may make a Will at twelve Years
of Age of a personal Estate; and a Male at seventeen Years, or fifteen, if he be a
Person of Discretion. 2 Vern. 104, 469.

That a Feme Covert cannot make a Will of her Lands or Goods except it be in Feme Covert.
some special Cafes, for of her Lands she can make no Will with or without her Hus-
band's Consent (Stat. 32 & 34 H. 8. c. 5. 4 Co. 51. Bro. Testament 13.) of the Goods
and Chattels she has as Executrix to any other; she may make an Executor without
her Husband's Consent, for if she does not so, the Administration of them must be
granted to the next of Kin to the Deceased Testator, and shall not go to the Hus-
band. 12 H. 7. 14. Perk. §. 502. Fitz. Executor 40.

But of them she can make no Devise with or without her Husband's Leave, for
they are not devisable; and if she devises them, the Devise is void. Plow. 526.
Fitz. Executor 109.

And of the Things due to the Wife whereof she was not possessed during the
Marriage, as Things in Action, and the like, she may make her Will, at least she
may make her Husband Executor of her *Paraphernalia*, viz. her necessary wearing
Apparel, being that which is fit for one of her Rank. Some say she may make a
Will without her Husband's Leave, others doubt of this; however all agree that she,
and not his Executor, shall have this after her Husband's Death, and that the Hus-
band cannot give it away from her. And of the Goods and Chattels her Husband has
either by her or otherwise, she may not make a Will without the Licence and Con-
sent of her Husband first had so to do. But with his Leave and Consent she may
make a Will of his Goods, and make him her Executor if she will. And it is said
also, that if she does make a Will of his Goods, (in Truth without his Leave and
Consent) and he after her Death suffers the Will to be proved, and delivers the
Goods accordingly; in this Case the Testament is good; and yet if the Husband
gives the Wife Leave to make a Will of his Goods, and she does so, he may revoke
the same at any Time in her Life-time, or after her Death, before the Will be proved.
But a Woman after Contract with any Man may before the Marriage make a Will
as well as any other, and is not at all disabled hereby. 12 H. 7. 24. 18 Ed. 4. 11.
Perk. §. 501. Fitz. Executor 5, 28, 109. Bro. Testament 11.

A Wife whose Husband is banished for Life may make a Will as a Feme Sole.
2 Vern. 104, 469.

A mad or lunatick Person during the Time of his Infanity of Mind cannot make a Lunatick.
Will of Lands or Goods; but such a one as hath his *lucida intervalla*, clear or calm
Intermissions, may during the Time of such Quietness and Freedom of Mind make
his Will, and it will be good.

So also an *Idiot*, i. e. such a one as cannot number twenty, or tell of what Age he *Idiot*.
is, or the like, cannot make a Will, or dispose of his Lands or Goods; and altho'
he makes a wise, reasonable and sensible Will, yet it is void. But such a one as is of
a mean Understanding only, that has *grossum caput*, and is of the middle Sort between
a wise Man and a Fool, is not prohibited to make a Will. Perk. §. 503, 504, 24.
Swinb. 37, 40.

So also an *old Man* that by Reason of his great Age is childish again, or so forget- Old Man.
ful that he forgets his own Name, cannot make a Will, for a Will made by such a
one is void.

So also it seems a *drunken Man*, that is so excessively drunk that he is deprived of Drunken
the Use of Reason and Understanding, during that Time may not make a Will; Man.
for it is requisite that when the Testator makes his Will, that he be of sound and
perfect Memory, i. e. that he have a reasonable Memory and Understanding to dis-
pose of his Estate with Reason. Swinb. 42. 6 Co. 23.

Deaf and dumb.

A Man that is both *deaf* and *dumb*, and that is so by Nature, cannot make a Will. But a Man that is so by Accident may by Writing or Signs make a Will. And so may a Man that is deaf or dumb by Nature or Accident.

Blind.

And so also may a Man that is *blind*. *Swinb.* 53.

Alien.

An *Alien born* cannot make a Testament of Lands or Goods.

Traitor.

A *Traitor* attainted from the Time of the Treason committed can make no Will of his Lands or Goods, for they are all forfeited to the King; but after the Time he has a Pardon from the King for his Offence, he may make a Will of his Lands and Goods as another Man. *Stat. 5 & 6 Ed. 6. c. 11. Swinb.* 54.

Felon.

A Man that is attainted or convicted of *Felony* cannot make a Testament of his Lands or Goods, for they are forfeited; but if a Man be only indicted, and dies before the Attainder, his Will is good for his Lands and Goods both. And if he be indicted, and will not answer upon his Arraignment, but stands mute, &c. in this Case his Lands are not forfeited, and therefore he may make a Will of them. *Plow.* 258, 259.

Felo de se.

And if a Man kill himself, his Will as to his Goods and Chattels is void, but as to his Lands is good. *Plow.* 261.

Outlawed Person.

A Man that is *outlawed* in a personal Action cannot make a Will of his Goods and Chattels so long as the Outlawry continues in Force, but of his Lands he may make a Will. *Fitz. Descent* 16.

Corporation.

The Head or any of the Members of a *Corporation* may not make a Will of the Lands or Goods they have in common, for they shall go in Succession. *Fitz. Testament* 1.

Note.

But note, that however the Wills of *Traitors, Aliens, Felons* and *outlawed Persons* are void, as to the King or Lord that has Right to the Lands or Goods by Forfeiture or otherwise, yet the Will is good against the Testator himself and all others but such Persons only.

And note also; by the Civil Law the Wills of divers others, as *excommunicate Persons, Hereticks, Usurers, incestuous Persons, Sodomites, Libellers*, and the like, are void. But by our Law the Wills of such Persons, at least as to their Lands, are good by the Statutes that enable Men to devise their Lands.

All other Persons.

But all other Persons whatsoever, Male or Female, Old or Young, Lay or Spiritual, Rich or Poor, at any Time before their Death, whilst they are able to speak so distinctly or write so plainly that another may understand them, and understand that they understand themselves, may make Wills of their Lands, Goods and Chattels, and that altho' they have sworn to the contrary; and none are restrained of this Liberty but such as are before named. *Swinb.* 155, &c. *Vide Stat.* 32 & 34 H. 8. *Perk.* §. 496.

(L.) Of the Testator's Resolution to make a Will.

TO the making of a good Will it is necessary, that he who makes it have at the Time of the making of it *Animus Testandi*, i. e. a Mind to dispose, a firm Resolution, and advised Determination to make a Will, otherwise it will be void; for it is the Mind, not the Words of the Testator, that gives Life to the Will; for if a Man rashly, unadvisedly, incidently, jestingly or boastingly, and not seriously, writes or says that such a one shall be his Executor, or have all his Goods, or that he will give to such a one such a Thing; this is no Will, nor to be regarded. And the Mind of the Testator herein is to be discovered by Circumstances; for if at the Time he be sick, or sets himself seriously to make his Will, or requires Witnesses to bear Witness of it, it shall be deemed in Earnest; but if it be by way of Discourse only, or of somewhat he will do hereafter, or the like, it shall be taken for nothing. *Swinb.* 9, 131, 324, 325.

(M) Of the Occasion or Motive to make a Will.

IN a good Will it is necessary that the Mind of the Testator in making of it be free, and not moved by Fear, Fraud or Flattery; for when a Testator is moved to make his Testament by Fear, or circumvented by Fraud, or overcome by some immoderate Flattery, the same is void, or at least voidable by Exception. And therefore

therefore if a Man by Occasion of some present Fear or Violence, or threatening of future Evils, does at the same Time, or afterwards by the same Motive, make a Will; it is void not only as to him that puts him so in Fear, but as to all others, altho' the Testator confirms it with an Oath. But if the Cause of Fear be some vain Matter; or being weighty is removed, and the Testator afterwards, when the Fear is past, confirms the Testament; in this Case perhaps the Will may be good. And if a Man by Occasion of some Fraud or Deceit be moved to make a Will, if the Deceit be such as may move a prudent Man or Woman; and if it be Evil also, the Will is void, or voidable at the least; but if the Deceit be light and small, or if it be to a good End; as where a Man is about to give all his Estate to some lewd Person, from his Wife and Children, and they perswade the Testator that the lewd Fellow is dead, or the like, and thereby procure him to give his Estate to them; this is a good Will. And one may by honest Intercessions and modest Perswasions procure another to make himself or a Stranger Executor to him, or the like, and this will not hurt the Will. Also a Man may use fair and flattering Speeches to move the Testator to make his Will, and to give his Estate unto himself, or some Friend of his; except it be in Case where the Flatterer first beats or threatens him, or puts him in Fear; or to his Flattery joins Fraud and Deceit; or the Testator is a Person of weak Judgment, or under the Danger of Government of the Flatterer; as when the Physician shall perswade his Patient under his Hand to make his Will, and give his Estate to himself; or the Wife attending on her Husband in his Sickness shall neglect him, or continually provokes him to give her all; or where the Perswader is importunate, and will have no Denial; or when there is another Testament made before; for in all these Cases the Will will be in Danger to be avoided. And if I be much privy to another Man's Mind, and he tells me often in his Health how he intends to settle his Estate, and he being sick, I of my own Head draw a Will according to his Mind before declared to me, and bring it to him, and ask him, whether this shall be his Will, or no; and he considers of it, and then delivers it back to me, and says yes; this is a good Will: But if otherwise some Friends of a sick Man of their own Heads shall make a Will, and bring it to a Man in Extremity of Sicknes, and read it to him, and ask him, whether this shall be his Will, and he says yes, yes; or if a Man be in great Extremity, and his Friends press him much, and so wrest Words from him, especially if it be in Advantage of them, or some Friends of theirs; in these Cases the Wills are very suspicious. *Swinb.* 283, 284, 285, 286.

But as touching these two last Things, *Quære*, how they shall avail in the Wills of Land, which are not regulated so much by the Civil Law.

(N) *Things requisite in a good Devise.*

IN a good Devise these Things are requisite:

First, That the Devisor be a Person capable to Devise, both with Respect to his Person, and the Thing devised.

Secondly, That the Devisee be capable to receive the Thing devised, either at the Time of making the Devise, or at least when it is to take Effect.

Thirdly, That the Devisor, at the Time of making the Devise, have *Animus Testandi*, i. e. a Mind to make a Devise.

Fourthly, That the Will of the Devisor be free, and not drawn or coerced by Fraud, Flattery, Fear, or the like.

Fifthly, That the Devise be made in due Manner and Form.

Sixthly, That the Thing devised be a Thing devisable.

Seventhly, That it be devised upon lawful Terms and Conditions.

Eighthly, That there be Words sufficient to make his Mind known.

Ninthly, That it be proved after the Death of the Devisor.

Tenthly, And if it be a Devise of Land, that the Devisor be solely seised, and not jointly with another; and that he be seised in Fee-simple, and that the Devise be in Writing.

See before what is a good Will.

(O) *Who may make a Devise, or not.*

WHOSOEVER may make a Will or Testament may make a Devise; *Et sic e converso*. And therefore

Infants.

Infants may not devise their Lands till they are twenty-one Years old, nor their Goods and Chattels till they be fourteen Years old, or as some say till they be eighteen Years of Age.

Feme Coverts.

Feme Coverts cannot devise their Lands to their Husbands or others, either by or without their Husband's Consent, altho' there be a Custom to enable them thereto. *Co. Lit. 112. 4 Co. 61. Bro. Devise 32.*

Spiritual Persons.

And *Spiritual Persons*, as Archbishops, Bishops, Deans, Archdeacons, Prebends, Parsons, Vicars, or any Member of a Corporation, may not devise the Lands or Goods they have in the Right of their Churches and Corporations. *Perk. §. 496.*

(P) *What Things may be devised or bequeathed.*

Lands, Tenements, Hereditaments in Possession, Reversion, Remainder. Lease.

LANDS, Tenements and Hereditaments, for the Nature and Quality of them, are devisable as well as other Things; and therefore by the Custom of some Places, Lands in Possession, Reversion or Remainder, are devisable in Fee, for Life or Years.

And a Man that has a Lease for Life or Years of Land, may devise the Land at his Pleasure during his Term.

Devises by Common Law.

By Custom.

But by the antient Common Law, in Favour to Heirs, the Lands that a Man had in Fee-simple were not devisable by Testament, except only in some special Places by Custom of the Place, as *Gavelkind Lands* in Kent, and Lands within certain Borough Towns, as London, Oxford, &c. and by the Custom of those Places such Lands are devisable. And in some Places the Custom is, that they may devise their purchased Lands only; and in other Places, that they may devise their Lands descended also: And in some Places, that they may devise for Life only; and in other Places, in Fee-simple and Fee-tail also. And in all these Places where such Customs are, they may devise their Lands now as they might have done before the Statute; for the Statute has not destroyed their Custom: And therefore at this Day, they who have Lands in such Places, have their Election either to devise according to the Power given them by the Custom, or by the Statute; and in the first Case the Devise is good against the Heir for the Whole; and in the last Case it is good against him for two Parts in three only. *Dyer 371, 155. 6 Co. 16. 8 Co. 83. Co. Lit. 111. Perk. §. 497, 499, 500, 538. Lit. §. 167.*

Common Law.

Statute Law.

Also by the Common Law, the Uses of Lands were devisable as Goods and Chattels were, at the Pleasure of him that had them. But otherwise and in other Cases Lands and Tenements might not be devised and disposed by Will, until the Statutes 32 H. 8. c. 1. & 34 H. 8. which enabled Owners of Land in Socage, Tenure, in Possession, Reversion or Remainder, to devise and dispose thereof, or any Rent, Common, or other Profit appender out of it, to any Person in Fee-simple, Fee-tail, for Life or Years, at his Pleasure. Note, That the other Tenures in these Acts mentioned, by Stat. 12 Car. 2. c. 24. are turned into free and common Socage.

So that now by the said Statute of H. 8. a Man who has Lands in Fee-simple may devise them in Fee-simple, Fee-tail, for Life or Years absolutely or conditionally at his Pleasure. And therefore,

If a Man devises his Land to one for Life, the Remainder in Fee or Fee-tail to another; or devises his Land to B. the Remainder to the next Heir Male of B. and the Heirs Male of the Body of such Heir Male, or the like; these are good Devises.

But for the better Understanding these Things, observe, That this Statute does not enable Men to devise Land who are disabled by Law in Respect of their Persons or Minds, as Infants, Females Covert, Men *De non sane Memory*, &c. nor such as are disabled in Respect either to the Nature of their Land, as Copyholders, (for Copyhold Lands are not devisable unless surrendered to the Use of the Will, which is the common Practice) or of the Estate they have in the Land, as Tenants in Tail, or *pur autre vie*, or Jointenants; for these can no more devise the Land which they so hold, than they could before the Statute. But such as are seised of Land in Common,

or Coparcenary, may devise their Land as well as those who are solely seised. And if two are Jointenants for Life, the Fee-simple to one of them, he who has the Fee-simple may devise it after the Death of his Companion. These Statutes do not enable those who are seised of Lands in Fee, in the Right of their Houses and Churches, to devise the same Lands; and therefore Bishops, Deans, Parsons, Vicars, Masters of Hospitals, or the like, can no more devise the Lands belonging to their Bishopricks, &c. than they could before the Statute; but the Lands which they are seised of in their own Right, they may devise as other Men. *Co. Lit.* 111. *Perk.* §. 500, 539, 540, 496, 497, 498, 544. *Lit.* §. 287. *Dyer* 210. *Old. Nat. Br.* 89.

Hereditaments which are not of any yearly Value, are some of them devisable, and some not: For if the King grants to one and his Heirs *bona & catalla felonum & fugitivorum vel utlagatorum*, Fines and Amerciaments within such a Manor or Village; in this Case the Owner can neither devise these Things to another, nor leave them to descend. And yet if one has a Manor with a Leet, Waif, Estray, or the like, is appendant or appurtenant, there by the Devise of the Manor with the Appurtenances these Things may pass as incident to the Manor; but if a Man has a Hundred with the Goods of Felons, Outlaws, Fines, Amerciaments, *Retorna Brevium*, and other such casual Hereditaments within the same Hundred, and these have been usually let to Farm for a Rent, they may be devised, or left to descend. 10 *Co.* 81. 3 *Co.* 32. *Co. Lit.* 111.

A Man must have a Right to and Possession of the Land he devises, or else the Devise is not good; and therefore if a Disseisor devises the Land he has got by Disseisin, this Devise as to the Dissee is void. And if a Man be disseised of his Land, so that he has nothing but a Right thereof left, and then he devises this Right, or devises the Land, this Devise is void. *Plow.* 485.

And if one contracts for Land, and pays his Money for it, but has no Assurance of the Land, and he devises this Land to another; this cannot be a good Devise of the Land, but perhaps the Devisee in a Court of Equity may compel him that received the Money to assure and settle the Land according to the Devise. *Nevil's Case.*

And if one devises another Man's Land, this Devise is void; but if he after the Devise made purchases this Land, the Devise is good. *Plow.* 344. *Fitz. Devise* 7. Another Man's Land.

If a Man bargains and sells Land to me on Condition to re-enter; if he pays me 10 *l.* and I covenant that I will take the Profits until Default of Payment, and he makes a Lease for six Years of it to another, and after breaks the Condition; in this Case I may devise this Land, and the Devise will be good. *Adjudged Possessy and Blakeman's Case.*

Estates *pur auter vie* are devisable by *Stat. 29 Car. 2. c. 3.*

A Seignior, Rent, or the like Thing, is devisable as Land is, and will pass without the Attornment of the Tenant. The like of a Reversion. And a Man may devise a Rent *de novo* issuing out of Land, or a Rent issuing out of Land that is *in esse* before; and therefore if a Man makes a Lease for Life or Years rendring Rent, the Lessor may devise this Rent. So if a Rent be granted to one and his Heirs, the Grantee may devise it. So a Man who is seised of Land in Fee may devise any Rent or Profit out of it at his Pleasure, altho' the Rent or Profit amounts to the Value of the whole Land; as if one has three Acres of Land worth three Pounds a Year, and he devises 3 *l.* Rent out of it; this is a good Devise of the whole Rent. *Perk.* §. 538. *Lit.* §. 585, 586. *Dyer* 253, 140. *F. N. B.* 121. *Co. Lit.* 111. 8 *Co.* 83. 3 *Co.* 33.

Estate pur auter vie.

Rent, Common, Seignior, &c.

Where a Man is seised of a House in Fee, and may devise the House itself, he may devise the Doors, Windows, Wainscot, or the like Incidents of the House. And where a Man may devise the Land itself, he may devise the Trees or Grass growing upon the Land. *Quando licet id quod majus, videtur & licere id quod minus.* But where the Land itself is not devisable, such Things incident or annexed to, or growing or being upon it, are not devisable. And therefore the Tenant in Tail for Life or Years of Land may not devise the Houses or Windows, Doors or Wainscot of Houses, or Trees or Grass being or growing thereupon. 4 *Co.* 63. *Perk.* §. 512, 518. 11 *Co.* *Rich. Lisford's Case, Kelw.* 88.

Things incident to Houses or Lands, as Doors, Windows, Wainscot, &c.
Trees, Grass.

Where a Man has an Use that is not executed by the Statute of Uses, but remains at the Common Law, he may devise it. And therefore if one be possessed of a Term of Years, and grants it over to another to the Use of the Grantor, he may dispose of this Use by his Will, for it is in the Nature of a Chattel. But if a Man has such an Use in Jointenancy, he cannot devise it. *Perk.* §. 500. *Dyer*

All

Goods and
Chattels.

All Manner of Goods and Chattels real and personal may be devised by Will. And therefore *Leases for Years* of Lands, for Years of Rent, Common, or the like, Cattle, as Oxen, Sheep, Horses, &c. Gold, Silver, Money, Plate, Household-Stuff, as Beds, &c. Corn, Wool, and Implements of Husbandry, may be devised by Will; and not only those a Man has at the Time of the Devise, but those a Man is to have or may have afterwards. And therefore it is held, that a Man may give his Corn that shall grow in such a Ground the next Year after his Death, or the Wool or Lambs his Flock of Sheep shall yield the Year after his Death; and that these Devises are good: But if in this Case there shall be no such Corn growing in that Ground, nor any Lambs or Wool arising out of his Flock that Year, the Legacy is fruitless. And yet if one devises to *J. S.* twenty Quarters of Corn, or twenty Lambs, to be paid out of his Corn that shall grow, or out of his Flock the next Year, and there be not so much Corn, or not so many Lambs, or not at all growing or arising; yet this is a good Devise, and the Things must be paid. In the like Manner if a Man gives to *J. S.* a Horse, or a Yoke of Oxen, yet the Devise is good, and must be performed.

Choses in Ac-
tion.

Things in *Action*, as Debts, and the like, altho' they are not grantable by Deed in the Life-time of the Party, yet they are devisable by Will. And therefore if the Testator by his Will gives any Debt due to him on an Obligation, or on a Contract, or the like; this is a good Devise. And the Thing devised may be had thus: The Testator, if he pleases, may make the Legatary Executor as to that Debt; or if he does not, the Legatary may sue the Executor in the Spiritual Court, or in some Court of Equity, and thereby compel the Executor either to recover it himself, and so to pay it to the Legatary, or to give the Legatary Power to sue for and recover it himself in the Executor's Name. But if it be such a Cause of Action as is altogether uncertain, as where a Man may have an Action against another for taking away his Goods, or to compel him to make an Account, or the like; this is such a Cause of Action as is not devisable. *Swinb. Part 3. §. 5. Perk. §. 511, 525.*

Possibilities
and Incertain-
ties.

And yet Possibilities and Incertainties are in divers Cases devisable. And therefore if one has Money to be paid him on a Mortgage, he may devise this Money when it comes; as if I infeoff a Stranger of Land, upon Condition that if he does not pay me 20 *l.* such a Day, that I may re-enter; I may devise this 20 *l.* if it be paid, and the Devise is good altho' it be made before the Day of Payment come. *Perk. §. 527. Dyer 272. Plow. 520.*

And if a Man be possessed of a Term of Years, and devises all the Residue of that Term of Years that shall be to come at the Time of his Death; this Devise is good, and yet such a Grant by Deed is void. *Child's Case, 17 Jac. B. R.*

But a meer Possibility, and a Thing altogether uncertain, is no more devisable by Will than it is grantable by Deed. *Perk. §. 520, &c.*

Emblements.

Emblements, i. e. the Corn that is sown and growing upon a Man's Ground at the Time of his Death, and which himself should have reaped if he had lived to the Harvest (as in most Cases he shall where he sows it) are devisable. And therefore if a Man has Land in Fee-simple, Fee-tail, for Life or Years, and sows it with Corn, he may devise the Corn at his Death to whom he pleases; and yet if Lessee for Years sows his Land so little while before his Term expires, that it cannot be ripe before the End of the Term, and he dies, he cannot devise this Corn, for if he had lived he could not have reaped it after the End of the Term.

Bonds, Coun-
terparts of
Leases, &c.

And by *Stat. 20 H. 3. c. 2.* Widows may bequeath Crops on their Dowers. Obligations, Counterparts of Leases, and such like Things, are devisable; but in this Case the Devisee cannot sue upon the Obligation in his own Name, nor enter for the Condition broken upon the Lease if there be Cause, but he may cancel, give, sell or deliver up the Obligation or Counterpart to the Obligor or Lessee. And whatsoever shall come to the Executor after the Death of the Testator as the Right of his Executorship, may be devised by the Will of the Testator. *Perk. §. 527.*

Things in
Jointenancy.

The Goods and Chattels which a Man has jointly with another are not devisable. And therefore if there be two Jointenants of Goods or Chattels, as where such Things are given to two, or two buy such Things together, and one of them devises his Part to a Stranger; this Devise is void: Inasmuch that if in this Case the Testator makes the other Jointenant his Executor, the Will as to this is void, and he shall not be charged as Executor for those Goods, but he shall have them altogether by Right of Survivorship. *Perk. §. 526. Lit. §. 287. Doct. & Stud. 167.*

Things in
autre droit.

The Goods and Chattels which a Man has in Right of another are not devisable; and therefore an Executor or Administrator cannot devise the Goods and Chattels he has

has as Executor or Administrator, for such a Devise is void. However the Executor may appoint an Executor of the Goods of the first Testator, which the Administrator cannot do; and of the Profits, that arise by the Goods and Chattels the Executor or Administrator has during the Time of his Administration, he may dispose of.

The Goods and Chattels belonging to Colleges and Hospitals may not be devised by the Wills of the Masters or Governors thereof, nor the Goods and Chattels belonging to other Corporations by the Mayors, Bailiffs or Heads thereof. *Plow. 525.* Colleges, Corporations, Hospitals.

Bro. Administrator 7. Fitz. Administrator 3.

And the Goods and Chattels that Church-wardens have in Right of the Church, are not devisable. *Perk. §. 496, 498, 499. Doct. & Stud. lib. 2. c. 39.*

All the Chattels real that a Man has in the Right of his Wife by her Means, and all the Obligations made to her *dum sola*, or during the Time of Coverture, and the Chattels real or personal that his Wife has as Executrix to any other, are not devisable by the Testament of the Husband. *Perk. §. 560. Doct. & Stud. c. 7.* Baron and Feme.

(Q) Of naming Things devised.

ALL such Things as are devised must be properly named, or otherwise described, whereby the Mind of the Testator may be known; for if he errs in the Name or Substance of the Thing devised, or if it be so incertainly devised and described that it cannot be perceived what he intends, the Devise is void. And therefore if one devises a Piece of Ground by the Name of a *Messuage*, except it be so called, the Devise is void. And yet by the Devise of the Use, Profit or Occupation of Land, the Land itself is well devised; and by the Devise of Land itself the Reversion thereof may be devised. But if one intending to devise a Horse, devises an Ox; or meaning to give Gold, gives Apparel; these Legacies are void, unless his Meaning appears by some Circumstance to be otherwise; as if a Man has but one Horse, and he is called *Arundel*, and he devises his Horse *Bucephal*; this Legacy is good enough. And if a Man gives all his Money in such a Chest, when in Truth there is no Money in that Chest; or gives to another the 10*l.* which *J. S.* owes him, when in Truth *J. S.* does not owe any such Money; this Devise is void. And yet if the Devise be thus, *viz.* I give to *A. B.* 10*l.* and I will that the same be paid of the Money I have in such a Chest, or of the Money which such a Man owes me; the Devise is good, altho' there be no Money in the Chest nor owing: And if one gives 10*l.* remaining in such a Chest, whereas in Truth there is but 5*l.* in the Chest; the Legacy is good for the 5*l.* But Error and Mistake in the Quantity and Quality of the Thing devised, when the same for the Substance of it is certain, does not hurt; and therefore if the Testator, meaning to give the fourth Part of his Goods, gives one half; or meaning to give 50*l.* gives 100*l.* or *e converso*, meaning to give a greater gives a less Quantity or Sum; the Legacy is good, and the Legatary shall have as much as the Testator did mean. If a Man gives his *White Horse*, when he has but one Horse and that is *Black*; this is a good Devise of the Horse. *Swinb. Part 7. c. 5. Plow. 525. Perk. §. 500.* Mistake or Error in naming the Thing.

If the Thing devised be under such general Words that the Mind of the Testator cannot be known by it, the Devise is void; and therefore if the Testator says, *I do bequeath something*, or *I bequeath a Substance*, or *I bequeath a Body*, or *I bequeath*, or the like; these are void for Incertainty: So if he says, *I do give Lands*, or *I do give Goods*; these Devises are void: And yet if the Testator gives a *Horse*, an *Ox*, a *Gold Chain*, or the like, *indefinitely*; the Devise is good altho' he has no such Thing. But if one devises thus, *I give Lead, Money, Wheat, Oil*, or the like, and do not say what Quantity; this Legacy is void for Incertainty, or at least the Executor may deliver what Quantity thereof he will, and that shall satisfy the Legacy. *Swinb. Part 7. c. 10.* Incertainty in naming the Thing.

(R) Who may be a Devisee or Legatee.

Regularly whosoever may be a Grantee may be a Devisee or Legatee; and therefore

A Devise made to any Person or Persons Male or Female, Children or Strangers, Laymen or Clerks, Debtors or Creditors, Infants, or Men of full Age, Women Sole

or Covert, Colleges, Universities, Corporations, or the like, are good. *Perk. §. 505, 510. Swinb. 222.*

A Devise to an Infant in the Mother's Womb at the Time of the Death of the Testator, is void. *Dyer 303, 304. Per Cur', Mic. 13 Jac. B. R.*

Yet if it happens to be born before Testator's Death, the Devise is good. *Terms de la Ley, Tit. Devise.* For it is a Rule, *That the Devisee must be capable of the Thing devised at the Time of the Death of the Devisor*; if it be then to take Effect in Possession; or if it be a Remainder, he must be capable of it at the Time when the Remainder shall happen; or otherwise the Devise is void. *9 Jac. B. R.*

And a Man may devise his Lands, Goods or Chattels to his own Wife, as well as to any other. *Lit. §. 168.*

(S) *Of naming the Devisee or Legatee.*

A Devisee must be certainly named and described; for if a Devise be to a Person altogether incertain, the Devise is altogether void; as if I give my Land to my best Friend, or to my best Friends; or to a Vicar, and do not say what Vicar, and no Averment; these are void Devises. *Mic. 19 Jac. B. R. Crumpe v. Bodie.*

If one has two Sons of one Name called *J. S.* and he devises to his Son *J. S.* without any Distinction; this is void for Uncertainty: But in this Case perhaps an Averment which Son is meant, may help. So if one gives to *J. S. 20 l.* and there be two or more of that Name; this Devise is void, unless it can be proved by something which of them he meant. So if one in his Will gives a Legacy to a Man incertain, and no such Man is to be found, and the Meaning of the Testator cannot be known; this Devise is void for Incertainty. And yet a Devise to him who shall marry my Daughter is good; and he who marries her in my Life-time or after my Death shall have it. If a Man devises any Thing *ad pias Causas*, as to the Church, or to the Poor, not expressing what Church or Poor; perhaps this is a good Devise. So if a Man gives *20 l.* to his Kindred, it is said this is a good Devise, and that a reasonable Exposition shall be made thereof as near the Testator's Intent as may be, *viz.* that those in the next Degree shall have it first, and then those in the next Degree to that shall have it afterwards; and if it be a Devise to the Kindred of another Man, that they shall have it equally. *Sed quere* of this Devise, for it seems altogether uncertain. *6 Co. 68. Swinb. 293, 294, 295, 296.*

So if a Man gives to *J. S.* or *J. D. 20 l.* this is held a good Devise altho' it is somewhat incertain, and the Disjunctive shall be taken for a Copulative, and so *J. S.* and *J. D.* shall both take by this Devise; but if one of them be nearer of Kin than the other, then it is said he shall have it for his Life, and the other afterwards. And if one devises *20 l.* to *A.* or *B.* which of them *J. S.* will appoint; this is good, and he who *J. S.* appoints shall have it. *Swinb. Part 7. §. 9.*

And if one devises to *J. S.* and his Children; this is good and certain enough, and hereby he and his Children shall take the Thing devised together. *Ibid.*

(T) *Of the Devisee's Capacity to take by the Name whereby he is described.*

THE Person to whom a Devise is made must not only be capable, and certainly described and named, but he must also be capable by the Name whereby the Devise is made to him, or otherwise the Devise is void; as,

If a Devise be to the Heirs of *J. S.* *J. S.* being living; it is void. And yet if Lands or Goods be devised to the Executors of *J. S.* and *J. S.* dies before the Testator, and makes Executors; this is a good Devise to the Executors. And if a Man devises his Land to *J. S.* for Life, the Remainder to the next of Kin (or next of Blood) of *J. S.* this is a good Devise of the Remainder. And if a Man devises Goods to the Parishioners of the Parish of *S.* to the Use of the Church; this is a good Devise, and the Church-wardens may recover it. And if a Man devises *Ecclesie Sanctæ Andree de Holborn*; this is a good Devise to the Parson of that Church. And if a Man devises to the City of London, University of Oxford, or to Queen's College in Oxford; these are good Devises. But if one devises to the Commonalty of a Guild, which is not incorporate, as to two of the middle Men of the Guild of the Fraternity of the *Whiteacres* of London, or the like; this Devise is void. *Fitz. Devise 27. Plow. 523. Perk. §. 509, 510. Bro. Corporation 55.*

(U) *Of*

(U) *Of misnaming the Devisee.*

IF the Devisee be capable, well named, and capable by that Name, if his Name be truly set down, yet if his Name be not so, but mistaken, the Devise is void. And therefore,

If one intending to give 20 l. to J. S. devises to J. N. 20 l. this Devise is void both to J. S. and J. N. except the Person be certainly denoted and described by some other Circumstance; as to J. N. the Son of J. S. my Landlord, or the like. So if one devises to the Abbot of *St. Peter*, when the Foundation is the Abbot of *St. Paul*; this Devise is void. And if one devises to a Corporation, and there be none of that Name at the Time of the Devise, nor during the Life of the Testator; this Devise is void; and so if there be a College made after that Name. *Dyer* 4. *Perk.* §. 505. *Swinb.* 289, 290.

But if one devises a Thing to the Wife of J. S. and before the Devisor dies, and she takes another Husband, and is called by another Name; yet this Devise is good. So if one gives a Legacy to J. S. Dean of *St. Paul's*, and the Chapter there and their Successors, and before the Death of the Devisor J. S. dies, and another is made Dean; this Devise is good notwithstanding this Mistake. *Plow.* 344.

(W) *Of the Words of a Devise.*

THE Form of Words in a Devise is not at all regarded; and therefore if one says, I give, institute, desire, appoint or will, that J. S. shall have my Land, or that J. S. shall have 20 l. or let J. S. have my Land, or 20 l. all these Devises are good. And if one devises that his Feoffees of his Land shall be seised of the Land to the Use of J. S. and his Heirs, or to the Use of J. S. and the Heirs of his Body; or if such a Man devises that his Feoffees shall make an Estate of the Land to J. S. and his Heirs, or to him and the Heirs of his Body; this is a good Devise of the Land in Fee-simple or Fee-tail. *Swinb. Part* 4. §. 4. *Plow.* 23. *Dyer* 23.

And if a Man makes a Feoffment of his Land to the Use of his last Will; and then devises that his Feoffors shall be seised to the Use of J. S. this is a good Devise of the Land *per intentionem*. *Pas.* 9 Jac. *Newman's Case*.

And if I devise that J. S. shall have, hold and occupy my Land for his Life; this is a good Devise of the Land for his Life. *Plow.* 546. 4 Co. 66. 8 Co. 95.

If a Man has a Lease for Years of Land, and he devises his *Lease*, or his *Term*, or his *Farm*, or the *Profits* or *Occupation* of the Land; by any of these Devises his whole Lease and all his Interest in the Land is given as well as by any other Form of Words. *Dyer* 4, 122, 33, 128. 1 Co. 83. 6 Co. 42.

(X) *Of the Intent of making a Devise.*

THE Intent of making a Devise should be good, for Devises to wicked Ends or upon wicked Conditions, as to the End that the Devisee shall kill a Man, or because he has killed a Man, or the like, are void. And when the Cause or Motive is false, as because one is my Cousin, or has lent me Money, I devise to him 20 l. and he is not my Cousin, or did not lend me Money; these Devises are void. *Swinb.* 289.

(Y) *Of the Manner and Form of making Wills and Testaments, and of Revocations of them.*First, *Of naming an Executor.*

IN making a good Will it is necessary that the Form and Order which the Law prescribes be observed in the Disposition. And therefore first, There should be an Executor named in all Wills of Goods and Chattels, and that the Executor named be capable of the Executorship; for this is said to be the Head and Foundation of the Will: For if there be never so many Legacies given, and no Executor made, this

Disposition

Disposition is but a Codicil, and cannot properly be called a Will or Testament; for in this Case the Party dead is said to die Intestate, and the Administration of his Goods must be granted to the Widow or next of Kin; whereas, on the other Side, if an Executor be appointed altho' there be no Legacy given, yet this Disposition is and is properly said to be a Will. *Swinb. 112. Bro. Testament 20.*

Where no Executor is named in a Will, Administration with the Will annexed is usually granted.

Secondly, *Where it must be in Writing.*

If a Will be of Lands or Tenements, it must be in Writing, and it must be committed to Writing at the Time of the making thereof; and it is not sufficient that it be put in Writing after the Death of the Testator, being first made by Word of Mouth only, for then it is but Nuncupative still. But if the Will be first made by Words of Mouth, and be afterwards written, and then brought to the Testator, and he approves it for his Will; or if the Testator, when he declares his Mind, appoints that the same shall be written, and thereupon the same is written accordingly in the Life-time of the Testator; these are good Wills of Land, and as good as if they be written at the first. If therefore one be very sick, and another comes to him and asks him whether his Wife shall have his Land, and he says yes; and a Clerk being present puts this in Writing, without any precedent Commandment or subsequent Allowance of the sick Man; this is no good Will of the Land. So if one declares his whole Mind before Witnesses, and sends for a Notary to write it, and dies before he comes, and he writes it after his Death; this is no good Will for his Lands, but a good Nuncupative Will for his Goods and Chattels, except he declares his Mind to be, that it shall not be his Will unless it be put in Writing, for then perhaps it may not be a good Will for his Goods and Chattels. So if he that writes the Will cannot hear the Party speak, and another that doth stand by the sick Man tells him what he says; in this Case if there be none others present to prove that he reported the very Words of the sick Man; this will be no good Will of the Land. But if a Notary takes Direction from the sick Man for his Will, and after goes away and writes it, and then brings it again, and reads it to the Testator, and he approves it; or if it be written from his Mouth by the Notary according to his Mind, and his Mind were to have it written, altho' it be not shewed or read to him afterwards, these are good Testaments. So if the Notary does only take certain rude Notes or Directions from the sick Man, which he agrees to, and they be afterwards written fair in his Life-time, and not shewed to him again, or not written fair until after his Death; these are good Wills of Lands. If a sick Man bids the Notary make a Will of his Lands, but does not tell him how, and the Notary makes a Devise of it after his own Mind; this is no good Will; and yet if it be after read unto and approved by the Testator, it may be good. And so if a Will be found written in the Testator's House, and not known by whom, and it be read unto and approved by the Testator; this is not a good Will in Writing for Lands and Goods. *Stat. 32 & 34 H. 8. Perk. §. 476, 477. Dyer 72. Plow. 345. 4 Co. 60. Dyer 53.*

And Uses of Lands before the Statute of Uses might, and Lands and Tenements devisable by Custom, and Goods and Chattels, may be disposed by Word without Writing, and such Wills of such Things so made are good.

But now by the Statute of Frauds and Perjuries, 29 Car. 2. c. 3. §. 5. All Devises and Bequests of any Lands or Tenements devisable shall be in Writing, and signed by the Party devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor, by three or four credible Witnesses, or else they shall be utterly void and of none Effect.

And by §. 6. No Devise in Writing of Lands, Tenements or Hereditaments, or any Clause thereof, shall be revocable, other than by some other Will or Codicil in Writing, or other Writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the Testator himself, or in his Presence, and by his Directions and Consent: But all such Devises and Bequests shall remain in Force until the same be burnt, &c. in Manner aforesaid, or unless the same be altered by some other Will or Codicil in Writing, or other Writing of the Devisor, signed in the Presence of three or four Witnesses, declaring the same.

See of Nuncupative Wills.

Thirdly,

Thirdly, *On what, and in what Hand and Language a Will may be written.*

It is not material in what *Matter* or *Stuff*, whether in Paper or Parchment, nor in what *Language*, whether in *Latin*, *French*, or any other *Tongue*, nor in what *Hand* or *Letters*, whether in *Secretary Hand*, *Roman Hand* or *Court Hand*, or in any other *Hand* a Will be written, so that it be fair and legible, that it may be read and understood; neither is it material whether the same be written at large, or by *Notes* or *Characters*, usual or unusual, as XX s. for twenty Shillings, or when the Figure 2 is used instead of the Letter A. if it be usual in the Testator's Writing, or the like, for the Will is good notwithstanding. So also if some Words be omitted, or Sentences improper used, when the Intent and Meaning is apparent; as where a Man says, *I make my Wife of this my last Will and Testament*, leaving out the Word *Exe- cutrix*, yet the Will is good, and this shall be understood: But if it be so done as it cannot be read, or by reading, the Mind of the Testator cannot be known, then the Will is void, and of no Force. In the like Manner as a Nuncupative Will is when the Words spoken are so ambiguous, obscure and uncertain, that thereby the Meaning of the Testator cannot be known or understood. *Swinb. Part 4. §. 25, 26.*

Fourthly, *Of the Testator's sealing and subscribing his Name.*

Where Writing is needful, (as in the Case of Disposition of Land it is) there Sealing the Will, or Subscribing the Testator's Name, is not necessary. And therefore if a Man by himself or another makes a Will of his Land, and does not put his Seal or Name to it, if he agrees to it, this is a sufficient Will. *Perk. §. 476, 477.*

Fifthly, *Of Interruption in the making a Will.*

If whilst the Testator is making his Will, and whilst he intends to proceed farther at that Time, either by adding, diminishing or altering, he be suddenly stricken with Sickness, or Insanity of Mind, whereby he cannot proceed, but gives it over in the midst, and so he dies; it seems in this Case the whole Will is void. And yet if a Man begins his Will, and makes perfect Devises to one, and then of himself he gives over till another Time; or if a Man makes a perfect Devise to one, and then dies before he can make any Devise to any others; it seems these are good Wills for as much as is done. And therefore it is said, if one commands another to make his Will, and by it to devise *Whiteacre* to J. S. and his Heirs, and *Blackacre* to J. N. and his Heirs, and he writes the Devise to J. S. and his Heirs, and the Testator dies before he can write the Devise to J. N. and his Heirs; this is a good Devise to J. S. but a void Devise to J. N. and his Heirs. But if a Man bids the Notary write a Devise of his Land to J. S. upon Condition, and the Notary writes a Devise to J. S. but the Testator dies before he can write the Condition; in this Case the whole Devise is void. *Swinb. 6. Part 7. §. 10. 3 Co. 31.*

But a Man may if he pleases make a Will of Part of his Goods, and die Intestate for the Rest, and the Disposition which he makes is good for so much. *Swinb. 188.*

Sixthly, *Of the Proof of a Will.*

The last Thing required to the Perfection of a Will, is the Proof of it; for if it be never so well made, and be in Truth the Will of the Testator, yet if it cannot be by Proof made to appear so, it is but a void Will, and of no Force at all.

And therefore as to this observe these Things:

First, That a Nuncupative Will must be proved by two (*now by Stat. 29 Car. 2. there must be three*) Witnesses at the least, and those must be such as are without Exception.

Secondly, A written Will, when it is written with the Testator's own Hand, proves and approves itself, and therefore needs not the Help of Witnesses to prove it. And for this Cause, if a Man's Will be found written fair and perfect with his own Hand after his Death, altho' it be not subscribed with his Name, sealed with his Seal, or have any Witnesses to it, if it be known or can be proved to be his Hand, it is held to be a good Testament, and a sufficient Proof of itself; but if it be sealed with his

Seal, and subscribed with the Name of the Testator, and can be proved by Witnesses, it is the more authentick. And when it is found amongst the choicest Evidences of the Testator, or fast locked up in a safe Place, it is the more esteemed; for if it be written in another Hand, and the Testator's Hand and Seal, or one of them, not to it, altho' it be found in such a Place as before; yet some Proof will be expected of it further by Witnesses in that Case; and if a Writing be found under the Testator's own Hand, yet if it be but a scribbling Writing, written copywise, with a great Distance between every Line, without any Date, in strange Characters, with many Interlineations, and lying amongst his void Papers, or the like; this will not be esteemed a sufficient Will, nor a good Proof of it; but it shall be accounted rather a Draught or Image of the Testator's Will, for a Direction to him after to make his Will by; and yet if it can be proved that the Testator did declare himself that this should be his Will, this will be a good Will, and a good Proof of it.

Thirdly, If it be proved that the Testator said his Testament was in such a Schedule in the Hands of J. S. and J. S. produces a Writing deposing it to be the same; this is a sufficient Proof: But if he says withall, it is written with his own Hand; then it seems some other Proof, as by comparing Hands, or the like, that it is his Hand wherein it is written, will be expected.

Fourthly, If the Witnesses will prove the Writing produced to be the last Will of the Testator, or that he said it was or it should be his last Will, or that it was the same Writing that was shewed to them, and whereunto they are Witnesses; altho' they never heard it read, or set their Hands to it, it is a sufficient Proof. *Swinb. Part 7. §. 13. Part 4. §. 25.*

Fifthly, All Persons Male and Female, Rich and Poor, are esteemed competent Witnesses to prove a Will, save only such as are infamous, as perjured Persons, and the like, and such as want Understanding and Judgment, as Children, Infants, and the like, and such as are presumed to bear Affection, as Kindred, Tenants, Servants, and the like. A Legatee is reputed a competent Witness to prove any other Part of the Will but his own Legacy, or to prove any Thing against himself touching his own Legacy, but not otherwise. And therefore where there are two Witnesses of a Will wherein either of them have somewhat bequeathed unto himself; this Will cannot be sufficiently proved for those Legacies, but for the Rest of the Will it may be sufficiently proved.

Sixthly, Where there is no Question nor Opposition moved or had about or against a Will, there the Oath of the Executor alone is esteemed a sufficient Proof of it, and in that Case regularly no other Proof is required. And where more Proof is necessary, as in the Cases before, it is in the Discretion of the Ordinary what Proof to admit and allow; and those Witnesses for Number, Nature and Quality, or that other Proof that he deems and accepts for sufficient, is sufficient; and the Will so proved by such Witnesses, or other Proof, is sufficiently proved. *Swinb. Part 4. §. 21.*

Lord Coke's
Advice concerning the
Disposition of
Lands and
making
Wills.

My Advice to all who have Lands (*says he*) is, That you take Care, by the Advice of learned Counsel, by Act executed, to make Assurances of your Lands according to your true Intent, in full Health and Memory, to which Assurances you may add such Conditions, or Provisoos of Revocation, as you please. For (*says he*) I find great Doubts and Controversies daily arise on Devises made by last Wills, sometimes in Respect of Tenures of Lands, sometimes by Pretences of Revocations, which may be made easily by Word, (*but now Revocations must be in Writing by the Statute of Frauds*) also in Respect of obscure and insensible Words and repugnant Sentences, the Will being made in haste: And some pretend that the Testator, in Respect of extreme Pain, was *Non compos mentis*, and divers other Scruples and Questions are moved upon Wills.

But if you please to devise your Lands by Will,

First, Make it by good Advice in your perfect Memory, and inform your Counsel truly of the Estates and Tenures of your Lands.

Secondly, If your Will concerns Inheritance, make it indented, and leave one Part with a Friend, lest after your Death it be suppressed.

Thirdly, At the Time of the Publication of the Will call credible Witnesses to subscribe their Names to it. Note; *By the Statute of Frauds, there must be three or four Witnesses to a Will of Lands or Tenements.*

Fourthly, Let all the Will be written with one and the same Hand, and in one and the same Parchment, for fear of Alteration, Addition or Diminution.

Fifthly, Let the Hand and Seal of the Devisor be set to it.

Sixthly,

Sixthly, If it be in several Parts, let his Hand and Seal be put, and the Names of the Witnesses subscribed to each Part.

Seventhly, If there be any Interlining or Rasure in the Will, let a Memorandum be made of it.

Eighthly, If you make any Revocation of your Will, or of any Part of it, make it in Writing, by good Advice. 3 Ch. 36. a. b. *It must be in Writing by the Statute of Frauds.*

To which may be added, that if the Will be made of Lands or Tenements in *Yorkshire or Middlesex*, take Care it be registred in due Time. *See before*, p. 495.

(Z) Of Nuncupative Wills.

See before concerning the Kinds of Wills.

BY Stat. 29 Car. 2. c. 3. §. 19. For the Prevention of fraudulent Practices, it is enacted,

1. That no Nuncupative Will shall be good, where the Estate thereby bequeathed shall exceed the Value of thirty Pounds, that is not proved by the Oaths of three Witnesses (at the least) that were present at the making thereof. (*And by Stat. 4 Ann. c. 16. §. 14. it is declared, That all such Witnesses as are and ought to be allowed to be good Witnesses upon Trials at Law, by the Laws and Customs of this Realm, shall be deemed good Witnesses to prove any Nuncupative Will, or any Thing relating thereto.*)

Nor unless such Nuncupative Will were made in the Time of the last Sickness of the Deceased, and in the House of his or their Habitation or Dwelling, or where he or she has been Resident for ten Days, or more, next before the making of such Will, except where such Person was surprised or taken sick, being from his own Home, and died before he returned to the Place of his or her Dwelling.

§. 20. That after six Months passed after the Speaking of the pretended Testamentary Words, no Testimony shall be received to prove any Will Nuncupative, except the said Testimony, or the Substance thereof, were committed to Writing within six Days after the making of the said Will.

§. 21. That no Letters Testamentary, or Probate of any Nuncupative Will, shall pass the Seal of any Court, till fourteen Days at the least after the Decease of the Testator be fully expired; nor shall any Nuncupative Will be at any Time received to be proved, unless Process have first issued to call in the Widow, or next of Kindred to the Deceased, to the End they may contest the same, if they please.

§. 22. That no Will in Writing concerning any Goods or Chattels, or personal Estate, shall be repealed; nor shall any Clause, Devise or Bequest therein, be altered or changed by any Words, or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing, and after the Writing thereof read unto the Testator, and allowed by him, and proved to be so done by three Witnesses at the least.

§. 23. Provided that any Soldier in actual Military Service, or any Mariner or Seaman being at Sea, may dispose of his Moveables, Wages and Personal Estate, as before the making this Act.

For more concerning Wills, see the following Chapters, and before, Of Executorship, p. 136. Administration and Distribution, p. 155. and Legacy, p. 163.

C H A P. VII.

Of fraudulent, forged, void and voidable Deeds and Wills.

S E C T. I.

Of void Deeds in general.

SOME Deeds are void *from the Beginning*, and never take Effect; and amongst these some are absolutely void, and void against all Persons; and some are void to some Purposes, and against some Persons; some also that are *not void from the Beginning*, are notwithstanding voidable, and that sometimes by the Party himself who made them, or any others, and sometimes by others, and not by himself; and some Deeds are good in their first Creation, and well made at the first, but become void by some Matter *ex post facto*; and this may be either by an extrajudicial Act, as Rasure, or the like; or by a judicial Act, *i. e.* when by Sentence of a Court a Deed is damned and made void, which is called a *Vacat* of the Deed.

S E C T. II.

Of Deeds obtained by Menace, Durefs, or false Suggestions.

IT is necessary that a Deed have a good Foundation, and be to a good End; for altho' a Deed have all the Qualities of a good Deed, *viz.* that it be well made, read, sealed and delivered, yet it may be void, or at least voidable for other Causes; as when it is either unjustly gotten or obtained, or corruptly, in Pursuit and Execution of some dishonest Agreement, or to a dishonest End or Purpose made.

A Deed whether it be a Feoffment, Gift, Grant, Lease, Release, Confirmation or Obligation, that is made or obtained by Menace or Durefs, *i. e.* when one threatens another to kill or maim him if he will not make him such a Deed, or imprisons another till he makes him such a Deed, and thereupon he makes the Deed; a Deed thus obtained by Force, and thro' Fear to avoid Danger, is void, and will not bind him that made it, nor avail him to whom it is made. 2 Co. 9. Perk. §. 16. Dyer 143. 45 Ed. 3. 6.

In which Respect observe these Things:

First, That there must be some Threatning of Life or Member, or Imprisonment, or some Imprisonment or Beating itself; for if it be only a Threatning to take away Goods, or to burn a House, or the Taking and Keeping of a Man's Goods, or the like; this will not make the Deed made upon that Occasion to be *per Dureffe*.

Secondly, It must be a Threatning, Beating or Imprisonment of the Party himself, or of his Wife, that makes the Deed void; for if it be a Threatning, Beating or Imprisonment of any other besides the Party himself that makes the Deed, or his Wife; this will not make the Deed to be *per Dureffe*.

Thirdly, The Threatning, Beating or Imprisonment, must be to this End, and hereupon the Deed must be made, for otherwise the Deed shall not be said to be by Durefs: As for Example, If four threaten one to imprison him if he will not seal a Deed to one of them four, and he does seal it; this Deed is got by Durefs, and therefore void. And if one threatens a Man to kill him unless he will seal a Deed to him and three others, and he does so; this is void as to all the four; for if one threatens another to kill or maim him if he will not seal a Deed to a Stranger, and thereupon he does so; this is as much void as if it were to the Party himself. If one threatens to kill, wound or imprison me, to make me swear or promise to seal him such a Deed, and afterwards at another Time and in another Place, when I am at Liberty, I do it accordingly, or imprisons me till I make the Deed; this is made by Durefs, and void. If I be in Prison at one Man's Suit, and then another Man causes me

me to be used more severely in Prison to compel me to make him some Deed, which I do thereupon make to him; this Deed is gotten by Durefs, and therefore void. But if I be imprisoned at one Man's Suit, (be the Cause just or not) and being in Prison I make an Obligation, or any other Deed, to a third Man; this shall not be said to be by Durefs, but is a good Deed. So if one threatens to take away my Goods, burn or break my House, enter upon my Land, kill or wound my Father, Mother, Brother, Sister or Friend, or imprisons any of them, and thereupon I seal a Deed; this is good, and shall bind me. So if one distrains my Beasts, or compels me to seal a Deed, and will not deliver them unless I do so, and threatens me that if I take the Beasts again and not seal the Deed he will kill me, and thereupon I seal the Deed; this is a good Deed, and shall bind me. If I be arrested upon good Cause, and being in Prison, or under Arrest, I make an Obligation, Feoffment, or any other Deed to him at whose Suit I am arrested, for my Enlargement, and to make him Satisfaction; this shall not be said to be by Durefs, but is good, and shall bind me: And therefore if Auditors in an Account commit an Accomptant to Prison, and then he makes an Obligation to his Master for the Arrearages; this is good. And if one in Prison for Felony grants a Reversion of Lands to another to help him out of his Trouble; this is a good Grant. (*But I think this should be before Conviction, for after the Reversion is forfeited.*) If A. and B. enter into an Obligation upon the Threatning of B. only; this is a good Obligation by A. who was not threatned. *Bro. Dureffe in toto. 9 H. 7. 25. 21 Ed. 4. 13.*

And if one makes an Obligation by Durefs, and after being at large takes a Defeasance upon it; this makes the Obligation good again, and the Obligee is concluded to say it was by Durefs. *Bro. Defeasance 17.*

There is a Diversity between a Deed and a Will gained from a weak Man, and upon a Misrepresentation, in Regard Equity will set aside the Deed, but not the Will. *2 Wil. 270.*

Where there is either *Suppressio veri*, or *Suggestio falsi*, it is a good Reason to set aside any Grant or Release. *1 Wil. 240.*

S E C T. III.

Of Deeds made or concealed by Collusion or Fraud.

(A) *In general.*

IT is Evidence of a Fraud when there is no Proof that any Instructions were given for preparing the Deed by the Grantor, or when the Deed was not read to him, *2 Wil. 203.*

(B) *To deceive Purchasers.*

A Deed of Grant of any Thing, made with Intent and on Purpose to deceive and defraud one that shall afterwards buy the same Thing, is void.

For it is to this Purpose provided by a Statute Law, (27 Eliz. c. 4.) That all fraudulent Conveyances of Land, or any Rent or Profit out of it for Money, or any good Consideration of the Fruit and Effect of their Purchase, shall be void against such Purchasers for so much as they buy, and against all others that come in by or under them; but all such Conveyances as are made *bona fide*, and upon good Consideration, are not to be accounted fraudulent.

For the better Understanding of which Statute, and the Law in these Cases observe, That Conveyances *bona fide* are opposed to such as are upon and with any Trust express or implied; and good Considerations are set down in the Statute to distinguish from such as are not valuable, as Nature, Blood, and the like. If one conveys Land with a present or future Power of Revocation or Alteration at the Will of him that conveys it; this shall be said a fraudulent Conveyance as against him that shall afterwards purchase this Land. So that if one conveys his Lands to the Use of himself for Life, and after to the Use of divers of his Blood, with a future Power; as

after the Death of *H.* or after such a Day to revoke it, and before the Day he sells this Land to a Stranger for a valuable Consideration; in this Case the first Deed shall be said to be fraudulent and void as to him that shall purchase the Land, and shall not do him any hurt. 3 Co. 31.

And if one conveys Land with such a Power of Revocation, and after with an Intent to defraud a Purchaser, makes a Feoffment to a Stranger to extinguish the Power, and after sells the Land for valuable Considerations to a Stranger; in this Case both the first and second Deeds as to the Purchaser shall be said to be fraudulent, and therefore void. 3 Co. 82, 83.

And if there be Grandfather, Father and Son, and the Grandfather makes a Lease for one hundred Years to the Father, and the Father to prevent the drowning of the Lease by the Descent of the Reversion to him, assigns over the Lease to certain Friends of his, to the Use of his Son an Infant, under Pretence to pay Debts; the Grandfather dies, the Father continues the Occupation of the Land, and makes Estates, and does all Acts as Owner of the Land; the Son pays no Debts, and the Assignment (altho' divers Persons of Quality were named Assignees) was delivered to one of the Assigns of mean Estate in private, and after the Father sells the Land for valuable Consideration; in this Case the Assignment shall be taken to be fraudulent and void as to the Purchaser. And if the Father makes a fraudulent Conveyance, and after continues the Occupation of the Land, and it descends to the Son after the Father's Death, and he sells it for valuable Consideration; in this Case the Purchaser may avoid the Conveyance made by his Father as well as if it had been made by the Son himself, and that whether the Son be privy to the Conveyance made by the Father or not. And if a fraudulent Conveyance be made to the King, yet it is void as to a Purchaser as if it were made to a common Person. And therefore if there be Tenant in Tail, the Remainder in Tail or in Fee, and he in the Remainder perceiving the Tenant in Tail intends to sell the Land, and bar him by a common Recovery, sells his Remainder by Deed inrolled to the King, and after the Tenant in Tail sells the Land by common Recovery for good Consideration; in this Case the Purchaser shall avoid the Deed to the King. 6 Co. 72.

If there be a Lease for Years, and the Lessor makes a fraudulent Conveyance in Fee, and then for good Consideration makes another Lease to begin at the End of the former Lease; this Conveyance shall be void as to the second Lessee. *M. 4 Jac. Corwell and Bart's Case.*

And if *A.* makes a Lease to *B.* for Years upon good Considerations, and after he makes another Lease to *C.* of the same Thing for the same Term, to begin at the same Time, upon good and valuable Consideration; and *B.* does not discover this, but drives this Bargain with *C.* and is Witness to this second Lease, and the first Lease is not excepted in the second Lease; the first Lease shall be void as to *C.* Per two Just. *H. 18 Jac. B. R.*

And in all these and such like Cases, altho' the Purchaser, before he makes his Bargain, has Notice of the fraudulent Conveyance, yet shall he avoid it as if he were ignorant of it: But such Conveyances and Deeds made as before shall never be said to be fraudulent and void as against him that shall have the Thing afterwards, if he does not give a valuable Consideration for it. And therefore if one makes a Lease that would be fraudulent and void as to such a Purchaser to *A.* and after makes another Lease *bona fide* to *B.* but without any Rent or Fine given for it; in this Case the first Lease shall not be said to be fraudulent as against the second Lessee, and therefore not void. So if one covenants for the Advancement of his Heirs Male, &c. to levy a Fine of Land by a Day, to the Use of himself for Life, and after of his Issue Male; and before the Day he makes a fraudulent Lease for many Years on Purpose, and after he levies a Fine accordingly; the Lease is good, and not fraudulent by this Statute as against the Issue in Tail. So if a Man, who is somewhat foolish and given to waste, be persuaded to settle his Lands upon some of his Friends, on Purpose to maintain himself with it; and after some of his lewd Companions inveigles him, and gets him for a small Sum of Money to convey it to them; in this Case the Conveyance first made shall not be said to be fraudulent as against these Purchasers, and therefore it is good against them. 5 Co. 60. 3 Co. 83.

And if one who has a Term of sixty Years, if he lives so long, makes it away, and then he forges a Lease for ninety Years absolutely, and after by Indenture reciting this forged Lease, for valuable and good Consideration bargains and sells this forged

forged Lease, and all his Interest in the Land to *J. S.* the first Lease is not void, and the Purchaser shall have nothing but the forged Lease. *Co. Lit. 3.*

All voluntary Conveyances are *prima facie* to be looked upon as fraudulent against Purchasers, unless the contrary be made appear. *1 Chan. Ca. 100, 216. See Abr. Ca. Eq. 23.*

A. had a House descended to him, which was let at 64*l.* per Ann. but subject to a small Mortgage, and *A.* being very poor, was inveigled to sell it for 80*l.* Tho' the Bargain was not a fair one, yet as it was not attended with strong Badges of Fraud, the Court would grant no Relief against it. *Abr. Ca. Eq. 176.*

(C) To defraud Creditors.

A Deed also made of any Thing with an Intent and on Purpose to deceive and defeat Creditors of their just Debts and Duties, is void also as against such Persons; for it is provided to this Purpose by other Statutes, (3 *H. 7. c. 4. 2 R. 2. Stat. 2. c. 3. 13 Eliz. c. 5.*) That all Feoffments, Gifts, Grants, Alienations, Bargains and Conveyances of Lands, Tenements, Hereditaments, Goods and Chattels, or any Rent, Profit or Commodity out of Land, made by Fraud or Collusion of Trust to him that made the same, or otherwise, with Intent to hinder and delay, or put off or put by Creditors or others of their just and lawful Actions, Suits, Debts, Accompts, Damages, Penalties, Forfeitures, Heriots, Mortuaries or Reliefs, shall be void as against them to whom such Thing shall belong, and he may recover the Thing notwithstanding; but all such as are made *bona fide*, and upon good Consideration, are not to be accounted fraudulent by the Statute.

For the better Understanding whereof these Cases following are to be observed,

If a Man a little before his Death makes a Conveyance of his Land to his Children or Friends of his Blood, with a Proviso to make it void at his Pleasure, and he takes the Profits of it as his own, or makes a Conveyance of it to Friends, to the Intent they shall not be subject to the Payment of his Debts, having bound himself and his Heirs by any Specialty, or to the Intent that a Warranty and Assets shall not bind his Son for other Land, or the like; in this Case the Conveyance shall be void as to them that should have Relief upon this Land by Discent, and especially when the Conveyance is made after the Suits begun; and more especially when any Judgment is had upon the Suits against him that makes the Deed; and so also is the Law for Goods. *5 Co. 60. 3 Co. 82. Dyer 295.*

And therefore if one be indebted to *A.* in 20*l.* and to *B.* in 40*l.* and be possessed of Goods to the Value of 20*l.* and *A.* sues the Debtor for his 20*l.* and hanging this Suit, the Debtor secretly makes a general Deed of Gift of all his Chattels real and personal to *B.* in Satisfaction of his Debt, and yet continues the Occupation, and uses the Goods as his own, and after *A.* gets Judgment and Execution; in this Case the Deed of Gift to *B.* is fraudulent, and therefore void as against *A.* So if in this Case he gives all his Goods to *B.* in Satisfaction of his Debt, and before any Suit begun by *A.* with an express or implicit Trust, as to the Intent that *B.* shall be favourable to the Debtor, or that if the Debtor provides the Money, that he shall have his Goods again; or that he shall suffer the Debtor to enjoy and use the Goods, and pay him as he can; in these and the like Cases the Deeds shall be said to be fraudulent and void; for howsoever it be made upon good Consideration, yet it is not made *bona fide*. So if one in Consideration of natural Affection, or for no Consideration, gives all his Goods to his Child or Cousin *bona fide*; this shall be a void Deed as to the Creditors; *Et sic de similibus.* So if one gives all his Goods and Chattels to his Executor in his Life-time by Deed of Gift; this shall be said to be fraudulent, and shall be void as to Creditors; and altho' those to whom the fraudulent Deed is made know nothing of the Fraud, yet is the Deed fraudulent in that Case also, as well as where they are privy to it. *3 Co. 80, 83. Bro. Donne 20. Plow. 54.*

If after a Commission of Bankruptcy be sued out, the Debtor makes a Deed of Gift of all his Goods to one of his Creditors in Satisfaction of his Debt; in this Case the Deed shall be void, as against the Rest of the Creditors, and as to the Commissioners, and they may order it with the Rest of the Estate notwithstanding. *2 Co. 25.*

But

But if *A. bona fide*, and for valuable Consideration, mortgages his Land whereof he has a Term of Years to *B.* upon Condition that if he re-pays the Money to *B.* a Year after, that he shall re-enter; and *B.* covenants with *A.* that he shall take the Profits of it until the Time, &c. *A.* does not pay the Money, and *B.* hoping that he will pay it in Time, suffers him to continue in Possession, and take the Profits of it two or three Years after, and in the interim Judgment is had against *A.* upon a Bond and Execution awarded; in this Case Execution shall not be made of the Lease, for this Deed of Mortgage shall not be said to be fraudulent as to the Creditor; for when a Conveyance is not fraudulent at the Time of the making of it, it shall never be said to be fraudulent for any Matter *ex post facto*. By two Judges of Assise, *August 5 Car. in Com. South. Lady Lambert's Case.*

If *A.* be seised of the fifth Part of the Manor of *B.* and *B.* of the sixth Part, and *M.* comes to *A.* to buy his Part, and after *M.* saith to *A.* my Counsel tells me I cannot safely buy of you unless *B.* joins, and *B.* grants a Rent-charge of 15 *l.* per Annum out of this Manor to *C.* her Son, and the Heirs of his Body, in Consideration of natural Affection, (and this was about 10 *Jac.* *C.* being then but about three Years old) with Proviso that if *D.* (whom *B.* did then intend to marry) grants to the said *C.* the like Rent of 15 *l.* and for the like Estate out of 20 *l.* by the Year of the Land of *B.* then the said Grant to be void; and after the said *A.* has bought the fifth Part of the said Manor of *B.* and *D.* her Husband being intermarried, and after *A.* *B.* and *D.* her Husband join in the Grant to *M.* in this Case it was ruled that the Grant to *C.* was not fraudulent and void. *Mic. 19 Jac. C. B. Miller and Pott's Case.*

If one holds his Land to pay a Heriot at the Death of every one that dies Tenant in Fee-simple, and he infeoffs his Son and Heir, in Consideration of natural Affection and Marriage to be had betwixt the Son and *J.* and the Son (to prevent the Dower of his intended Wife during his Father's Life) makes a Lease for forty Years unto his Father, if his Father lives so long; and afterwards the Marriage is had, the Father pays the Rent, the Son does Suit of Court for the Land, and after the Father dies; in this Case the Lease shall not be said to be fraudulent as to the Lord to deceive him of his Heriot, because it was made to another End. 10 *Co.* 56, 57.

A Deed not fraudulent at first may afterwards become so by being concealed, or not pursued; by Means of which Creditors may be drawn in to lend their Money. 2 *Vern.* 262.

A. made a Conveyance of Lands to *B.* to the Use of himself for Life, with Power to mortgage such Part of the Estate as he should think fit; Remainder to Trustees to sell to pay all his Debts; and afterwards he became indebted by Judgments, Bonds and simple Contract. The Deed of Trust was decreed fraudulent as to the Creditors by Judgments, who had no Notice of it. 2 *Vern.* 510.

S E C T. IV.

Of usurious Contracts.

A Deed made upon or in Pursuit and Execution of an usurious Contract, *i. e.* such a Contract as whereupon the Lender is sure to have in Money or Monies worth for the Loan of the Thing above the Principal more than after the Rate of 5 *l.* per Cent. is void.

In which Case observe these Cases:

If one 6 *Decembris* borrows 30 *l.* until the second Day of *June* next following, to be paid then for it 33 *l.* for the principal Loan, if the Son of the Obligee be then alive, and if he dies before that Time, that then he shall pay but 27 *l.* which is less than the Principal; in this Case the Contract is usurious and corrupt, and therefore the Deed that contains it is void. *Terms de la Ley.* 5 *Co.* 70.

See the Statutes of Usury.

If I lend another Man 10 *l.* for a Year, and take Security by Statute or Obligation that the Borrower pays me the Lender 20 *l.* for it; this Contract is usurious, and therefore the Statute and Obligation is void: But if the Agreement and Statute or Obligation be, that if the Borrower pays not the 10 *l.* within the Year, that then he shall pay 20 *l.* for it; this is no Usury, and therefore in this Case the Deed is good.

If

If one comes to me to borrow 500 *l.* and tells me he is unable to pay it all together, and desires that he may pay it in twelve or thirteen Years, and offers for my Kindness 200 *l.* over, and besides the Use, to let him have it so; and then the 500 *l.* the Interest, and the 200 *l.* is cast up together, and so we agree upon an Annuity of 80 *l.* *per Annum* for fourteen Years, which is assured by Conveyances unto me; the Contract is usurious, and all the Assurances made to perfect it are void. *Corflet's Case, Pas. 7 Jac. B. R.* And yet regularly where the Principal Money is lost, the Contract is not usurious.

If a Man desires to borrow of me 100 *l.* for a Year, and I am content to let him have it for the Use of 5 *l.* but withal I compel him to take a Lease of me of a House of 60 *l.* Rent, which is but worth 30 *l.* this Contract is usurious, and therefore the Assurances thereupon made are void. *Et sic de similibus. Sander's Case, Hil. 14 Jac. B. R.*

But if a Man the 17th of July 1579. grants me a Rent of 20 *l.* *per Annum* for the Loan of 100 *l.* to be paid every half Year, and the first Payment at Christmas 1580. and it is agreed between us, that if he pays 100 *l.* the 17th of July 1580. that then the Rent shall cease; this Contract is not usurious, and therefore the Assurances thereupon made are not void, but good. But if in this Case there be a private or collateral Agreement between us that he shall not pay the 100 *l.* and redeem the Rent, and that Clause be put in only to evade the Statute; then the Contract is usurious, and the Deeds or Assurances thereof void. *Et sic de similibus. 5 Co. 69.*

If one borrows 100 *l.* after the Rate of 5 *l.* *per Cent.* and the Borrower afterwards pays Part of the Principal and all the Use within a Year, and the Lender receives it, or the Lender sues for his Money within the Year; these subsequent Acts do not make the Contract, or Deeds or Assurances thereof, void; for it is a Rule, That *if the original Contract be not usurious, no Matter ex post facto can make it so.* *Per Cur., Hil. 7 Jac. B. R.*

If one borrows of me 10 *l.* and binds himself to pay me at a Day, and moreover binds himself, that if he pays it not by the Day, that he shall pay me 20 *l.* for it; this Contract, and the Deed for Perfection of it, are good; for this is not usurious, for all Obligations with Conditions for Payment of Money lent are of this Nature. And yet if one borrows 100 *l.* of me, and for this mortgages Land to me of a greater Value than 5 *l.* *per Ann.* on Condition that he pays the Money any Time before the Year's End, that then the Assurance to be void; this should seem to be an usurious Contract, for in this Case I am sure to have by the Agreement more than after the Rate of 5 *l.* *per Cent.* but it is not so in the last Case before. *Bro. Obl. 79.*

If one borrows 100 *l.* for a Year, and gives the Broker 20 *l.* to procure it; this will not make the Contract usurious, nor the Assurances void; but for this the Broker may be punished. *Per Just. Bridgman, Hil. 7 Car.*

S E C T. V.

Where a Deed good in its Creation, may become void, or become fraudulent, by Matter ex post facto, or not.

(A) *By the Cause or Consideration of a Grant's failing.*

WHEN the Cause of a Grant fails, and the Thing granted is executory, the Grant is become void: As if one grants an Annuity for an Acre of Land for Tithes, or for Counsel; in this Case *pro* is conditional, and therefore if the Land be evicted by an elder Title, or the Grantee disturbed in the Tithes, or he refuses to give Counsel, the Annuity is determined. But if a Feoffment, or Lease for Life or Years be made of an Acre of Land *pro una acra, &c.* as in the Case before; altho' the Acre be evicted, &c. yet the Grant of the Acre of Land is good: As if one grants an Annuity for Counsel, if the Grantee will not give Counsel, the Grant is not of Force. So if one grants to make new Pales in a Place for the old Pales; if in this Case he cannot have the old Pales, it seems the Grant shall not bind him to make new Pales. So if one who grants a Rent for a Way, stops the Way, the Rent shall be stopped. *Co. Lit. 204. Plow. 134. 15 E. 4 4. Dyer 76. 9 E. 4 20.*

If one has a Lease for Life or Years of a Manor to which an Advowson is appendant, grants the next Avoidance that shall happen during the Lease, or grants a Rent out of the Manor, and then surrenders the Manor, so that his Estate is gone; in this Case notwithstanding the Grant of the next Avoidance, and of the Rent continues good, the Grantee shall enjoy it according to the Grant, as long as the Estate that is surrendered should have had Continuance. 8 Co. 144, 145.

If an Annuity be granted to one until he be advanced to a Benefice by the Grantor, and the Grantor dies, and the Heir or Executor of the Grantor tenders a Benefice; this will not determine the Grant. *Plow.* 272. 15 H. 7. 1.

If *A.* be Lessee for Years of an Advowson, and grants the next Avoidance to *B.* if it shall happen to become void during the Term, and *A.* surrenders the Term to *C.* who has the Inheritance, and the Church becomes void before the End of the Term; in this Case the Grant is good to *B.* and he shall have the next Avoidance, for a Man cannot derogate from his own Grant. So if *A.* be Lessee for Years, and he grants a Rent-charge to a Stranger, and after surrenders his Term to the Lessor; in this Case altho' the Term be extinct, yet the Rent continues, and the Stranger shall have it during the Term. So if *A.* has a Rent-charge out of the Land of *B.* and acknowledges a Statute to *C.* and then releases the Rent to *B.* in this Case altho' the Rent be gone as to *A.* and *B.* yet it is *in esse* as to the Conusee, and he may extend it. 8 Co. 145. 7 Co. 39.

If a Man be seised of a great Wood, and grants to *J. S.* six hundred Cords of Wood out of the same Wood, to be taken by the Assignment of *A.* in this Case if *A.* will not upon Request assign where the Wood shall be taken, yet the Deed will not lose its Effect, but *J. S.* may take it without Assignment. 5 Co. 24.

If *A.* be Lessee for Life, on Condition to have Fee, and he makes a Lease to *B.* for Years, and after he performs the Condition, and so his Estate for Life is turned into a Fee-simple; in this Case the Lease for Years is good notwithstanding: But otherwise it is in Case of the King. 7 Co. 14.

If a Tenant in Tail infeoffs *B.* on Condition, to the Use of *A.* in Fee, and *A.* has granted a Rent-charge, or acknowledged a Statute, which by the Statute 1 R. 3. c. 5. was extended, and after *A.* had performed the Condition; in this Case altho' the Estate had been changed, yet the Interest of the Grantee or Conusee had continued. 1 Co. 147, 148. 11 H. 7. 21.

If *A.* be Tenant for Life, the Remainder to *B.* in Tail, the Remainder to *A.* in Fee, and *A.* grants a Rent-charge, or acknowledges a Statute, and dies; in this Case and hereby the Grant is not become void. But if *B.* dies without Issue, the Heir of *A.* shall be charged. 5 Ed. 4. 2. *Petbouse* and *Carne's* Case, *M.* 36 & 37 *El.* C. B.

If a Corody be granted for a Service to be done, the Omission of the Service determines the Corody. *Davis's Rep.* 1.

If one grants Lands with his Daughter in Frank-Marriage, or Goods with his Daughter in Marriage, and after the Marriage is dissolved, and they are divorced; in this Case the Grant is now become of no Force. *Cessante causa cessat effectus.* 20 Ed. 4. ult. *Dyer* 13, 120.

(B) By Rasure or Interlining.

IF a Deed that is well and sufficiently made in its Creation shall be afterwards altered by Rasure, Interlining, Addition, Drawing a Line thro' the Words, (tho' they be still legible) for by Writing new Letters upon the old in any material Place or Part of it; as if it be in a Deed of Grant in the Name of the Grantor, Grantee, or in the Thing granted, or in the Limitation of the Estate; or if it be in an Obligation, when the Word (*Heirs*) shall be inserted, or the Sum increased, or in the Date of either, or the like, be the same either by the Party himself that has the Property of the Deed, or any other whomsoever, except it be by him that is bound by the Deed; and be the same with or without the Consent of him to whom it is made or does belong; in this Case, and by either of these Means, the Deed has lost its Force, and is become void. And if the Alteration be made by the Party himself that owns the Deed, altho' it be in a Place not material, and that it tends to the Advantage of the other Party, and his own Disadvantage, yet the Deed is hereby become void; but if the Alteration be made by the Party himself that is bound by the Deed, in any

any material or immaterial Part thereof; or a Stranger, without the Privy or Consent of the Owner of the Deed, shall make any such Alteration in any Part of the Deed not material; as if it be a Deed of Grant containing a Lease for Years, and there be inserted between, *To have and to hold, and for thirty Years*, these Words, *from henceforth*; or if it be an Obligation, and there be inserted, between *obligo me* and *per præsentes*, these Words, *Executores meos*; in both which Cases these Words are needless, and without any Fruit at all; hereby the Deed is not hurt, but it remains good notwithstanding. But if the Alteration be before the Delivery of the Deed, be it whatsoever or by whomsoever, it will not hurt the Deed. 11 Co. 27. 5 Co. 119. Dyer 59, 261. Perk. §. 123, 135. Kelw. 162. Fitz. Release 27. 14 H. 8. 25. Bro. Fait 9.

And observe, that a Rasure, &c. is most dangerous, and the Deed thereby most suspicious when it is in a Deed Poll, and there is but one Part of the Deed; and when the Rasure or other Alteration is in any material Part of the Deed, and when the Alteration makes to the Advantage of him to whom the Deed is made, and to the Disadvantage of the other that made it, and when there appears some other Thing to be written before, and when there is no other Part of the Deed, Recital, Defeasance, or other Matter to which this may be compared, and that may make it appear to be before the Delivery; and when there are other Parts of the Deed, or other Matters whereunto this being compared does not agree in that Part wherein the Alteration is, and when the Deed has been in the Smoke, or any such like Means has been used to cover the Alteration. Perk. §. 123, 124, 127, 128, 129. Bro. Fait 6.

And in these Cases the Matter was antiently used to be tried by the Judges upon the View of the Deed, but it is now used to be tried by Jurors, whether the Rasure or other Alteration were before the Delivery of the Deed, or not. Co. Lit. 225.

(C) *By breaking or defacing the Seal.*

AND if after the Sealing, Delivery and Perfection of a Deed, the Seal thereof happens to be broke off, or to be utterly defaced, so that no Sign or Print thereof can be seen, or it appears to have been broke off and is glued, or the Wax new heated and set on again, or the Label of the Deed has been broke off from the Deed, and is sewed on again, or the Deed is now sealed with other Wax, be the same by whatsoever Means or whomsoever, unless it be by him and his Means that is bound by the Deed; in these Cases, and by either of these Means, the Deed is become void. But if any Piece of the Seal remains fixed to the Deed, and there be any Print left upon that Piece, the Deed continues good. And if after the Seal of the Deed is broken off the Party that sealed it seals and delivers it *de novo*, by this Means the Deed is become good again. Dyer 59. 11 Co. 28. 5 Co. 23. Dyer 112. Perk. §. 135, 136. Bro. Obl. 83.

(D) *By Re-delivery or cancelling it.*

AND if a Deed be delivered up to the Party that is bound by it to be cancelled, and it be so, or if he that has the Deed by Agreement between him and the other cancels the Deed, by either of these Means the Deed is become void; but if an Obligee delivers up an Obligation to be cancelled, and the Obligor does not afterwards cancel it, but the Obligee happens to get it again into his Hands, and sues the Obligor upon it, the Obligor has not any Plea to avoid it, for the Deed remains still in Force. Trin. 38 Eliz. C. B. Dyer 112.

(E) *By Disagreement and Refusal.*

AND if an Obligation be delivered as an Escrow to a Stranger, to be delivered to the Obligee on certain Conditions; or to a Stranger to the Use of the Obligee, and when this is after tendered to the Obligee he refuses it and disagrees to it; or if an Obligation be made to a Feme Covert, and her Husband disagrees to it; in all these Cases the Deed is become void. And the like Law is of other Deeds in such like

like Cases. But the Party bound by the Deed may not in these Cases plead *Non est factum*. And in these Cases when the Party has once by his Agreement made the Deed good, he cannot afterwards by his Disagreement make it void; and when once by Refusal and Disagreement he has made the Deed void, he cannot by Agreement or Acceptance afterwards make it good. 3 Co. 26. 5 Co. 119. Dyer 167.

Also a Feoffment, Grant or Lease in Writing, may become void by Disagreement or Refusal: And this may be either by the Disagreement of the Party himself to whom it is made, or by the Disagreement of another: *Of the Party* himself, for no Estate can be made to a Man of any Thing in Fee-simple, for Life, or otherwise, against his Will; and therefore by his Disagreement or Refusal of it, the Estate itself, and the Deed whereby it is conveyed, may become void. By the Disagreement of *another*, as the Husband in Case of a Feoffment, &c. made to his Wife, may by Disagreement avoid it. And for the first of these the Law is thus: That all such Acts that give Estates directly or by way of Use are good at first, and the Things granted when the Deed of the Grant is delivered to his Use, shall vest in the Grantee before he has Notice of the Grant, or agrees to accept of the Thing granted; so that if Lands be limited to a Man by way of Use, or granted immediately by Feoffment, Gift, Grant or Lease; or Goods or Chattels be given or granted to a Man; in these Cases the Things granted shall be said to be in the Grantee, and the Grant good before Notice and Agreement until Disagreement. And before Agreement the Grantee may waive it, and so avoid the Estate and the Deed also whereby the Estate is made. And if it be but a Lease for Years that is made, he may waive and avoid that by Word of Mouth in the Country, as well as a Gift of Goods, or an Obligation delivered to his Use. But if it be an Estate of Freehold that is made by Feoffment, &c. he cannot waive and avoid that but in a Court of Record. 3 Co. 26, 27. 5 Co. 119. Doct. & Stud. 119. Perk. §. 44, 45. Fitz. Donne 4, 5. Bro. Donne 29, 30, 59.

Deeds or Settlements solemnly executed are not to be set aside by the Party's Parol Expressions declaring against it. 1 Will. 482.

(F) *By Judgment of a Court.*

A Deed also good in its original Creation may be afterwards damned or avoided by Sentence and Order of a Court, and this formerly was usually done in the Star-Chamber and in the Chancery; and it is when it appears that the Deed was obtained by some Fraud, Force, Circumvention, or such like Practice, or when it appears to be forged, or the like. Crom. Jur. 29, 40. Bro. Fait 38.

(G) *By Forfeiture.*

AND a Feoffment, Grant or Lease, and the Estate thereby made, become void by Forfeiture, or upon a Breach of a Condition, or by a Limitation.
For which see of **Conditions**, and **Deed declaring Uses**, before.

S E C T. VI.

Of fraudulent and void Wills in general.

BY Stat. 3 & 4 W. & M. c. 14. All Wills concerning Lands, or any Rents, Profits, Term or Charge out of the same, whereof the Devisors shall be seised in Fee-simple, in Possession, Reversion or Remainder, shall be deemed to be fraudulent and void against Creditors upon Bonds or other Specialties, their Executors, Administrators, &c.

S E C T.

S E C T. VII.

Where a Will or Testament good in its Creation and Beginning may become void by Matter ex post facto, or not.

(A) *By Countermand or Revocation.*

A Will or Testament sufficient and good in its Creation and Beginning may afterwards become void by divers Means, as first by Countermand or Revocation; and this is sometimes by the Party himself who made it, and sometimes it is by another; and sometimes it is expressed, and sometimes implied; for it is a Rule, That *any Act or Thing done, or Words spoken (but now a Revocation must be in Writing) by the Testator after the Testament made, that alters or crosses all or Part of his Testament made before, is a Revocation of it, or of that Part thereof that is so crossed and altered:* And therefore if a Feme Covert makes a Will, and after takes a Husband, by this the Will is revoked. And if a Man makes a Will of Land, and after makes a Feoffment of the same Land, which is not good for some Defect in the Livery of Seisin, or otherwise, so that notwithstanding it the Feoffor dies seised of the Land, hereby the Will as to this Land is revoked. So if a Man makes a latter Will, and therein by express Words revokes the former Will; or if a Man by any Writing expressly revokes a former Will, and makes no new Will, (for so a Man may do, and die Intestate if he will); or if a Man makes a latter Will, and makes no mention of the former; all these are Revocations of the former Will. And altho' in the former the Executor be appointed simply and without Condition, and in the latter he be appointed conditionally, and the same Condition is also broken, so that the Condition be of something then to come at the Time when the Condition was made; but if the Executor of the latter Testament be made upon some Condition then present or past, the Condition not existing, the former Testament is not revoked; and altho' the former Will be made irrevocable, *i. e.* if the Testator says, *I make this my last Will and Testament irrevocable;* and altho' the Testator has sworn not to revoke the former, the Oath being also revoked together with the Will; and altho' the Testator enters into an Obligation with Condition not to revoke it; but then in this Case he forfeits his Obligation.

But the latter Will does not revoke the former in the following Cases:

First, *When the latter is imperfect in Respect of a Will, i. e.* When the Testator dies whilst he is making it, and before he can finish it, or when it is vehemently suspected that the Testator was compelled to make the latter by Fear or Violence, or induced to make it by Fraud and Deceit, or when the former was made by the Testator whilst he was in good and perfect Mind and Memory, and the latter is made by him when he is *inops mentis*; or when the latter is made by the Persuasion and for the Benefit of certain Persons, when the Testator is in Extremity of Sicknefs, unless it appears plainly to be the express Will of the Testator to revoke the former, or unless the Testator himself did dictate the latter, or in case the latter be in Favour of the Children of the Testator, or others who have the Administration of his Goods if he dies Intestate.

Secondly, When the Testator makes two Wills, a former and a latter, both being written, and afterwards lying sick upon his Death-Bed, they are both presented unto him, and he is desired to deliver to one of the Standers by, which of them he will have to stand for his last Will, and he delivers the former.

Thirdly, When the latter agrees in all Points with the former, for then both of them are as one in divers Writings.

Fourthly, When in the latter there is no Executor named, for then it is but a Codicil or Addition to the former.

Fifthly, When the latter is made upon some sudden Discontent against the Executors of the former, and afterwards he and the Executors are reconciled again; in these and such like Cases the latter Will is no Revocation of the former. If the Husband licences his Wife to make a Will, and after her Death he forbids the Probate, this is a Countermand of the Will.

But note, That Revocations in general are not favoured in Law, and therefore he that will avoid a former Will must see he proves it well. 4 Co. 61. Lit. §. 168. Plow. 344, 341. Swinb. Part 7. §. 14, 15. Perk. §. 478. 3 Co. 36. 8 Co. 82, 83. Dyer 310. 34 Eliz. B. R. Burton's Case.

(B) *By cancelling it.*

A Good Will may become void by Cancelling or other Destruction of it, as where the Testator himself, or some other by his Order, cuts or tears it in Pieces, defaces it, or throws it into the Fire; by this Means the Will is made void, except where the Testator does it unadvisedly, or it be done by some other without his Consent, or by some Casualty, or when he willingly pulls away the Seal, and then afterwards seals it again; or where the whole Will is not cancelled or defaced, but some or the chief Part thereof, as naming the Executor, or the like; for it is good still for the Residue; or where there are several Papers or Writings containing the whole Will, the Cancelling or Defacing some of them does not hurt the Will, unless it can be proved that the Testator's Mind was to avoid it all; or where the Will is lost in the Life-time of the Testator, or after; for in this Case, so much as can be proved by Witnesses is still in Force. Swinb. lib. 7. §. 16.

(C) *By Alteration of the Estate of the Testator.*

A Good Will may become void by Alteration of the Testator's Estate; as when a Man after the Time of making the Will, and before his Death is convicted or condemned of some great Crime, for which the Law deprives him of making a Will, as Treason, Felony, or the like. And yet if the Crime be pardoned and purged before his Death, the Will may be good enough. And if a Man of sound and perfect Memory makes his Will, and after becomes *inops mentis*, as every Man for the most part is before his Death; this does not hurt the Will. Swinb. lib. 7. §. 17. 4 Co. 62.

(D) *By Intention to alter it.*

A Good Will may become void by an Intention only to alter it, when the Testator is hindered in his Intention that it cannot take Effect: If therefore when the Testator intends to alter his Will, or to make a new one, he be by Fear or Fraud forbidden or letten, that he dares not, nor cannot alter it, or the Writer or Witnesses dare not, or may not be suffered to come to him; as when a Wife, or some other that is to have Benefit by the former Will, under Pretence that she has a Charge from the Physician, that none shall come at him, or under Pretence that he is asleep, or the like, will not suffer any Body to come at him; or when the Notary and Witnesses are all present, and they make such a Noise quarrelling that they hinder the Effect of his Intent; or when the Testator is kept from doing it by importunate Requests and flattering Perswasions; in all these Cases, and by these Means, the former Testament may become void. But if it appears that the Testator does not purpose to alter the Will when he is let as aforesaid, the Fear is a vain Fear, the Testator is prohibited at another Time; and not at the Time when he intends to alter the Will, but he has sundry Opportunities after that Time to do it, and does it not, or he is drawn only by the fair Speeches of a Wife or Friend, or by the Weeping, or other Trouble arising from the Grief of the Legatary or Executor for the Testator's Sickness only he is disturbed; in these Cases perhaps it may not be void. And where it is void by the Prohibition of a Legatary only, it is void for so much as concerns him only, and not for the Rest of the Will. Swinb. Part 4. §. 18.

(E) *By*

(E) *By making another of the same Date.*

A Good Will may become void by making another of the same Date; for if two Wills be found after the Death of the Testator, and it cannot be discerned or proved which was made former or latter; the one overthrows the other, and both are void, except they be both to the same Purpose, or one of them be made in Favour to Wife and Children, &c. and the other to Strangers. And yet in the first Case also the Testator, by Declaration of his Mind, which of them he will have to take Effect, may make either of them good. *Swinb. Part 7. §. 11. Perk. §. 479.*

(F) *By the Declaration of the Testator.*

A Good Will may be made void by the Declaration of the Testator's Mind; as if a Man has two Wills lying by him, the one made after the other, and they are both shewed or delivered to the Testator when he lies sick, and he by Word or Sign declares that he will have the former to stand; this Declaration revokes the latter, and affirms the former. And where a Man would revoke a Will for any of these Causes, he must presently after the Death of the Testator put in a Caveat or Exception in the Court where the Will is to be proved, and thereupon proceed to question it, or by a Prohibition in some Cases he may stay the Probate in the Spiritual Court.

S E C T. VIII.

Where and by what Means a Feoffment, Gift, Grant, Lease, &c. or the Estate thereby made being void or voidable at the first, &c. may become good by Matter ex post facto.

A Deed of a Feoffment, &c. in some Cases is helped, and a Fault therein cured by making of Livery of Seisin. But an Attornment will not help the Grant of a Reversion, &c. for it is a Maxim in Law, That *Attornment cannot make a void Grant good.*

If a Tenant in Tail makes a Lease for Life or Years of Land, and this Lease is voidable, and after the Tenant in Tail suffers a common Recovery of the Land to whomsoever it be; by this the Lease is affirmed and made good during the Term, as well against the Issues and Heirs by the Intail, as against him in Reversion or Remainder. And so it is of a Charge of Rent upon the Land. And if Tenant in Tail makes a Lease of Land, or charges it, and after levies a Fine of the Land to a Stranger; by this the Lease or Charge is become good against the Issue in Tail also. *1 Co. Capel's Case. Dyer 373. 1 Co. 48, 76.*

If Tenant in Tail makes a Lease for forty Years, rendring Rent, and dies, and his Issue leases to another by Indenture for twenty-one Years, rendring Rent, to begin after the Expiration, Forfeiture or Surrender of the first Lease; it is said this confirms the first Lease: *Sed quære.* So held in *Scaecario, Hil. 16 Jac.*

Acceptance of Rent reserved on a Lease for Life or Years, which is voidable only, and not void, may make the Lease good.

A Feoffment, Gift, &c. that is made by Duress or Menace, and therefore voidable, may by another Deed of Defeasance afterwards made between the same Parties become good. *Bro. Defeasance 17.*

Also Grants, Leases, and the Estates thereby made that are not good, may be made good and perfected by Release or Confirmation. *For which see Release and Confirmation.*

Altho' a Deed appeared to be cancelled, it was decreed to be a good Deed, and that the Cancelling should not devert the Estate out of Trustees, &c. And in the *Lady Hudson's Case*, where the Father having taken Displeasure at his Son, made an additional Deed of Jointure on his Wife, but kept it in his Power, and being afterwards reconciled to his Son, cancelled the additional Jointure; yet the Wife after his Decease having found the cancelled Deed, recovered by Virtue of it. So where two

Settlements

Settlements were made of an Estate, and the former was never published, but found amongst waste Papers; the Parties claiming by the second Deed could not be relieved against the first Settlement. *Clavering's Case*, 2 Vern. 473, 476. 2 Ch. Rep. 100.

S E C T. IX.

Where a Will void or voidable in its Inception may become good by some Matter or Accident ex post facto, or not.

IF a Feme Covert without her Husband's Leave makes a Will of her Husband's Goods, and the Husband after her Death connives at the Probate, and delivers the Goods accordingly, hereby the Will of the Wife is become good; but if an Infant or mad Man makes a Will in the Time of his Infancy or Madnefs, and after the Infant or mad Man becomes of full Age, or sober, before his Death; these Wills are void. And yet if the Infant at his full Age, or the mad Man when he is sober, makes a Publication of this Will, it may perhaps be good. *Perk. §. 501. 1 Co. 99. 2 Co. 55.*

If a Man makes a former and a latter Will, and by the latter the former is revoked, and after the Testator declares himself that the former shall stand; by this the former that was void before, is now become good again. And yet if a Man makes a Will that is void, and it be proved after his Death, this Probate will not make it good, but it remains void as it was before. If a Feme Sole makes a Will, and then takes a Husband, whereby the Will is countermanded, and so become void; if her Husband dies, so that she becomes Sole again; this Accident will not make the Will good again, but it remains void still; but perhaps by a new Publication after she becomes Sole, it may become good again. *Perk. §. 479. 4 Co. 61. Plow. 344.*

S E C T. X.

When and where a Deed may be good in Part, and void in Part; or good against one Person, and void against another, or not; or good for one Time, and void for another.

AS to these Matters, observe these Differences:

First, When a Deed is void *ab initio*, and when it becomes void *ex post facto*.
Secondly, When the Deed which is void in Part from the Beginning, is intire, and when it consists of several Clauses; and when it consists of several Clauses, when the several Clauses are absolute and distinct; and when they are several, and yet the one has Dependancy upon the other: For if any of the Covenants of an Indenture, or the Conditions of an Obligation be against Law, or the Rest of the Covenants or Conditions be good and lawful; in this Case those that are against Law, and the Deed as to that Part, are void *ab initio*, and the Rest of the Deed is good *ab initio*. So if three distinct Obligations are written upon a Piece of Parchment, and one of them only is read to the Obligor, and he being an illiterate Man seals and delivers the Deed; in this Case this is a good Deed for that which was read, and void for the Rest *ab initio*. But if an Obligation be for 20 l. and it be read to the Obligor an Obligation of 20 s. this is void for the Whole *ab initio*. 11 Co. 27. 14 H. 8. 27, 28, 29.

If a Deed be read as containing the Grant or Gift of an Estate-tail and Letter of an Attorney to give Livery of Seisin, and in that Sense the Party seals it; and in Truth it is a Feoffment and Conveyance of an Estate in Fee-simple; in this Case altho' the Letter of Attorney were truly read, yet because it has the Dependance on the Estate, it is void for all. 11 Co. 27. *Kelw. 70.*

If a Man be indebted to me 20 l. on a Contract, and 100 l. on an Obligation, and he pays me this 20 l. and I am to make a Release for it, and the Intendment of the Release is no more; and it is so read to me, being an illiterate Man; but in Truth it is a general Release; in this Case it is good for so much as it is intended and was declared, and void for the Rest. 11 Co. 28. *Fitz. Feoffments and Fairs 57. 47 E. 3. 3.*

If the Condition of an Obligation be altered by Rasure, &c. the Obligation also is thereby become void, because the Condition and Obligation are one Deed; but if the Rasure, &c. be in the Defeasance of an Obligation, this will not make the Obligation void. *Dyer 27.*

If a Deed contains divers distinct and absolute Covenants; and any of these Covenants be altered by Addition, Interlineation, Rasure, or the like; by this Means the whole Deed, and not that Part only, is become void. *14 H. 8. 25, 26. 11 Co. 28.*

If there be divers Grantors, Obligors, &c. named in a Deed, and one of them only seals the Deed; this is a good Deed as against him that seals it, and void as to all the Rest that do not seal it.

And if several enter into Covenants by a Deed severally, and the Seal of one of them is broken from the Deed; in this Case the Deed is good still as to all the Rest, but void as to him. But if an Obligation, or the Covenants of a Deed, be joint and not several, or joint and several, and the Seal of one of the Obligors or Covenantors is broken, or the Obligation or Covenants be altered by Rasure, or the like, thereby the whole Deed is become void. *5 Co. 23. 11 Co. 28. 3 H. 7. 5.*

By a Power of Revocation or a Condition a Deed may be made void in Part, and continue in Force for another Part; and therefore it seems in the usual Case where a Deed is made upon Condition that if such a Thing be or be not done, that the Deed shall be void, or that these Presents shall be void; that in these Cases the whole Deed and all the Covenants therein contained are void: But if the Frame of the Condition be, that upon such a Thing to be or not to be done, it shall be lawful for the Feoffor, Lessor, &c. to re-enter, or that the Demise shall be void without more Words; in these Cases the Estate only, and those Covenants that are incident thereunto, as for quiet enjoying, and the like, and the Deed as to that Part only, is void; and for other Covenants that are collateral, and have no Dependence upon the Estate, that the Deed remains in Force, and is good still; for a Man may grant two Acres upon Condition to re-enter upon one of them. If it be intended that the whole Deed shall be void, the best way is to use these Words, *Then these Presents and every Thing therein contained shall be utterly void.* *1 Co. 173. Dyer 127.*

A Feoffment may be good against some Persons and void against others, but cannot cease and revive, and be good and void at several Times, as a Lease for Years, or a Grant of Rent, &c. may in many Cases; for a Grant may be suspended, and a Lease for Years may cease and revive again; as if Tenant in Tail makes a Lease for Years, rendering 20 s. Rent, and after takes a Wife and dies without Issue, and he in Reversion or Remainder endows his Wife (as he may); in this Case the Lease as against the Woman is revived, altho' it be void as to him in Reversion or Remainder.

So if Tenant in Tail makes a Lease for Years, and dies without Issue, his Wife *enseint* with a Son, and he in Reversion enters, and after the Son (being Heir to the Intail) is born; in this Case the Lease which was before avoided by him in Reversion, if it be such a Lease as is warranted by the Statute, it is good against the Issue in Tail, and therefore is revived again. So if Tenant in Fee-simple takes a Wife, and then makes a Lease for Years and dies, and the Wife is endowed, she shall avoid the Lease for her Estate, but after her Death the Lease will be in Force again. But if the Patron grants the next Avoidance, and after the Parson, Patron and Ordinary, before the Statutes, had made a Lease of the Glebe for Years, and after the Parson had died, and the Grantee of the next Avoidance had presented a Clerk to the Church, who had been admitted, instituted and inducted, and had died within the Term, and the Patron had presented a new Clerk to the Church, who had been admitted, instituted and inducted; in this Case the Lease had not revived again, no more than if a Feme Covert levies a Fine alone, and the Husband enters and avoids the Fine, the Estate shall revive against the Wife after his Death, for it is avoided as to her also as well as to the Husband by his Entry. *Co. Lit. 46. 7 Co. 8.*

S E C T. XI.

In what Cases a Man may avoid his own Grant, &c. or not, and at what Time.

IF one Man grants to another an Office of Charge only, to which there is no Benefit or Fee incident; in this Case he may avoid and determine his own Grant at his Pleasure without any Cause given. But if there be any Fee or Profit incident to the Office, then he may not avoid the Grant of it, or put out the Officer without some Cause of Forfeiture; and if he does, the Grantee may have an Assise. And yet in this Case also he may put him out of the Office, altho' he may not deprive him of the Fee or Profit incident thereunto. *Bro. Grant 103.*

If one makes a Lease for Years of his Land rendring Rent, and after grants the Rent to *J. S.* and the Termor attorns, and after the Lessor accepts of a Surrender of the Estate of the Termor; yet this does not avoid the Grant of the Rent, but the same shall continue still. *Bro. Grant 128.*

If a Disseisor grants a Rent, Common, or other Profit appender out of the Land, and after the Disseisee enters and infeoffs him of the Land; in this Case the Rent is avoided, and the Common is gone. But if the Disseisee releases the Disseisor, in this Case he shall not avoid his own Grant. *Lit. §. 477.*

An Infant, and others disabled, may impeach and avoid their own Grants in divers Cases; *which see before in Grants.*

Where a Feoffment, Gift, Grant or Lease, is voidable in some Cases, it may be avoided by the Party himself that made it, and not by others altho' they be Privies; as Heirs, Executors or Administrators; and in some Cases it is voidable by others, and not by the Party himself and by others. And in some Cases it is avoidable only at some Times, and in some Cases it is avoidable at all Times: As for Example, An

Infant.

Infant if he grants by Fine must avoid it during his Minority, if he lives to be of full Age, otherwise he himself or any other shall never avoid it. But if he grants by Deed, this may be avoided at any Time by himself, his Heirs, Executors or Administrators, or his Guardian in his Right, as the Case is. But a Lord by Escheat cannot

Feme Covert.

avoid a voidable Estate made by his Tenant, being an Infant. And if a Woman Covert does any such Act by Deed, it may be avoided by her Husband during the Coverture, or her Heirs, &c. that are Privies after her Death. And if a Man *De non sane*

De non sane
memorie.

memorie does any such Act, it may not be avoided by himself that is the Party denying it, but it may be avoided by his Heirs, &c. that are Privies. And if Tenant in

Tenant in
Tail.

Tail makes a voidable Lease not warranted by the Statute, he may not avoid it himself, but his Issue may. And if a Corporation Spiritual, Sole or Aggregate, make Leases not warranted by the Statutes, they may not avoid it themselves, but their Successors after their Death, Translation, or other Remotion, may avoid it; or if a Bishop makes such a voidable Lease, the King when the Bishoprick doth come into his Hands, may avoid it. *Co. Lit. 78, 45. 7 Co. 8. Dyer 337, 239.*

Corporations.

S E C T. XII.

Where Defects and Mistakes in Deeds may be supplied and amended, or not.

A Defect in a voluntary Conveyance generally, shall not be supplied in Chancery; but if a Man voluntarily makes a Settlement as a Provision for his Children, and for their Maintenance, such a voluntary Conveyance shall be made good in Equity. *1 Vern. 40.*

Defective Deeds, Conveyances, Securities, &c. have been made good in Equity in divers Cases, for which see *2 Vern. 3 Mod. Ca. in Law 3 Eq. 63, 68, 152. Abr. Ca. Eq. 23, 170.*

A. having two Nephews, who were his Heirs at Law, by Conveyance executed in his Life-time, settled all the Lands to the Use of himself for Life, Remainder to his Issue, if he should happen to have any, Remainder to his Nephews; but in the Enumeration of the Particulars of the Lands a Mistake was made, but the Conveyance being merely voluntary, the Court refused to amend it, but left the Land to descend equally between them. *1 Vern. 37, 38.*

The reciting Part of a Deed is not a necessary Part either in Law or Equity; it Recitals. may be made use of to explain a Doubt of the Meaning of the Parties, but hath no Effect or Operation; and let a Deed be never so ill drawn, and the Mistakes and Misrecitals ever so many, yet if the Deeds were really executed by the Party, all this will not be a sufficient Ground in Equity to set aside this Deed. 3 Chan. Ca. 101, 118.

C H A P. VIII.

General Rules for the Exposition of Deeds and Wills.

S E C T. I.

Of Deeds.

IN the Construction of Deeds it must be considered,

First, How a Deed in the Gross shall be taken and enure.

Deeds in
Gross.

And Secondly, How it shall be taken and expounded in the several Parts and Pieces of it.

And as to the first these Rules are to be known:

1. If several join in a Deed, and some are able to make such a Deed, and some are not; this shall be said to be the Deed of those alone who are able. And so Ability of Persons. *e converso*, if a Deed be made to one that is incapable, and to others that are capable; in this Case it shall enure only to him that is capable. Co. Lit. 302. Perk. §. 66.

2. It shall enure as much as may be according to the apparent Intent of the Parties. Intent of the Parties. *Finch's Law* 58.

3. A Deed that is intended and made only to one Purpose may enure to another; Purpose and Effect intended. for if it will not take Effect that way, it is intended it may take Effect another way. *Vide Dyer* 251. 2 Co. 35. Co. Lit. 49.

Where a Conveyance will not take Effect the way it was intended, there rather than it should have no Effect, it shall pass by another way than what the Parties designed. *Lucas* 35.

And shall never be void where the Words may be employed to some Intent. *Plow.* 160. b.

4. When a Deed is made it shall enure as it may, and so as it may have and take Effect. the most and best Effect that may be according to Reason. *Vide Plow.* 140, 59. Co. Lit. 302.

In Conveyances we are to Respect two Things, the Form and Effect of them; and in all Cases where the Form and Effect cannot stand together, the Form shall be rejected, and the Effect shall stand. 2 Leon. Case 23. p. 17.

5. When a Deed may enure to divers Purposes, he to whom the Deed is made shall have Election which way to take it, and he may take it that way as shall be most for his Advantage. Co. Lit. 301. *Dyer* 251. Election.

6. The Words of an Indenture are the Words of both Parties. Cro. Jac. 398. pl. 4. Words. *Lucas* 47, 48. Tho' they are spoken as the Words of one Party, yet they are not his Words only, for he has the Consent of the other Party to every one of these Words. *Plow.* 134.

But not so in a Deed Poll, for they are only the Words of the Grantor, and shall be taken most strongly against him. 1 *Plow.* 134. a. 2 *Rob. Abr.* 65. Co. Lit. 146. *Lucas* 47.

7. If one has divers Estates in Land, and he makes any Charge or Grant upon or Charge out of out of it; this shall issue out of all his Estates. And if one has a Possession and an Estates. antient Right, and grants a Rent-charge out of the Land, or makes a Lease of the Land; this shall issue out of both the Estates, and it shall enure from him having several

several Estates, as it shall enure from several Persons having the same Estates. *Quando duo jura concurrant in una persona æquum est ac si essent in diversis.* Vide Perk. §. 592.

Rent-charge
enures by Ex-
tinguishment
or Grant.

8. If one that has a Rent-charge out of a Manor by Grant, reciting his Grant, grants the same Rent to a Lessee for Life of the Manor out of which the Rent issues, to have and receive to him and his Heirs, and surrenders to him the Deed; this shall not enure to extinguish the Rent but by way of Grant, of which the Heir of the Lessee for Life may take Advantage, if he does not by granting away the Rent, purchasing the Reversion of the Manor, or making a Feoffment of the Manor, and thereby committing a Forfeiture, or by some such like Means prejudice himself; for by these Means the Rent will be extinct and determined.

Office of the
Court.

9. It hath been held, that the Construction of Deeds is the Office of the Court, and that the Contents are not to be proved by Witnesses, but only the Fact touching the Execution. 3 Ch. Rep. 94.

Deeds in se-
veral Parts.

Secondly, For the Construction in the several Parts there are some Rules in general:

Minds of Par-
ties.

1. That the Construction be favourable, and as near the Minds of the Parties as possible.

Reasonable
Words.

2. That it be reasonable and according to indifferent and reasonable Understanding.

3. Too much Regard is not to be had to the Nature and proper Distinction, Signification and Acceptance of Words and Sentences, to prevent the simple Intentions of the Parties.

Parts to be
compared.

4. That one Part of the Deed be construed by and help to expound the other, and the Parts are presumed to agree with one another.

5. That the Construction be such as the whole Deed and every Part of it may take Effect to the Purpose as much as may be for which it was made.

Advantage
of Grantee.

6. All the Words in the Deed are to be taken most strongly against him who speaks them, and in most Advantage to the other Party.

Rejection of a
repugnant
Clause.

7. If there be two Clauses in a Deed repugnant one to another, the latter shall be rejected, but on the contrary in Wills.

Generally
spoken, so
understood.

8. That that which is generally spoken be generally understood, unless it be qualified by some special subsequent Words.

Words with
the Law not
against it.

9. That if Words admit of a double Intendment, and the one is with Law and the other against it, it is to be taken in that Sense which is agreeable to Law. Co. Lit. 42. a. b.

10. Wheresoever you once use the Words for your Purpose, you shall not use it for another Construction. Lit. Rep. 28, 281.

11. That Things doubtfully set down be applied to him to whom they are properly belonging.

12. That such Constructions be made of the Abbreviations as the Deed may not lose its Force.

For more concerning the Exposition of Deeds, see the sixth Chapter, under the Name of each respective Deed; and Chapter five, concerning each Part of a Deed.

S E C T. II.

General Rules for the Exposition of Wills.

Intent of Te-
stator.

1. **T**HEY must have a favourable Interpretation, and as near to the Mind and Intent of the Testator as may be, so that it be not repugnant to Law; as if Lands are devised to one and his Heirs Female, they shall take by such Devise. By whatever Words Lands will pass in a Deed, they will pass by the same Words in a Will, and the same Words that will make a Condition in a Deed will make the same in a Will.

2. A Testator being *inops consilii*, there ought to be a Construction made of his Words to answer his Intent as near as may be, appearing in other Parts of his Will. Latch 35, 96, 42. T. Raym. 456. And not by any Averment. Latch 35, 36.

3. The Words in a Will which disinherit an Heir must have an apparent Intent, and not be ambiguous and doubtful. Cro. Car. 269. Lucas 520.

4. The Law favours the Intent of the Devisor, and will not suffer his Will to be void, if by any reasonable Construction it can be made good. 2 Will. 282.

5. If

5. If the Intent be not apparent out of the Words, then it must be expounded by the Common Law. *Latch* 39, 40.

6. The Intent is to be construed by the Words of the Will, and not by any Thing *dehors*. *Latch* 42.

7. When any Chattels real or personal are given to an Executor by a Will, the Election; Executor has an Election given him by Law to have or take them in the Right of Legatee, or as Executor.

8. The Ordinary cannot refuse a Probate to an Executor, because he is an ab- Probate. fconding Person, for the Testator has trusted him, nor can he insist on Security, for he has a Temporal Right, which he cannot sue for before Probate. *1 Salk.* 299.

9. When a Devise of Goods or Chattels is well made, the Assent of the Executor Assent of Exe is necessary to the Perfection thereof, for till then the Legatee may not meddle with cutor. the Thing devised, but the Agreement of the Executor or Administrator is not necessary in a Devise of Land, and if there be many Executors, the Assent of any one is sufficient.

10. A Person that may make a Testament, or devise his Goods and Chattels, may Making an make an Executor; and any Person that may be a Devisee or Legatee may be an Executor: But if an Infant be made an Executor, he cannot meddle with the Ad- Executor. ministrations of the Goods till he be seventeen Years of Age.

11. A Person *Non compos* cannot be an Executor nor Administrator; an Admini- strator becomes Bankrupt, Administration may be revoked; but Administration shall not be granted tho' the Executor becomes Bankrupt. *1 Salk.* 36 & 39.

12. In Wills the Judges ought to know the Intent of the Parties by certain and Words; sensible Words, agreeable and consonant to the Rules of Law. *1 Co.* 35. a.

13. The Words in a Will ought to have a favourable Construction, because made sometimes *in extremis*, *inops consilii*, and shall be so marshalled to make it good, that those Words which are last shall be put first. *2 Plow.* 540. b. 541. a. 546. a.

14. An express Devise shall not be altered by doubtful Words. *Hob.* 65. *Cro. Car.* 51, 52.

15. Express Words in a Condition in a Will may amount to no more than a Limitation. *Mod. Rep.* 86. *1 Vent.* 200. *1 Brownl.* 65. *1 Rol. Abr.* 412. *Cro. Eliz.* 204. *Owen* 112. *2 Mod.* 7. *1 Lut.* 809. *3 Mod.* 32.

For more concerning the Exposition of Wills, see before Chap. 6. §. 23. Of Wills and Testaments.

10 Q

The END of the FIRST PART.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

1883

The following is a summary of the work done by the General Land Office during the year 1883. The work has been divided into three main parts: the first part relates to the land of the United States, the second part relates to the land of the States, and the third part relates to the land of the Territories. The first part of the report deals with the land of the United States, and is divided into two sections: the first section deals with the land of the United States, and the second section deals with the land of the States. The second part of the report deals with the land of the States, and is divided into two sections: the first section deals with the land of the States, and the second section deals with the land of the Territories. The third part of the report deals with the land of the Territories, and is divided into two sections: the first section deals with the land of the Territories, and the second section deals with the land of the States.

THE END

THE TABLE TO THE FIRST PART.

Abator.

A Batement, what.	Page 118
Who is an Abator.	4
An Abator is lawful Owner against all Men but the right Heir.	4
In what Time an Abator may be sued.	4
Difference between Disseisin and Abatement.	118
Estate devested by Abatement.	118

Ability.

Ability to purchase or Grant.

See Allen.

Artificers.
Attainder.
Baron and Feme.
Bastard.
Corporations.
Deaf and dumb Persons.
Ecclesiastical Persons.
Feme Covert.
Felon.
Felo de se.
Ideots.
Infants.
Lunatics.
Outlaws.
Papists.
Queen.

PART I.

Acquisition.

Of acquiring Real Estates.	Page 1 to 125
----------------------------	---------------

See Conveyance.

Descent.

Entry.

Escheat.

Forfeitures and Losses in Civil Cases.

Prescription.

Purchase.

The different Ways of acquiring or conveying Personal Estates in particular.	125
Of acquiring or conveying Personal Estates by Act in Law, by Act of the Party, or by a mixed Act.	125
The Acquisition of Property by Act in Law.	125
— By Succession.	125
— By Devolution.	125
— By Prerogative.	125
— By Custom.	126
— By Judgment.	126
— By Sale in a Market overt.	126
The Acquisition of Property by Act of the Party.	126
— By Grant.	126
— By Contract.	126
— By Assignment.	126

to R

The

The T A B L E.

The Acquisition of Property by a mixed Act, partly by Act of Law, and partly by Act of the Party.	Page 126
Of acquiring or conveying Personal Estates by Gift.	126
— By Sale.	129
— By Marriage.	135
— By Executorship.	136
— By Administration and Distribution.	155
— By Legacy.	163
— By Judgment and Execution.	171
— By Custom.	171
— By Means of Forfeiture and Losses in Civil Cases.	172
— By Means of Forfeitures and Losses in Criminal Cases.	175

See Administrators.

Custom.

Distribution.

Executors.

Execution.

Forfeitures and Losses in Civil Cases.

Forfeitures and Losses in Criminal Cases.

Gift.

Judgment.

Legacies.

Marriage.

Sale.

Administration and Administrators.

Of acquiring Estates, &c. by Administration and Distribution.	155
Administration what, and who is an Administrator.	155, 853
Kinds of Administrators.	853
By whom Administration may be granted.	155
Power given to the Ordinary by Stat. 31 E. 1.	155
How the Law was before the Statute.	155
What Alterations that Statute has made.	156
To whom Administration may be granted.	157
Letters <i>ad colligendum bona defuncti</i> .	157
Administration <i>de bonis non, &c.</i>	157
Administration <i>cum testamento annexo</i> .	157
Administrations <i>durante minori etate</i> .	157
The Power of an Administrator <i>durante minori etate</i> .	157
As to bringing Actions.	157
Selling the Goods.	157
Granting Leases.	158
Administration <i>durante absentia extra regnum</i> .	158
Administration <i>pendente lite</i> .	158
Where Administration does not cease.	158
The Interest of an Administrator in the Goods, &c. of the Intestate.	158
The Power of an Administrator.	158
The Office and Duty of an Administrator; and	

therein how, to whom, and of what Distribution is to be made. Page 159

Distribution how to be made. 159

Of bringing into Hotchpot according to the Statute of Distribution, where Provision has already been made for some of the Children. 160

Estates *pur autre vie*. 163

Estates in London and the Province of York. 163

Of the Administrator's accounting. 163

Where Administrators shall have an Action of Covenant. 407

Where Administrators are bound by the Covenant of the Intestate. 411, 412

Agreements.

What shall be said an Agreement, and what Agreement amounts to a Covenant. 380

Where Agreement has a mutual Remedy. 380

Where a Recital amounts to an Agreement. 381

Agreement of the Lessee, and Covenant of the Lessor. 381

Agreement of him to whom a Deed is made how necessary. 494

Of the Agreement of a Surrenderee to the Surrender. 812

Aliens.

Whether capable of taking by Descent. 45, 46

— By Purchase. 49, 50, 191

Persons naturalized or made Denizens when incapable to take Grants. 60

An Alien may be an Executor. 137

Whether an Alien may make a Feoffment. 534

Of a Recovery suffered by an Alien. 661

Of a Grant by an Alien. 717

Whether an Alien may be a Grantee. 719

— May make a Will. 856

Amendments.

Of amending Errors in a Common Recovery. 673

Antient Demesne.

Of a Recovery suffered of Lands held in Antient Demesne. 663

Apprentices.

Covenants concerning Apprentices. 484

Action by an Apprentice. 484

Covenant against an Apprentice, and those bound with him. 485

Against Executors of the Master. 486

Artificers.

The T A B L E

Artificers.		Of Forfeiture in Case of a <i>Felo de se</i> . Page 123	
Going beyond Sea incapable of taking by Purchase. Page 60		Of Forfeiture by Attainder of Manslaughter.	123
Exercising or teaching their Trades in Foreign Parts, incurs a Forfeiture of Lands, &c. 125		Of Attainder by Outlawry, &c.	123
Cannot be an Executor. 137		Of a <i>Premunire</i> .	124
Nor a Legatee. 165		A Person attainted may not make an Executor.	136
		But may be an Executor.	137
		Whether he may give, grant, &c.	190
Assets.		Whether an attainted Person may make a Feoffment.	534
What shall be Assets. 147		Of a Recovery suffered by one attainted.	661
		Of a Grant by a Person attainted.	717
Assignee.		— To a Person attainted.	720
Where an Assignee shall be intitled to an Action of Covenant. 408, 409		Whether a Felon may make a Will.	856
Where the Assignee shall be liable to an Action of Covenant. 411, 412, 413, 414, 415			
How far an Assignee is chargeable with Rent, &c. 786		Attorney.	
		Who may be an Attorney to make Livery of Seisin. 365	
Assignment.		Attornment.	
How a Term may be assigned by a Trustee who was never in Possession. 15		Of Attornment. 734	
Covenant that the Lessee shall not assign. 466		Attornment what. 734	
Assignment what, the Assignor and Assignee who. 784		The Kinds of Attornment. 734	
Things requisite in an Assignment. 784		The Effect of Attornment. 734	
Of what an Assignment may be made or not. 784		In what Cases the Attornments of Tenants is necessary or not, and void or not. 734	
How far a Grantor or Grantee, Lessee or his Assigns, are chargeable before or after an Assignment made, with the Rent, &c. 786		By whom an Attornment may and must be made or not. 735	
		To whom an Attornment may and must be made or not. 736	
		At what Time an Attornment must be made. 736	
		How to make an Attornment, and what shall be said a good Attornment or not. 736	
Attainder.		Attornment for Part of the Grant good for the whole. 737	
Whether any may be Heir to a Man convicted of Treason or Felony. 46		Attornment to one good to others. 737	
How far a Person convicted of Treason or Felony may purchase. 50		Attornment by one good for others. 737	
Lands of Persons attainted of Treason or Felony shall escheat. 79, 82, 83,		Who shall be compelled to attorn or not, and when. 737	
Of seizing Goods and Chattels of Felons. 84		How an Attornment shall enure and be taken. 738	
Of Forfeiture by Attainder of High Treason. 119		How an Attornment shall relate. 738	
When the King shall be vested of the Lands, &c. forfeited. 119		Of Attornment upon a Fine. 636	
Of Forfeiture by Attainder of Misprision of Treason. 120		Whether Attornment is necessary in a Bargain and Sale of Land. 708	
Of Forfeiture by Attainder of Petit Treason or Felony. 120			
Standing mute. 120		Averment.	
Challenging Jurors. 120		Of Averment of Uses, or the Proof of Uses by Witnesses. 694	
How the Forfeiture differs from High Treason. 120			
Of Gavelkind Lands. [See Gavelkind.] 120		Bankrupts.	
When the Lands shall be vested in the King. 122		Purchase from a Bankrupt not to be impeached unless a Commission sued out within five Years, &c. 62	
Of seizing Goods before Conviction. 122			
Forfeiture at the King's Will upon Statute. 122			

Estate

The T A B L E.

Estate devested by Bankruptcy.	Page 101
Who may be a Bankrupt, and what Acts make a Bankrupt.	101
How Lands, Tenements and Hereditaments may be forfeited and lost by Bankruptcy.	104
Sale of Bankrupts Lands, &c.	104
— Copyhold Estate.	104
Commissioners to account to the Bankrupt.	105
Sale of Goods, Chattels and Debts, &c.	105
Lands or Goods purchased, descending or coming to a Bankrupt after Bankruptcy, and before Debts paid.	105
Lands conveyed before Bankruptcy.	106
Lands conveyed to others, or Debts transferred in other Mens Names.	106
Of Debts due to the Bankrupt.	106
How the Bankrupt's Lands and Goods shall be divided notwithstanding Judgment, &c.	106
Sale of Lands intailed.	107
And of mortgaged Lands.	107
Fraudulent Sales, and the Bankrupt's Continuing in Possession.	107
Appointment of Assignees.	108
How far the Statutes relating to Bankrupts extend.	108
Entering Proceedings on Record.	108
Disposal of Personal Estate.	108

Bargain and Sale.

A Bargain and Sale what.	704
Kinds of Bargains and Sales, viz. of Lands or Goods.	705
The Effect of a Bargain and Sale.	705
Who may make a Bargain and Sale, or not.	706
To whom a Bargain and Sale may be made, or not.	706
Of what Things a Bargain and Sale may be, or not.	706
By what Deed a Bargain and Sale of Land may be made.	706
By what Words a Deed of Bargain and Sale of Land may be made.	706
What Consideration is requisite in a Bargain and Sale of Land.	707
Whether Livery or Attornment is necessary to a Bargain and Sale of Land.	708
Of inrolling a Bargain and Sale of Land in the Courts at <i>Westminster</i> , or before the <i>Custos Rotulorum</i> , &c.	708
What is to be paid for Inrolment.	709
Where the Inrolment is to be kept for Inspection.	709
How to inrol Deeds in the King's Bench.	709
Of inrolling Bargains and Sales in <i>Lancashire</i> , <i>Cheshire</i> and <i>Durham</i> .	710
— In <i>Yorkshire</i> .	710
What Deed shall enure as, and be deemed a Bargain and Sale, or not.	710
How a Bargain and Sale shall be taken	711
— Of Lands.	711
— Of Goods.	711

How and to what Purposes a Deed of Bargain and Sale of Lands, and the Inrolment thereupon, shall relate. Page 711

Baron and Feme.

Where by Marriage the Personal Estate of the Feme is vested in the Husband.	135
Grants, &c. by both Husband and Wife to others.	179
Or one of them to others.	181
The Husband alone.	181
The Wife or other Woman alone.	185
By Husband and Wife to one another.	187
Where the Husband and Wife, or the Survivor of them, shall be intitled to an Action of Covenant.	410
Where the Husband shall have Covenant in the Right of the Wife.	409
Where the Husband and Wife are bound by a Covenant.	414
Of a Feoffment made by Baron and Feme.	535
Of a Fine by Baron and Feme,	589
Fine acknowledged by a Feme Sole, who marries before the Day in Bank, good.	591, 638
Of Fines by or to Husband and Wife, or one of them.	607
By the Baron of the Feme's Lands.	607
— Of his own Lands.	607, 608
By Baron and Feme, Tenants in special Tail.	607
By a Feme Covert alone.	608
Wife within Age.	608
How the Act of the Husband shall bind the Wife.	609
Of a Recovery suffered by Baron and Feme.	649, 651, 660
Of a Lease by Baron and Feme.	740
What Leases (or other Acts) may be made (or done) by the Husband, with the Lands he has in Fee-Simple or Fee-Tail in the Right of his Wife, or jointly with her; and what Leases made by him of such Lands are good or not, and how.	744

Bastard.

A Bastard cannot be Heir,	45
Where the Entry of a Bastard and his dying seised shall bar the <i>Mulier</i> , &c.	5, 45 to 48
Bastardy a Cause of Escheat,	79
A Bastard may give and grant.	718
— May take by Grant.	720

Bishops. See Ecclesiastical Persons.

Bonds. See Obligations.

Borough-English.

The Custom of <i>Borough-English</i> .	29
--	----

Can-

The T A B L E.

Cancelling.	
O F Cancelling a Deed.	Page 875
Of cancelling a Will.	878

Cestuy que Use, and Cestuy que Trust.

<i>Cestuy que Use</i> who.	676
Of a Feoffment made by <i>Cestuy que Use</i> .	535
Of a Recovery suffered by <i>Cestuy que Trust</i> .	658

Chancery. See Equity.

How a Fine levied in Pursuance of a Decree in Chancery works.	627
---	-----

Charitable Uses.

Of charitable Uses.	689
---------------------	-----

Claim.

Claim what, and the different Kinds of Claim.	629
Of Nonclaim.	629
The Time of Claim.	631
Where there is no need of Claim.	634
Of avoiding a Fine by Claim.	642

Codicil.

A Codicil what.	852
The Nature and Effect of a Codicil.	854

Collusion.

Of Deeds made or concealed by Collusion.	869
--	-----

Common Recoveries.

Recovery what, and how a Common Recovery differs from other Recoveries.	644
Of the Origin of Common Recoveries.	645
The Nature and fictitious Formality in suffering Common Recoveries.	645
Recovery in Value or <i>pro rata</i> , what.	646
The Use and Operation of Common Recoveries.	647
What is the Reason that Common Recoveries are a Bar.	648
Who is bound and barred by a Common Recovery.	648
Of the Parties in Common Recoveries in general.	652
Of the Demandant.	653
Of the Tenant.	653
Where a Common Recovery shall be valid, tho' no Conveyance of the Freehold from the Tenant for Life.	655
Of the Vouchee.	656
Of the Use of Vouchers, and the Intent of Recoveries with single, double, treble, &c. Vouchers.	656
PART I.	

Of the due Order and Form required in Common Recoveries.

How the Writ of Entry must be brought.	Page 657
The Form of a Recovery with single, double or treble Voucher.	657
Who may suffer a Common Recovery.	658
Of what Things a Writ of Entry may be brought, i.e. of what a Common Recovery may be suffered.	658
Of what Things a Writ of Entry does not lie.	661
Rules to be observed in placing Particulars in a Writ of Entry.	663
How to suffer Common Recoveries.	664
Of suffering a Recovery by the Parties in open Court.	665
Of suffering a Recovery when the Parties appear by Attorney.	665
By Warrant before a Judge.	667
By <i>Dedimus potestatem</i> .	667
How to sue out a <i>Dedimus</i> .	667
How to sue out a Writ of Entry.	667
How to sue out the Writs of Summons and Seisin.	667
Of passing the Writ of Entry, and of returning it, and the Summons.	668
The Rule for the Payment of Money in the Alienation-Office.	668
Of drawing Recoveries, and entering the Summons, <i>Mittimus</i> , Transcript and Recovery on the Rolls.	669
Of exemplifying the Recovery, examining, docketting, signing and sealing it, &c.	669
Of Execution after Recovery, and the Estate the Recoveror has by the Recovery.	670
The Remedy of Recoverors against Lessees for Rents, Services and Waste.	670
Of Evidence allowed in Common Recoveries, in what Time to be disputed or deemed valid, and of its Validity as to the Time of making the Tenant to the <i>Præcipe</i> .	670
Of avoiding Recoveries.	672
Of Errors in Common Recoveries, and in what Cases they may be amended.	673
Of Mistakes in naming the Parties.	673
In naming the Particulars of the Land, &c.	673
As to the Place where the Lands lie.	673
In the Writ of Entry.	674
As to the Appearance.	674
As to the Warrant of Attorney.	674
As to the Writ of Seisin.	674
As to the Death or Non-age of the Parties.	674

Conditions.

A Condition what, and how it differs from a Limitation.	280
The several Kinds of Conditions.	280
Express, Implied.	280
10 S	Pre-

The T A B L E.

Precedent, Subsequent.	Page 281	To whom a Condition may be performed.	Page 312
Affirmative, Negative.	281	At what Time a Condition shall be performed	
Collateral, Inherent.	281	where a Time is limited.	313
Restrictive, Compulsory.	281	Upon Request.	313
Single, Copulative, Disjunctive.	281	When the Act is to be done between the	
Void and Voidable.	281	Parties themselves.	314
To enlarge, destroy or clog an Estate.	281	To make an Estate.	314
The Nature of a Condition expressed, and of		To pay Money.	314
a Limitation.	281	By and to whom Money shall be paid upon	
What shall be said a Condition in Law, and		a Condition.	314
when an Estate shall be subject to such a		To tender Money.	315
Condition.	282	To re-entfeoff.	315
Upon what Act a Condition may be created.	283	At what Time a Condition is to be performed	
Where the Cause or Consideration of the Grant		where no Time is limited.	316
will make a Condition.	283	Presently.	316
What may be made upon Condition, and to		Within convenient Time.	316
what Things Conditions may be annexed, or		Not before Request.	317
not.	283	Upon Request.	318
How and by what Deed a Condition may be		Notice.	318
created and annexed.	284	During the Lives of the Parties.	319
To what Things a Condition shall extend.	286	To the Obligor, Feoffor, &c.	320
Incidents that Conditions to create an Estate		To a Stranger.	320
ought to have.	286	To a Stranger and the Obligor, &c.	320
To what Persons a Condition may be reserved.	287	Of performing Conditions where a Place is li-	
When a Person to whom a Condition is not cer-		imited.	320
tainly designed, the Law shall say who it shall		At what Place a Condition must be performed	
be.	287	where no Place is limited.	321
Of the Manner, Form and Order of making		Conditions to perform Covenants.	321
a Condition.	287	Where the Person to whom the Condition	
At what Time a Condition may be created.	288	is to be performed must be sought.	321
Where placed in a Deed, and by what Words		How a Condition shall be performed.	322
expressed and created.	289	As to the Intent.	322
Words in Covenants.	292	In Respect of the Parties.	323
Improper Words.	293	Conditions precedent and subsequent.	323
What shall be said a Condition precedent, and		Where divers Things are to be performed	
what a Condition subsequent.	294	in the Conjunctive or Disjunctive.	323
Of Conditions copulative and disjunctive.	296	Tender.	324
Of Conditions to enlarge Estates.	296	<i>Pro concilio impendendo.</i>	325
Of Conditions to abridge Estates.	297	To make a Lease.	326
Of the Matter and Substance of a Condition.	297	To purchase Lands.	326
Repugnant Conditions to restrain Alienations.	297	To pay Money.	326
Conditions against Law.	299	Tender.	326
Conditions impossible.	300	Acceptance.	326
Of Conditions relating to Assignees by Nomi-		To get the good Will of J. S.	327
nation.	300	To save harmless.	327
What Persons shall be bound by a Condition.	301	Conditions for further Assurance.	327
Who shall be bound by a Condition as Af-		What shall be said a Performance of a Con-	
signee.	301	dition, and what a Forfeiture.	331
Of Conditions to perform Covenants.	302	By whom collateral Things conducive to the	
Of Conditions to save harmless.	303	Performance of Things limited shall be done.	333
What Persons may perform a Condition.	303	In what Cases a collateral Thing is a Satisfac-	
Of Conditions where something is to be done		tion of a Condition.	333
before Breach or Performance of them.	304	What will excuse the Performance of a Con-	
By Demand, &c.	304	Condition.	335
By Notice.	305	Act of God.	335
Before Notice.	311	Act of the Parties.	337
Who are disabled to perform Conditions.	311	Act of him who is to have the Advantage.	337
		Act of the Obligee.	339
		Act of both Obligor and Obligee.	339
		Where	

The T A B L E.

Where Absence shall excuse.	Page 340	To grant an Advowson or Rent.	Page 353
Act of a Stranger.	340	To pay Money.	354
Act of the Law.	341	To pay Money or do any Thing.	354
What Things will dispense with a Condition.	342	To make a Lease.	354
Acts of him that will have the Advantage.	342	To get the good Will of J. S.	354
Who may dispense with a Condition.	342	In Respect of Place.	354
A Stranger.	342	To pay Money.	354
In what Cases the Dispensation or Extinguishment of Part of a Condition shall be of the whole.	342	To enfeoff.	355
What will destroy a Condition, and what not.	343	To acknowledge Satisfaction on a Judgment.	355
Acts by the Reserver.	343	To pay Rent.	355
Acts in Law.	344	To deliver Corn or Wood.	355
What shall be said a Condition impossible and void, and what not.	344	In Respect of other Matters.	355
The Effect of a Condition impossible at the making thereof.	344	To pay Money.	355
The Effect of a Condition impossible after the making thereof.	345	To make an Estate.	355
What Condition shall be said to be repugnant.	345	To cleanse Ditches.	355
Intent of the Parties.	345	To dwell in a House.	355
Repugnant to the Estate.	346	Annuity.	356
Repugnant to the Grant.	346	To give Goods.	356
What Condition shall be said against Law, and what shall be void, <i>et e contra</i> .	347	Not to disturb the Lessor in taking Wood.	356
The Effect of a Condition against Law.	349	To pay Rent.	356
What Act shall be a Breach of a Condition.	349	Where a Court of Equity will relieve against a Breach of a Condition.	357
Breach of a Condition in Deed.	349	How a Covenant differs from a Condition.	378
Not to alien.	349	What Words amount to a Covenant, and not to a Condition, or to a Condition, and not to a Covenant.	396
Not to suffer a Woman with Child in the House.	350	Covenant on the Part of the Lessor, and not a Condition.	397
Not to do Waste.	350	Covenants in a first Lease, and Conditions in a second.	397
Not to sell without the Lessor's having the first Offer.	350	Where a Covenant is a Condition to defeat the the Estate.	397
To make an Estate.	350	Paying and Performing.	397
To employ the Profits to charitable Uses.	351	Where the Word <i>paying</i> amounts to a Condition, and where not.	397
To re-enfeoff.	351	Where Words amount to a Condition, and not to a Covenant.	397
To make an Estate.	351	A Condition though the Words found in Covenant.	398
To suffer one to take his Goods.	351	Where a Proviso shall not make a Condition.	398
To suffer one to come into the House.	351	Where a Proviso can have no Effect as a Condition, but is by Way of Agreement.	398
To pay a yearly Sum.	351	Where a Proviso makes a Covenant and a Condition also.	399
Not to molest a Copyholder.	351	Where a Proviso amounts to a Condition or a Covenant.	399
To pay Rent.	351	<i>Provided also, and it is covenanted, granted and agreed; where it is a Covenant, and where a Condition.</i>	399
Not to disturb.	351	Of Feoffments upon Conditions.	532
Not to be outlawed.	351	Release of a Condition.	764
To give Advice.	352	What is a good Condition of an Obligation, or not.	831
When a Condition in Law shall be said to be broken, or not.	352	As to the Manner and Form of making it.	831
How a Condition shall be expounded.	352	As to the Matter and Substance of the Condition of an Obligation.	832
In Respect of Persons.	352	Against Law.	832
Not to alien.	353	Im-	
To pay Money.	353		
To create an Estate.	353		
In Respect of Time.	353		
To pay Money.	353		
To enfeoff.	353, 354		

The T A B L E.

Impossible.	Page 832		
Insensible and incertain.	833		
Repugnant.	833		
Not triable.	833		
How an Obligation with a Condition, or the Condition of an Obligation, shall be construed, and how it must and ought to be performed.	836		
With Respect to the Persons that are to do the Thing.	836		
With Respect to the Time of doing the Thing.	836		
With Respect to the Place where the Thing is to be done.	837		
In Respect of the Thing itself to be done.	838		
To perform Covenants.	838		
To make a Feoffment, Lease, &c.	838		
To make a Release or other Assurance.	838		
To pay Money or Rent.	838		
To warrant Land, and for quiet Enjoyment.	838		
To prove a Thing.	838		
To suffer a Wife to make a Will.	838		
In Respect of the Manner and Order of doing the Thing, &c.	839		
Conditions impossible.	840		
When the Condition of an Obligation shall be said to be performed, and the Obligation saved or satisfied, or not.	840		
To make a Feoffment.	840		
To make an Estate.	841		
To make further Assurance.	841		
To save harmless.	841		
To grant a Rent, or to procure it to be granted.	841		
To pay Money.	842		
To stand to an Award.	843		
To shew a Release.	843		
For quiet Enjoyment.	843		
To make a Bond.	843		
To marry a Woman.	843		
For quiet Possession.	843		
When the Condition of an Obligation shall be said to be broken, and the Obligation forfeited, or not.	844		
To make a Feoffment.	844		
To make a Lease.	844		
To make an Estate.	844		
To make further Assurance.	845		
To save harmless.	845		
To pay Money.	845		
To pay Rent.	845		
For quiet Enjoyment.	845		
To stand to an Award.	846		
To appear.	846		
Not to alien.	846		
To marry a Woman.	846		
To perform Covenants.	846		
To keep Prisoners.	846		
The Difference between a Condition and a De-feazance.	850		
		Confirmations.	
		A Confirmation what, and Confirmor and Confirmee who.	Page 776
		The Nature and Operation of a Confirmation in general.	776
		Kinds of Confirmations.	777
		Of a Confirmation confirming or altering the Quality of the Estate of him to whom it is made.	777
		Of a Confirmation diminishing or abridging Services, &c.	781
		How to make a Deed of Confirmation.	781
		Where the Confirmation of some Persons is needful to perfect the Grant of others, or not, and how it may be done.	781
		Where a Confirmation may be good for Part of the Estate, or Part of the Thing, or not.	782
		The Force and Virtue of a Confirmation, and how it shall enure, and be construed or taken.	782
		Consideration.	
		The Consideration of a Deed what.	257
		What Consideration is necessary to a Feoffment.	537
		Of the Consideration of a Use, and what shall be a sufficient Consideration to raise or alter an Use, or not.	684
		Of the Consideration in Covenants to stand seized to Uses.	702
		What Consideration is requisite in a Bargain and Sale of Lands.	707
		Of the Consideration in a Deed of Bargain and Sale of Goods and Chattels.	713
		Of a Grant's becoming void by the Consideration failing.	873
		Of the Consideration in a Lease (or Bargain and Sale) for a Year.	774
		Of a Consideration of a Release thereupon.	775
		Continual Claim.	
		Prevents a Descent from taking away an Entry.	43
		Continual Claim what.	43
		Where to be made.	43
		How.	44
		When.	44
		Who may make it.	44
		In what Case Claim made by one shall serve for another.	44
		Conveyancing in general.	
		Conveyancing what.	1
		Definition of Conveyancing.	1
		Derivation and Definition of the Name.	1
		What Estates or Things may be conveyed.	1
		As	

The T A B L E.

As to Estates of Inheritance.	Page 1
As to Estates less than Inheritance.	2
By whom and to whom Estates may be conveyed.	2
The different Ways and Means whereby Properties in Estates may be acquired or conveyed in general.	3
By Act of Law.	3
By Act of the Party.	3
By a mixed Act.	3
Of the different Ways of acquiring or conveying Real Estates in particular, and of claiming Titles thereto.	4

See Descent.
Entry.
Escheat.
Occupancy.
Prescription.
Purchase.

As to Personal Estates. See Acquisition.

Coparceners.

Of a Feoffment made by a Coparcener.	536
Of a Lease by Coparceners.	740

Copyholds.

An Estate-Tail may be of a Copyhold by the Custom co-operating with the Statute.	34
A Copyholder may alledge a Custom, but cannot prescribe against his Lord.	78
Of Forfeitures of Copyholds by Attainder of Treason or Felony.	83
Whether a Copyholder can lease.	189
Of a Recovery suffered of Copyhold Lands.	663
Where Copyhold Lands shall pass without a Surrender.	868

Corporations.

Whether a Corporation can contract, give or grant.	178, 188
Of a Feoffment made by a Corporation.	536
Of a Fine by or to a Corporation.	589, 590
Whether a Corporation may grant.	717, 718
Of Grants to a Corporation.	719
Of a Corporation's avoiding their own Grant.	882
Whether they can be barred by a Fine.	621

Covenants.

Covenant what, Covenantor and Covenantee who.	377
Custom of <i>Bristol</i> , <i>conventio ore tenus facta</i> , to be taken strictly.	377
Where a Covenant terminates in itself, or to a present Act, no Covenant properly.	378

PART I.

How a Covenant differs from a Defeazance Condition, Warranty, or Exception, &c.

	Page 378
Defeazance and not a Covenant.	378
Covenant <i>quasi</i> a Defeasance.	378
Covenant in Nature of a Condition precedent.	378
Covenant and not Warranty, or Warranty and not Covenant.	378
Difference between a Lease and an Inheritance as to Words of Warranty.	378
Covenant and not Exception.	378
Covenant and a Grant also.	378
Not a Covenant nor a Condition, but a Declaration explanatory.	379
Reservation and not a Covenant.	379
Rent and Reservation, and not a Covenant.	379
Covenant and not a Rent.	379
Lease and not a Covenant.	379
Rent and not a Sum in Gross.	379
Where a Recital amounts to a Covenant.	379

A Covenant that doth not consist with the Recital that leads and occasions it, shall not oblige.

Recital being considered with the rest of the Deed, is material.

What shall be said an Agreement, and what Agreement amounts to a Covenant.

Where Agreement has a mutual Remedy.

Where a Recital amounts to an Agreement.

Agreement of the Lessee, and Covenant of the Lessor.

What amounts to a Covenant to levy a Fine.

The Kinds of Covenants relative to their Nature.

In Deed or in Law.

Real or Personal.

Inherent or Collateral, or to stand seised to Uses.

Copulative or Disjunctive.

Where mutual Disagreement ought to be alledged.

Election of the Covenantor or Covenantee.

Executed, Executory, or Present.

Affirmative or Negative.

Joint or Several.

Mutual and Reciprocal.

Distinct and several.

To convey Lands.

Charter-party.

Marriage.

To stand seised.

Notwithstanding any Thing by him done to the contrary.

Covenants synonyma or distinct.

10 T

Seised

The T A B L E.

Seised in Fee, and has a Power to sell.	Page 392	Proviso abridging a Covenant.	Page 399
General or particular, and where the particular or express Covenant qualifies the general or not.	393	What Words of Covenant amount to a Grant, Lease, &c. and what to a Covenant only.	400
Obligatory or Declaratory.	394	Covenant to permit one to enjoy, &c. is a Covenant and no Lease.	400
What Words will create or amount to an express Covenant, or not.	394	Where a Covenant shall amount to a Grant.	400
The Word <i>Covenant</i> sometimes sounds in Covenant, sometimes in Contract.	395	Covenant and Grant that one shall enjoy the Lands, &c. amounts to a Lease.	400
Covenant on what Words; oblige, <i>teneri et firmiter obligari</i> .	395	Mortgage and not a Lease.	400
Where the Word <i>Covenant</i> will make a Lease.	395	Covenant and Grant that one shall have and hold the Lands, &c. is a Lease.	400
Demise and Grant.	395	Agreement between Strangers not to amount to a Lease.	400
<i>Vendidit, Assignavit et transulit</i> .	395	Articles make an immediate Lease; though there is a Covenant therein that a Lease shall be made and sealed.	401
Yielding and paying.	395	How a Covenant in Law may be created, and the Operation and Consequents upon it.	401
Words of Agreement make a Covenant.	395	<i>Concessi</i> or <i>Demisi</i> .	401, 402
The Lessee shall repair.	395	Assignee shall have an Action of Covenant on the Words <i>Demise and Grant</i> .	401
Words in the Future Tense.	396	Particular Covenant subsequent qualifies the Force of the Word <i>Demise</i> .	401
Bond to pay 400 <i>l.</i> when an Account shall be stated, it is a Covenant.	396	<i>Demisi, concessi et ad firmam tradidi</i> .	402
Covenant or Warranty according as the Eviction is.	396	<i>Vendidit, assignavit et transulit</i> .	402
<i>Concessi et Feoffavi</i> .	396	Covenant in Law ought to be fixed upon an Estate.	402
What Words amount to a Covenant and not to a Condition, or to a Condition and not to a Covenant.	396	If a Stranger enters before the Lessee enters, no Covenant lies.	402
A Covenant on the Part of the Lessor, and not a Condition.	397	No Covenant in Law upon Eviction of Goods.	402
Covenant in a first Lease, and Condition in a second.	397	A Covenant in Law shall not be extended to make a Man do more than he can.	403
Where a Covenant is a Condition to defeat the Estate.	397	By whom Covenants may be made.	403
Paying and Performing.	397	Attorney.	403
Where the Word <i>paying</i> amounts to a Condition, and where not.	397	With whom Covenants may be made.	403
What Words amount to a Condition, and not to a Covenant.	397	No Covenant or Grant to be made with any one who is no Party to the Deed or Indenture; <i>aliter</i> in a Deed Poll.	403
A Condition though the Words found in Covenant,	398	The Use and Operation of a Covenant.	404
Covenant not to disturb any Tenants of the Manor out of their Tenements doing their Duty.	398	What shall be said a good Covenant in Deed upon which an Action of Covenant may be had, and what not.	404
Where a Proviso shall not make a Condition.	398	In Respect of the Manner of making it.	404
Proviso where it makes not a Lease, but only a Covenant.	398	In Respect of the Matter or Substance of it.	405
Where a Proviso can have no Effect as a Condition, but is by Way of Agreement.	398	Against Law.	405
Articles amounting to an immediate Lease.	399	Impossible.	406
Where a Proviso makes a Covenant and a Condition also.	399	What shall be said a good Covenant in Law, upon which an Action of Covenant may be had, and what not.	407
Where a Proviso amounts to a Condition or a Covenant.	399	Who shall or may have Advantage of a Covenant in Deed or Law, and bring a Writ of Covenant upon the Breach of it, or not.	407
Provided also, and it is covenanted, granted and agreed; where it is a Covenant and where a Condition.	399	Party to the Deed not a Stranger.	407
Where a Proviso is a bare Covenant, and why.	399	Party or his Heir, Executor or Administrator.	407
		Grantees, Lessees, Assignees.	408, 409
		Husband in the Wife's Right.	409
		Husband and Wife.	410
		I	Who

The T A B L E.

Who shall be bound and charged by a Covenant, and against whom a Writ of Covenant lies, and where or not.	Page 411	To convey Lands of the Value of, &c.	Page 432
Party.	411	That the Lessee shall make Estates.	432
His Heirs, Executors, Administrators or Assigns.	411, 412	That the Lessor shall have the first Refusal.	332
Assignee without naming.	413	To do one Thing for another.	432
Where Covenant lies against the Assignee.	414	That the Lessee shall have the Fee.	433
Husband and Wife.	414	To do a Thing to J. S. or his Assigns.	433
Patentee, Grantee,	415	For quiet Enjoyment.	433
How and in what Case an Infant shall be bound by his Covenant, or not.	415	To be free from Incumbrances and Charges.	433
What shall be accounted a real Covenant that runs with the Land, or shall affect the Assets only.	416	To repair the Houses.	434
Where Covenants are placed in a Deed, and in what Form written.	417	To have House-boot, &c.	434
What Covenants are void in Law.	417	Where a Covenantor shall be relieved in Equity.	435
For being against Law.	417	Of the particular Kinds of Covenants relative to their Uses, which are either such as are commonly annexed	435
For being impossible to be performed.	419	To all Kinds of Estates, or	435
What shall excuse the Performance of a Covenant, or not.	420	To Estates for Lives or Years, and not to Estates in Fee-Simple; or	435
The Act of God.	420	Which may or may not be in Deeds of Conveyance of Land, or may be in Articles of Covenant only.	435
Of the Party.	420	Of Covenants commonly annexed to all Kinds of Estates.	436
Of a Stranger.	420	That the Covenantor is lawfully seised (or possessed) of the Premises.	436
Of the Law.	421	That the Premises are of such a yearly Value.	437
What is a good Performance of a Covenant, or not.	422	That the Grantor, &c. has a Right to sell, &c.	437
With Respect to the Substance of the Covenant.	422	For peaceable Enjoyment.	438
With Respect to the Time and Place of performing a Covenant.	423	Free from Incumbrances.	448
With Respect to Notice, as where it is necessary (or not) for the Performance of a Covenant.	424	To make further Assurance.	450
With Respect to Cases, where a Demand, Request or Tender, is necessary (or not) for the Performance of a Covenant.	425	To stand seised to Uses.	452
When a Covenant is broken, or not.	426	Covenants commonly annexed to Estates for Lives or Years, and not to Estates in Fee-Simple.	453
That the Covenantor is seised of a good Estate, &c.	426	Concerning the Payment of Rents, and other Payments issuing out of Land.	453
For quiet Enjoyment.	426	Where Rent is to be demanded.	454
To free from Charges and Incumbrances.	427	Covenant to pay Taxes.	459
To make Estates and Assurances.	427	Concerning Reparations.	460, 481
To pay Money and give a Bond.	428	Where one is bound to repair.	460
To build a House.	428	Where Notice to repair must be given.	461
To cleanse a Ditch.	428	Where Covenant will lie, and what is a Breach.	461
To repair.	428	That the Lessee will not assign, &c. the Premises leased.	466
To pay Money.	429	That the Lessee will drain the Water which is upon the Land.	466
To leave a Stock, &c.	429	That the Lessee will do all reasonable Charges of the Lessor.	466
Not to take Toll.	429	That the Lessee shall have House-boot, &c.	467
To have Liberty to go in and out of a Shop.	429	That the Lessor may view the Premises.	467
To come into a House.	429	That the Lessee will render up the Possessions at the End of the Term, and in good Condition.	467
To marry another and make a Feoffment.	429	Covenants	
To save harmless.	429		
What will extinguish, suspend or discharge a Covenant.	429		
How a Covenant shall be taken and expounded.	431		
Joint and several.	432		

The T A B L E.

Covenants which may or may not be in Deeds of Conveyances of Lands, or may be in Articles of Covenant only. Page 467

To pay Money.	467
To make Assurances of Land.	469
According to Draughts made	471
To make Estate of such a Value.	472
Of such a Quantity.	472
To such a Person.	472
Usual Covenants.	472
Such Assurances as the Grantee or his Counsel shall advise.	472
Reasonable Assurance.	473
Whose Counsel to advise.	475
To give Security upon Procurement of an Office to pay so much yearly.	475
To save harmless and indemnified.	477
Concerning Marriages and Portions.	479
Concerning building Houses, &c.	481
To permit Things to be done.	481
To account.	483
Concerning Apprentices and Servants.	484
Action by an Apprentice.	484
Covenant against an Apprentice, and those bound with him.	485
Against the Executor of the Master.	486
To do Things.	486
Of Covenants determining with the Estate, and of suing on Covenants after the Estate determines.	486
What Covenants are good or void in a Lease.	488
Of Conditions to perform Covenants.	302

Covenants to stand seised to Uses. 452

The Difference between a Covenant to stand seised to Uses, and a Feoffment to Uses.	531
What a Covenant to stand seised to Uses is.	701
The Things necessary to raise an Use by Way of Covenant to stand seised.	702
The Consideration in Covenants to stand seised to Uses.	702
What amounts to a Covenant to stand seised, or not.	703
Who may covenant to stand seised to Uses.	703
To whose Use Covenants to stand seised may be, or not.	703
Of what a Covenant to stand seised may not be.	704
What Words amount to a Covenant to stand seised.	704

See Uses, and Declarations of Uses.

Covin.

Where a Fine shall be avoided for Covin. 641

Curtesy. See Tenant by the Curtesy.

Custom.

The Difference between Prescription, Custom and Usage.	Page 78
Of acquiring Things personal by Custom.	171
Heriot.	171
Heriot-Service.	171
Heriot-Custom.	171
Mortuary.	172
Heir-Looms.	172
Foreign Attachment.	172
Bills of Exchange.	172

Date.

Of the Date of a Deed. 255

Deaf and Dumb.

Whether such Persons can make a Feoffment.	534
Of a Grant by a Person born deaf and dumb.	718
Whether a deaf and dumb Person can make a Will.	856

Death.

Where a Fine shall be avoided by the Death of any of the Parties. 636, 639

Deceit.

Where a Fine shall be avoided for Deceit. 641

Declarations of Uses.

Of Deeds declaring (or leading) the Uses of a Feoffment, Fine or Recovery.	690
Of what Assurance a Use may be declared.	690
Of declaring the Use according to the Estate the Party has in the Land.	691
By what Deed Uses may be declared.	691
When a Declaration of Uses may be made.	692
Of a precedent Agreement for the Limitation of a Use.	692
Of the Certainty of the Declaration of Uses.	693
Of Revocations and new Declarations.	816
In what Cases a Person may make a Revocation, and a new Declaration both, or only one of them.	817

See Uses, and Covenants to stand seised to Uses.

Deeds.

The T A B L E.

Deeds.	
Of Deeds in general, and the Things incident thereto.	Page 176
Deed what.	176
Charter what.	176
Muniment what.	176
The Essence of a Deed.	176
Things incident to a Deed.	176
In what Hand or Language a Deed must be written.	176
On what a Deed must be written.	177
Who is able to contract, or to give, grant, &c.	177
Disabilities by Common and Statute Law.	177
Bodies Natural or Politic.	178
General Rules.	178
Who are incapable to make a Deed.	178
Who are capable.	178
Tenant in Fee-Simple.	178
in Tail.	178, 196, 205, 209, 213
for Life or Years.	178
Ecclesiastics.	178
Who may make Estates for Lives or Years.	178
Who may grant, &c.	179
Grants, &c. by both Husband and Wife to others.	179
Grants by one of them to others.	181
The Husband alone.	181
The Wife or other Woman alone.	185
By Husband and Wife to one another.	187
Husband to the Wife.	187
Wife to the Husband.	187
Grant, &c. by several, though only one has Right.	187
Grant, &c. by an Infant.	187
By a Corporation.	188
By a Disseisor or Feoffee of a Disseisor.	189
By a Copyholder.	189
By one blind, deaf and dumb.	189
By a deformed Person, Lessor, &c.	189
By an Hermaphrodite.	190
By Persons attainted of Treason or Felony.	190
By outlawed Persons.	190
By an excommunicated Person.	190
By a Man that is drunk.	190
By an Idiot or Lunatic.	190
By an alien Enemy.	191
By Persons dead in Law.	191
By a Bastard.	191
By Executors or Administrators.	191
By a Jointenant, Tenant in Common, or Coparceners.	187, 191
By a Disseisor or Disseisee.	189, 195
By a Person not in Being.	195
By Lessor or Lessee.	196
By one who is not the Owner.	196
By Tenant in Tail.	196, 205, 209

PART I.

Second Grant of the same Thing.	Page 196
By one out of Possession for the present.	196
By one before Entry or Seisin.	197
By an Heir.	197
By one that has but a Right or Title of Entry, &c.	197
By Feoffor, Feoffee, Mortgagor, Mortgagee, Donor, Donee.	198
By one who has but an <i>Interesse termini</i> or Possibility.	198
By a Servant of his Master's Goods.	198
By Ecclesiastical Persons Offices.	198, 200
Bishops.	200, 202
Dean and Chapter.	203
Prebend.	203
Parson or Vicar.	204
By Tenant in Tail.	178, 196, 204, 205, 213
By a Woman Tenant in Tail.	209
Rules relating to Leases, &c. by Tenant in Tail.	211
By a Husband of the Wife's Lands.	212
By the Husband alone.	212
By the Husband and Wife.	212, 213
By one who has no Interest or Property.	214
By one that has a future Interest, and more than a Right.	215
By one who has but a Possibility.	215
By one who has granted the same before.	215
By Jointenants.	215
By Coparceners.	215
by one outlawed.	215
by a Lessee.	215
By Tenant in Remainder or Reversion.	215
By a Person having a special Power or Proviso.	216
Of the Name and Description of the Person contracting, as the Grantor, Donor, &c.	218
To whom Grants, Contracts, &c. may be made, &c.	222
To both Husband and Wife.	222
To the Husband alone.	223
To the Wife alone, or to a Feme Sole.	223
To the Wife alone, or to her and a Stranger.	224
To an Infant.	224
To a Bastard.	225
To a Lessee.	225
To a Corporation.	225
To a Jointenant, Tenant in Common or Coparceners.	225
To those in Reversion or Remainder.	226
To Heirs.	226
To Executors or Administrators.	226, 227
To Persons in Trust.	227
To Ecclesiastical Persons.	227
To Persons attainted of Treason or Felony.	227
To a Clerk Convict or Villain.	227
To	To

The T A B L E.

To an outlawed Person.	Page 227	A Distress.	Page 241
To Persons <i>Non compos mentis</i> , deaf, dumb and blind.	227	Deeds.	241
To an excommunicate Person.	227	Rules as to Grants, &c. by or without Deed.	242
To a drunken Person.	227	Rules as to Revocations, Releases, Disavowances, &c.	242
To a deformed Person, Leper, &c.	227	What Words the Law requires in a Deed or Instrument of Conveyance.	242
To Persons dead in Law.	227	Fee-Simple.	242, 243
To Persons not in Being.	227	Tail.	243
What is a sufficient Name for a Donee, Grantee, or other Person to whom a Contract may be made.	228	Estate for Life.	243
Of the Things to be contracted for, granted or conveyed.	231	Words in Deeds in general.	244
The Division of Things.	231	In Feoffments.	245
Ecclesiastical or Spiritual.	231	In Gifts and Grants.	246
In their Nature.	231	In Leases for Lives or Years.	246
In their Use.	231	In Assignments of Leases.	248
Temporal.	231	In Patents.	248
<i>Juris publici</i> .	231	An Use.	248
<i>Juris privati</i> .	231	Of sealing Deeds.	248
Things Real.	231	Of delivering Deeds.	249
Corporeal.	231	With Respect to the Person who makes it.	249
Incorporeal.	232	With Respect to the Person to whom it is made.	250
Things personal.	232	With Respect to the Time.	251
In Possession.	232	With Respect to the Place.	251
In Action.	232	With Respect to the Order and Manner of the Delivery.	251
What Things may be contracted for or conveyed, and by what Means or Instrument.	232	Delivery of a Deed as an Escrow.	252
Things that lie in Livery.	233	Of the formal or constituent Parts of Deeds, and the Ceremonies used on the Execution thereof.	254
Things that lie in Grant.	233	Of the Parts of Deeds in general.	254
Common of Pasture, Turbary, Fishing, Estovers, &c.	235		
A Way.	235	See Condition.	
Reversions and Remainders.	235	Covenants.	
<i>Interesse termini</i> .	236	Habendum.	
Things annexed to a Freehold, Trees or Wood.	236	Letters of Attorney.	
Timber of a House.	237	Premises.	
Vesture or Herbage.	237	Reddendum.	
Franchises.	237	Tenendum.	
Advowsons.	237	Warranty.	
Parsonages, Rectories, Tithes, and Portions of Tithes.	237		
Next Avoidance of a Presentation.	238	Of the Conclusion of a Deed, or <i>in cujus rei testimonium</i> .	490
Title of Lapse.	238	Which of the formal or constituent Parts of a Deed are essential, or not.	491
Pensions.	238	Of the Ceremonies used in the Execution of Deeds.	491
Chattels Real.	238	Reading Deeds to blind and illiterate Men.	491
Personal.	238		
Emblements.	238	Of signing Deeds.	492
Annuity.	238	Of sealing Deeds.	492
Money.	238	Of delivering Deeds.	493
Things <i>Feræ naturæ</i> .	238	Of Witnesses to the Execution of Deeds.	493
A Licence or Authority.	239	Of indorsing the Receipt for the Consideration Money.	493
A Possibility or Thing suspended.	239	Of other Ceremonies necessary to perfect a Deed.	494
Things in Action.	239	As to the Agreement of him to whom a Deed is made.	494
Rents or Services suspended.	239		
Things uncertain.	239		
On Condition.	240		
Offices.	240		
A Trust.	241		
A Use.	241		

The T A B L E.

As to Livery of Seisin.	Page 494
As to Attornment.	494
As to actual Entry.	495
As to Election.	495
As to inrolling Deeds.	495
As to the registering Deeds and Wills.	495
In <i>Middlesex</i> .	507
In the North Riding of <i>York</i> .	511
In the East Riding.	500
In the West Riding.	495
Of the different Kinds of Deeds, Wills and Testaments.	520
Of the Difference between Deeds, Wills and Testaments.	520
Of the various Kinds of Deeds in general.	520
With Relation to the exterior Form.	520
Indenture.	520
Duplicate.	522
Deed Poll.	522
What Deeds must be by Indenture and not by Deed Poll.	522
Of the various Kinds of Deeds with Relation to their Use and Effect.	524

See Agreement of Articles of Covenant.

Assignment.

Bargain and Sale.

Common Recovery.

Confirmation.

Covenants to stand seised to Uses.

Defeasance.

Devise of last Will and Testa-
ment.

Exchange.

Feoffment.

Fine.

Grant:

Indentures to lead the Uses of Feoffments, Fines and Common Recoveries.

Leaf.

Lease and Release.

Obligation.

Revocation and new Declaration.

Statute.

Surrender.

Of fraudulent, forged, void and voidable Deeds.	868
Of void Deeds in general.	868
Of Deeds obtained by Menaces, Durefs or false Suggestions.	868
Of Deeds made or concealed by Fraud or Collusion.	869
In general.	869
To deceive Purchafors.	869
To defraud Creditors.	871
Where a Deed good in its Creation may become void, or become fraudulent by Matter <i>ex post facto</i> , or not.	873
By the Cause or Consideration of a Grant's failing.	873

By Razure or interlining.	Page 874
By breaking or defacing the Seal.	875
By Re-delivery or Cancelling it.	875
By Disagreement or Refusal.	875
By Judgment.	876
By Forfeiture.	876
Where and by what Means a Deed, or the	
Estate thereby made, being void or voidable	
at the first, &c. may become good by Mat-	
ter <i>ex post facto</i> , or not.	
	879
When and where a Deed may be good in Part,	
and void in Part ; or good against one Per-	
son and void against another, or not ; or good	
for one Time, and void for another.	
	880
In what Cases a Man may avoid his own Grant,	
&c. or not, and at what Time.	
	882
Where Defects or Mistakes in Deeds may be	
supplied and amended, or not.	
	882
General Rules for the Exposition of Deeds.	
	883

Deed Poll.

Deed Poll what.	522
What Conveyances must be by Indenture, and not by Deed Poll.	522

Defeasance.

How a Covenant differs from a Defeasance.	378
Defeasance what.	849
The Difference between a Condition and a Defeasance.	850
In what Cases a Defeasance may be made, and what Things may be defeated and avoided thereby, and what not.	850
Things requisite in a good Defeasance.	850
As to the Manner of it.	850
As to the Matter of it.	851

Deforcement.

What it is. 118

Dilapidations.

Dilapidation a good Cause of Deprivation. 101

Delivery.

Of delivering Deeds.	249, 493
With Respect to the Person who makes it.	249
With Respect to the Person to whom it is made.	250
With Respect to the Time.	251
With Respect to the Place.	251
With Respect to the Order and Manner of the Delivery.	251
Delivery of a Deed as an Escrow.	252
How a Deed may become void by Re-delivery.	875

De.

The T A B L E.

Demand.

Where a Demand is necessary before Performance or Breach of a Condition.	Page 304
Where a Demand is necessary or not for the Performance of a Covenant.	425

Deodands.

Deodand what.	175
Original of Deodands.	175
Acquisition of Property by Means thereof.	175
To whom Deodands are forfeited.	175
What Things may be Deodands.	175
When the Forfeiture accrues.	175
Distribution thereof.	175

Descent.

Of acquiring Real Estates by Descent.	21
Of Descents in general.	21
Descent, its Derivation and Signification.	21
Heir who.	21
Kinds of Descents and Successions.	22
Descents by the Common Law.	22
General Rules concerning Descents of Lands in Fee-Simple, with Examples, Reasons, Exceptions, Observations, &c.	22
Worthiness of Blood.	22
Males before Females.	22
Descendants from the Males before Descendants from the Females.	22
Proximity of Blood.	22
Half Blood.	22, 23
Priority of Blood in Males.	23
Equality in Females.	23
Right of Representation.	24
The Root of the Descent.	24
The Blood of the first Purchaser.	25
Male Root has the Preference.	26
Particular Rules of transversal ascending Successions.	26
Male Line ascending.	26
Paternal Line preferable to the Maternal.	27
Paternal Male Line before the Female Line.	27
Female Line ascending.	27
Descents by Custom.	29
By the Custom of Gavelkind.	29
By the Custom of <i>Borough-English</i> .	29
Descents by Statute.	31
<i>Statute de donis conditionalibus</i> .	31
The Nature of Lands before the Statute.	31
Cause of making the Statute <i>de donis</i> .	32
Inconveniencies of it.	32
What Alienations are restrained by the said Statute.	33
Descents <i>jure Coronæ</i> .	34
By what Seisin Descents to the Half-Blood shall be defeated.	35

What shall be an Impediment of a Descent.

Page 36

In what Cases a Man shall be said to be in by Descent or by Purchase.	37
Of Descents which take away Entries.	39
In what Cases.	40
Where the Descent is immediate.	40
Where the Entry is given by Record.	40
Of what Things a Descent shall take away an Entry.	41
Of what Estates.	41
Who shall be bound thereby	41
In what Respect of his Right or Estate.	42
In Respect of several claiming by the same Title.	42
Where an Entry taken away by Descent shall revive.	43
How a Descent to take away an Entry may be prevented by continual Claim.	43
What Things shall descend to the Heir, and not go to the Executor.	45
What Person may be Heir to another, and to whom.	45
In general.	45
By Matter subsequent.	46
Where the Mulier shall be barred.	47

See Continual Claim.

Devise.

A Devise what, and Devisor or Devisee who.	852
Kinds of Devises.	853
Of Things requisite in a good Devise.	857
Who may make a Devise or not.	858
What Things may be devised.	858
Of naming Things devised.	861
Who may be a Devisee.	861
Of naming the Devisee.	862
Of the Devisee's Capacity to take by the Name whereby he is described.	862
Of misnaming the Devisee.	863
Of the Words of a Devise.	863
Of the Intent of making a Devise.	863

Disability.

To Grant or Purchase.

See Aliens.
Artificers.
Attainder.
Baron and Feme.
Bastard.
Corporations.
Deaf and dumb Persons.
Ecclesiastical Persons.
Felony.
Felo de se.
Feme Covert.
Idiots.

See

The T A B L E.

See *Infants.*
Lunatics.
Outlaws.
Papists.
Queen.

Disagreement.

How a Deed may become void by Disagreement. Page 875

Discontinuance.

Where a Fine works a Discontinuance. 625

Disseisin.

Forfeiture of Estate by Disseisin. 110
Disseisin what. 110
Disseisor who. 4, 110, 113
What Act shall be said to be a Disseisin. 110
Who shall be said to be a Disseisor, or not, where a Man cannot qualify his own Act. 112
Disseisin of a Rent. 112
Denial. 112
Disseisor by Command. 114
By Agreement. 114
By Election. 114
By whom and to whom Disseisin may be made. 116
Who may be a Disseisor to the Use of another. 117
Where an Entry is taken away. 117
Where the Act of the Disseisor shall bind the Heir. 118
Disseisee's Remedy after Re-entry. 118
A Disseisor may hold against all Men but the right Owner. 4
In what Time a Disseisor may be sued. 4
Where a Disseisee, &c. shall be barred by a Fine of the Disseisor, &c. 621

Disseisor.

Of a Feoffment made by a Disseisor or Disseisee. 536
Of a Lease by Disseisee. 740

Distribution.

Distribution of the Intestate's Estate to be made. 159
Of bringing into Hotchpot according to the Statute of Distribution, where Provision has already been made for some of the Children of the Intestate. 160
Estates *pur autre vie*. 163
Estates in *London* and the Province of *York*. 163

Dower.

Attainder of Felony in the Husband no Loss of Dower to the Wife. Page 83

See Tenant in Dower.

Duress.

How it will avoid a Grant. 718
Of Deeds obtained by Duress. 868

Ecclesiastical Persons.

Whether Ecclesiastical Persons can contract, give or grant. 178
Of a Feoffment made by an Ecclesiastical Person. 536
Of Fines by Ecclesiastical Persons. 589
Of Grants by Ecclesiastical Persons. 718
What Leases (or other Acts) Bishops or other Spiritual or Ecclesiastical Persons and Colleges may make (or do) with the Lands they have in the Right of their Churches or Houses, &c. and what Leases made by such Persons will bind their Successors and others, or not. 745
Ecclesiastical Persons may not devise Lands or Goods they have in Right of their Church. 858

Election.

Where it must be made. 495
Of Election on a Grant. 727

Entry.

Of Entry in general. 4
Entry what. 4
Property by Entry, what it is. 4
Derivation of this Law. 4
Antiquity. 4
Entry or Claim not sufficient to avoid a Fine, &c. unless an Action be brought within a Year, &c. 9
Entry congeable. 5
In what Case congeable. 5
What shall be said an Entry to reduce an Estate. 6
Where an Entry into Part shall be an Entry for the whole. 7
Where an Entry by one shall serve for another. 8
In what Cases the Entry of one to the Use of another settles the Possession in him without Agreement. 8

The T A B L E.

What is a good Agreement to settle an Estate where the Entry is to the Use of another.	Page 10
Of what Things Advantage may be taken without an Entry.	10
In what Cases an Estate shall be in a Person without Entry.	10
By whom and on whom an Entry may be for a Forfeiture.	11
At what Time an Entry may be for a Forfeiture.	11
Entry for the Breach of a Condition.	11
In what Cases it may be.	11
Who may enter.	11
At what Time.	12
Where a Demand must be before Re-entry.	12
Things to be observed in demanding Rent.	13
How he, who enters for a Condition broken, shall be said to be in.	14
1. Of the same Estate.	14
In Respect of Impossibility.	14
In Respect of Necessity.	14
2. In Respect of collateral Qualities.	15
What Things shall be avoided by Entry for a Condition broken.	15
Where Trustees for Years never entered, but suffered <i>Cestuy que Trust</i> to take the Profits, how the Trustees may assign over this Term.	15
How to enter into and take Possession of Lands, and execute a Deed thereupon.	16
Entry taken away by a Descent.	39 to 42
Where it shall be reserved.	43
How prevented by continual Claim.	43
Of Entry for a Forfeiture.	93
On whom made.	93
At what Time.	93
Where an actual Entry is necessary to perfect a Deed.	495
Where an Entry for a Forfeiture incurred by levying a Fine is good.	627
Of Entry to avoid a Fine.	629
The Time of Entry.	631
Of avoiding a Fine by Entry.	642
Where Uses extinguished shall revive by Entry.	696
Where a Lease is only voidable by Entry.	752
See Continual Claim.	
See Forcible Entry and Detainer.	

Equity.

Where a Court of Equity will relieve against the Breach of a Condition.	357
Where Equity will supply Livery of Seisin.	373
Where Equity will relieve against a Forfeiture incurred by levying a Fine.	628
Relief in Equity against Fines obtained by Fraud, &c.	641
Where Equity will not make good a Fine, nor supply any Defect in the levying it.	644

Where a Release shall be set aside in Equity.	Page 773
Where a Lease and Release shall be set aside in Equity.	776
Where Equity will compel a Surrender in Pursuance of a Bond.	813
When Equity will supply a defective Surrender, or the Want of a Surrender.	815
Where an Accident or Fraud in the writing of an Obligation has been relieved in Equity.	829
Where a Bond, though extinguished in Law, is good in Equity.	848
What shall be recovered on a Bond in Equity.	849
In what Cases Obligees have Remedy in Equity where Bonds are lost or clandestinely taken away.	849
Where Defects or Mistakes in Deeds may be amended or supplied in Equity, or not.	882

Equity of Redemption.

Where an Equity of Redemption shall be forfeited.	794
---	-----

See **Mortgages.**

Error.

Where a Fine shall be avoided for Error.	637
Of Errors in Common Recoveries, and in what Cases they may be amended.	673

Escheat.

Of acquiring Real Estates by Escheat.	79
The Derivation and Signification of the Word <i>Escheator</i> .	79
Property of Lands by Escheat.	79
Causes of Escheat.	79
Bastardy.	79
Attainder of Treason or Felony.	79
Things to be observed in Escheats.	80
The Tenure.	80
The Manner of the Attainder.	80
What Attainders shall give Escheat to the Lord.	82
In what Cases an Escheat shall be to the Grantor, or not.	83
Who shall take Advantage of an Escheat.	84
By what Act an Escheat may be prevented.	84
At what Times Forfeitures commence.	84
Of seising Felons Goods and Chattels.	84
Of a Purchase by a Person attainted.	84
Restitution in Blood.	85

Escrow.

Of delivering a Deed as an Escrow.	252
------------------------------------	-----

Estates in Fee-Simple. See **Descents.**
 Estates-Tail. See **Descents by Statute,**
 Tenant in Tail.

Estates

The T A B L E.

<p>Estates pur auter vie.</p> <p>How and when distributable. Page 163</p> <p>See Tenant for Life.</p> <p>Estoppel.</p> <p>How a Fine shall bar by Way of Estoppel. 624</p> <p>Estrays. See Strays.</p> <p>Evidence.</p> <p>Of Evidence allowed in Common Recoveries. 670</p> <p>Exceptions.</p> <p>Exception in a Deed what. 260</p> <p>It must be of such a Thing as he who makes the Exception may have, and does belong to him. 260</p> <p>It must not be of the whole Thing granted, but a Part thereof only. 260</p> <p>The Thing that is excepted must be a Part of the Thing granted before, and not of some other Thing. 260</p> <p>The Thing excepted must be of such a Thing as may be severed from the Thing granted, and not of inseparable Incidents. 260</p> <p>It must be of a particular Thing out of a general, or of a Part of an intire Thing, and not of a particular out of a particular, or the whole Thing itself granted. 261</p> <p>An Exception must be conformable to the Grant, and not repugnant thereto. 261</p> <p>The Thing excepted must be certainly described and set down. 261</p> <p>In what Part of the Deed, and by what Words. 263</p> <p>By the same Words whereby it may be well granted, it may be well excepted. 263</p> <p>It may be made by other Words that carry the same Sense, but the Words before mentioned are most proper. 263</p> <p>How a Covenant differs from an Exception. 378</p> <p>Excommunication.</p> <p>Whether an excommunicated Person can make a Feoffment. 534</p> <p>Executors.</p> <p>Of acquiring, &c. Personal Estates by Executorship. 136</p> <p>Who are Executors, and how they are appointed. 136, 853</p> <p>Kinds of Executors. 853</p> <p>By whom Executors may be appointed. 136</p>	<p>Queen. Page 136</p> <p>Feme Covert. 136</p> <p>Felon. 136</p> <p>Outlaw. 136</p> <p>How many may be appointed. 136</p> <p>Of naming an Executor. 863</p> <p>For what Time Executors may be appointed. 137</p> <p>Who are capable or not of being Executors. 137</p> <p>Of accepting or refusing an Executorship. 137</p> <p>In what Cases a Person may refuse an Executorship, or not. 137</p> <p>What Acts will be an Administration to make a Consent to an Executorship. 137</p> <p>Of Refusal or Consent where there are many Executors. 138</p> <p>How far Acts of Charity or Humanity are not accepting of an Executorship. 139</p> <p>The Executors Interest in the Goods, &c. of the Testator. 139</p> <p>What Things shall go to the Executor or Administrator. 139</p> <p>Where, upon the Death of one of the Executors the Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other. 141</p> <p>What Things the Executor or Administrator shall have as Lessee. 142</p> <p>When the Surplus of the Personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin to the Testator. 142</p> <p>What the Heir shall have, and not the Executor. 45, 145</p> <p>Of Paraphernalia. 146</p> <p>An Executor's Power. 146</p> <p>Of Assets. 147</p> <p>The Office and Duty of an Executor. 149</p> <p>As to the Burial. 149</p> <p>Probate. 149</p> <p>Inventory. 150</p> <p>Debts. 150</p> <p>Legacies. 151</p> <p>Accounting before the Ordinary. 152</p> <p>Of Overseers of a Will. 152</p> <p>Waste by Executors. 152</p> <p>Executor <i>de son tort</i> who. 152</p> <p>The Power of an Executor <i>de son tort</i>. 153</p> <p>Who shall be chargeable as Executors. 154</p> <p>Where Executors shall have an Action of Covenant. 407</p> <p>Where Executors are bound by the Covenant of the Testator. 411, 412</p> <p>Release by one Executor will bar the rest. 765</p> <p>Where a Mortgage shall go to the Executors. 790</p> <p>Exchanges.</p> <p>Exchange what. 797</p> <p>The Nature and Effect of an Exchange. 797</p> <p>When</p>
---	---

The T A B L E.

When a Deed shall take Effect as an Exchange, or not.	Page 798
Things requisite to the Perfection of an Exchange.	798
Of the Parties to a Deed of Exchange.	799
Of the Things exchanged.	800
How an Exchange must be made.	801
Of the Equality of the Estates or Interests exchanged.	802
Of the Execution of an Exchange.	803
Where an Exchange shall be determined, or the Nature of it changed by Matter <i>ex post facto</i> , and where not.	804
Where an Exchange voidable at first becomes good by Matter <i>ex post facto</i> , or not.	804
Who may take Advantage of a void or voidable Exchange, or not.	805
How an Exchange shall be construed and taken.	805

Extinguishment.

What is extinguished by a Feoffment.	533
Where a Fine is an Extinguishment of an Estate.	626
Where and how Uses of Land may be extinguished, &c.	696
What is an Extinguishment of a Power of Revocation, or not.	819

False Suggestions.

O F Deeds obtained by false Suggestions.	868
---	-----

Feme Covert.

Cannot purchase <i>sans</i> Assent of her Husband.	80
Where she may make an Executor.	136
She may be an Executrix.	137
Of Livery of Seisin by a Feme Covert.	565
Of a Fine by or to a Feme Covert.	589, 590
Of a Grant by a Feme Covert.	717
To a Feme Covert.	720
Whether a Feme Covert is capable of making a Will,	855
Or Devise.	858
Of a Feme Covert's Avoiding her own Grant.	882

Felony. See Attainder.

Whether any may be Heir to a Man convicted of Treason or Felony.	46
How far a Person convicted of Treason or Felony may purchase.	50
A Felon cannot make an Executor.	136
But may be an Executor.	137
Whether he can make a Will.	856

Felo de se.

Whether a Will made by one who becomes a <i>Felo de se</i> be good.	856
---	-----

Feoffments.

Feoffment what, and Feoffor and Feoffee who.	Page 526
Feoffment, Definition of the Thing.	526
Derivation of the Word.	526
It is a Conveyance in Fee-Simple of a corporeal Estate.	526
Must be by Writing with Livery of Seisin.	527
Of the Antiquity of Feoffments.	527
Of the Kinds of Feoffments.	528
The Difference between a Feoffment at Common Law and a Feoffment by the Statute 1 R. 3.	529
Feoffment how made and executed.	529
What amounts to a Feoffment.	530
The Difference between a Feoffment to Uses, and a Covenant to stand seised to Uses.	531
In what Cases Uses are vested or changed by a Feoffment.	531
Of Feoffments upon Conditions and to the Uses of another, and to a Will.	532
Of the Nature, Operation and Force of a Feoffment.	533
What is extinguished by a Feoffment.	533
Who may make a Feoffment, and to whom it may be made.	533
How the Feoffor may be named.	537
How the Feoffee may be named.	537
What Consideration is necessary to a Feoffment.	537
Of what a Feoffment may be.	537
By what Name a Thing may pass by Feoffment.	538
What is a good Feoffment in Respect of the Presence or Possession of other Persons on the Land.	539
What Feoffments are void.	540
Livery of Seisin what.	541
The Antiquity and Origin of Livery of Seisin.	541
The Kinds of Livery of Seisin.	541
Livery in Deed what.	541
Livery in Law what.	542
The Nature and Operation of Livery of Seisin.	542
The Effect and Operation of Livery of Seisin to pass a future Interest.	542
The Effect of Livery of Seisin with Respect to the Presence or Possession of others.	545
Livery of Seisin in what Cases it is requisite, or not.	548
By whom Livery of Seisin may be made.	550
To whom Livery of Seisin may be made.	551
When Livery of Seisin must be made.	553
At what Place Livery of Seisin must be made.	554
Of what Things Livery of Seisin may be made.	555
How Livery of Seisin is to be made.	555

Livery

The T A B L E.

Livery in Deed, how and to whom to be made, and when it is good. Page 559	With Proclamations. Page 579
Livery in Law, or within the View, how and to whom to be made, and when it is good. 560	Executed. 579
What shall be said an Execution of the Livery. 563	Executory. 579
In what Cases several Parcels shall pass by one Livery, or where several Parties may take by a Livery to one. 563	Other Divisions of Fines. 579
Of making Livery of Seisin by Letter of Attorney in general. 564	Fine <i>sur Cognizance de droit come ceo, &c.</i> 580
By whom and to whom Livery may be made by Letter of Attorney. 564	Fine <i>sur Concessit.</i> 582
Who may make Livery of Seisin by Attorney. 565	Fine <i>sur Concessit tantum.</i> 583
Who may be an Attorney to make Livery of Seisin. 565	Fine <i>sur Concessit et Reddidit.</i> 583
Livery to be by Deed. 566	Fine <i>sur Cognizance de droit tantum.</i> 583
When Livery must be made. 566	Fine <i>sur Cognizance de droit ove Grant and Render.</i> 584
In what Place Livery by Attorney may be made. 567	Fine <i>sur Done, Grant and Render.</i> 584
How Livery must be made. 567	Of the Parts of a Fine. 587
Livery to one in the Absence of the other Feoffee, or to more Persons than is requisite. 568	As to the original Writ. 587
Delivery of Seisin of Part in the Name of the whole, or of more than the Authority extends to. 569	The Composition or King's Licence. 587
Where Livery is void on Account of the Letter of Attorney being bad. 569	The Concord. 587
What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin. 570	The Note of the Fine. 587
How Livery of Seisin shall enure, and be taken and construed. 570	The Foot of the Fine. 588
What must be done after Livery of Seisin. 573	Proclamations made upon a Fine. 588
Indorsement when Livery is made by the Feoffor. 573	Who may be Cognizors. 588
When made or received by Letter of Attorney. 573	Who may be Cognizees. 590
When Livery is presumed at Law, or supplied in Equity. 573	By what Names Cognizors and Cognizees may give and take in a Fine. 590
Where a Feoffment made by Tenant for Life or Years, shall be deemed a Surrender, or not. 813	Of what Fines may be levied with Respect to the Estate of the Parties. 591
Where it is made to him in Reversion or Remainder. 813	Of what Fines may be levied with Respect to Things. 593
When it is made to him and a Stranger. 814	Of what Fines may not be levied with Respect to Things. 593
When it is done both with the Tenant and him in Reversion or Remainder. 814	By what Names Things must be expressed in Fines. 593
	The Order of placing Things in Fines. 595
	Of naming the Places where the Things lie. 595
	Of the <i>Præcipe</i> and Concord of a Fine. 596
	The <i>Præcipe</i> what. 596
	Concord what. 596
	Of what a Concord may be. 596
	Of reciting Things in a Concord. 597
	Exception in a Concord. 598
	Dividing Things. 598
	How the Right is to be limited. 598
	Release and Warranty. 599
	Several Purchases in one Fine. 599
	Lands in several Counties. 599
	Of what Term a Fine shall be. 599
	Exposition of Concords. 599
	In what Courts Fines may be levied. 599
	Before what Persons Fines may be acknowledged. 600
	Judges. 600
	Commissioners. 600
	Their Duty. 601
	Before whom to be recorded. 601
	How to sue out and levy Fines in general. 601
	How to acknowledge a Fine at the Bar. 602
	How to sue out a Fine before the Chief Justice of the Common Pleas. 602
	How a Fine must be acknowledged before a Judge of the Common Pleas in the Country. 602
	The Manner of acknowledging and levying Fines before Commissioners. 603
	In 10 Y

Fines.

A Fine what. 575
Different Acceptations of the Word <i>Fine</i> . 575
Of the Origin and Antiquity of Fines. 576
The Nature, Use and Effect of a Fine. 577
Of the several Kinds of Fines. 578
Single. 578
Double. 578
Without Proclamations. 579
PART I.

The T A B L E.

In what Cases a <i>Dedimus potestatem</i> may issue.	Page 603	Where Equity will relieve against a Forfeiture by levying a Fine.	Page 628
How to sue out a <i>Dedimus potestatem</i> .	604	Claim what, and the different Kinds of Claim.	629
How the Commissioners are to take the Acknowledgment of a Fine, and return, or certify the same into the Court of Common Pleas.	604	Of Non-claim.	629
How the Fine must be transmitted to and allowed by a Judge of the Common Pleas.	605	Of Entry.	629
How to pass a Fine (after it is allowed) through the several Offices till it is finished.	606	The Time of Entry or Claim.	631
Of Fines by or to Husband and Wife, or one of them.	607	Where there is no good Claim.	634
Husband alone of the Wife's Lands.	607	How Fines executory are to be executed.	634
Husband alone of his own Lands.	607	Of Attornment upon a Fine.	636
Husband alone of Lands whereof they are both Tenants in special Tail.	607	Of avoiding Fines in general.	636
Wife alone.	608	By Death of some of the Parties.	636
Baron and Feme.	608	By Error.	637
The Feme under Age.	608	By Fraud, Deceit or Covin.	641
How the Act of the Husband shall bind the Wife.	609	Relief in Equity against Fines obtained by Fraud.	641
Of Fines by Tenant for Life or Tenant in Tail.	609	By Claim, Entry, &c.	642
Of Fines barring Estates in general.	618	By Plea.	642
How Parties shall be barred.	618	By Sentence of a Court.	644
How Privies shall be barred.	619	Where Equity will not make good a Fine, nor supply any Defect in the levying it.	644
How Strangers shall be barred.	619		
All Persons whatever that have present Right and no Impediment.	619	Forcible Entry and Detainer.	
Such as have present Right, and have Impediments.	620	What it is.	16
Such as have not a present but a future Right upon a Cause precedent.	620	Remedy given by divers Statutes.	16, 17
Such as have neither present nor future Right at the Time of levying the Fine, by Reason of any Matter had before the Fine, but whose Right grows either intirely after the Proclamations, or partly before and partly after.	620	Forfeitures and Losses in Civil Cases.	
Parties having natural or civil Capacities how barred.	621	Of acquiring Real Estates by Means of Forfeitures and Losses in Civil Cases.	85
Heirs when barred.	621	Of Forfeitures and Losses of Real Estates in general.	85
Where a Disseisor, &c. may be barred by a Fine of the Disseisor, &c.	622	Forfeiture what.	85
Where a Fine shall be a Bar as to one Person, and not to another, or as to one Part of the Land and not to another.	622	Of Forfeitures by the Alienation of a particular Tenant, by claiming a greater Estate than he ought, or by affirming a Reversion or Remainder to be in a Stranger.	85
What Estate may be barred by a Fine.	622	Of the Nature of the Thing forfeited, whether in <i>Pais</i> or by Record.	85
Where a Fine is a Corroboration only, and no Bar.	624	In <i>Pais</i> .	85
How a Fine is a Bar by Estoppel.	624	By Matter of Record.	86
Where a Fine works a Discontinuance.	625	By Alienation,	86
Where a Fine works by Way of Remitter.	625	Devesting.	86
Where a Fine is an Extinguishment of an Estate.	626	Not devesting.	86
Fine by Tenant by the Curtesy extinguishes his Right.	626	By Claim.	86
How a Fine levied in Pursuance of a Decree in Chancery works.	627	Express.	86
Where a Fine enures as a Release.	627	Implied.	86
Where levying a Fine makes a Forfeiture, and where not; and where the Entry for such Forfeiture is good.	627	By affirming the Reversion or Remainder to be in a Stranger.	86
		Actively.	86
		Passively.	86
		What is a Forfeiture by Matter of Record.	86
		Of a Lease.	87
		Of what Estate such Forfeitures may be.	89
		What Persons may commit such Forfeitures.	90
		By what Alienation such Forfeiture may be.	91
		In Respect of the Person to whom it is made.	91
		In what Cases such Forfeitures may be dispensed with.	92
		Who	

The T A B L E.

<p>Who in Respect of the Estate may dispense therewith. Page 92</p> <p>What Act shall be a Dispensation of it. 92</p> <p>What shall excuse such Forfeitures. 93</p> <p>Of Entry for a Forfeiture. 93</p> <p> On whom made. 93</p> <p> At what Time. 94</p> <p>What Person shall take Advantage of a Forfeiture. 94</p> <p>By Alienation, Mortmain. 96</p> <p>By Non-performance of a Condition. 98</p> <p>By Waste. 98</p> <p>By Bankruptcy. 101</p> <p>By Disseisin. 110</p> <p>By Abatement, Intrusion, Deforcement, Usurpation and Purpresture. 118</p> <p>Of acquiring the Property in Personal Estates by Means of Forfeitures and Losses in Civil Cases. 172</p> <p>By Sale in a Market-overt and Bankruptcy. 172</p> <p>By the King's Prerogative, or by his Grant or by Prescription. 172</p> <p> Of Treasure trove. 172</p> <p> Of Waifs. 172</p> <p> To whom forfeited. 173</p> <p> Restitution in what Cases made. 173</p> <p> Why the Forfeiture is. 173</p> <p> Who may seize Waifs. 173</p> <p> Of Strays. 173</p> <p> Proclamation thereof. 173</p> <p> Of straying again within the Year. 173</p> <p> Of the Owners claiming and seizing the Cattle. 173</p> <p> Estrays how to be used. 173</p> <p> Of Wrecks. 174</p> <p> What is not a Wreck. 174</p> <p> To whom a Wreck belongs. 174</p> <p> Of Deodands. 174</p> <p> Original of Deodands. 175</p> <p> Acquisition of Property by Means thereof. 175</p> <p> To whom Deodands are forfeited. 175</p> <p> What Things are Deodands. 175</p> <p> When the Forfeiture accrues. 175</p> <p> Distribution thereof. 175</p> <p>Where levying a Fine makes a Forfeiture, and where not. 627</p> <p>Of Forfeiture by Lessees. 752</p> <p>Forfeitures and Losses in Criminal Cases.</p> <p>Of acquiring Real Estates by Means of Forfeitures and Losses in Criminal Cases. 119</p> <p>Forfeiture in High Treason. 119</p> <p>When the King shall be vested of the Lands, &c. forfeited. 119</p> <p> In Misprision of Treason. 120</p> <p> In Petit Treason and Felony. 120</p> <p> Standing mute. 120</p> <p> Challenging Jurors. 120</p> <p>How the Forfeitures differ from High Treason. 120</p>	<p>Custom of Gavelkind what. Page 120</p> <p>General Rule as to Customs. 121</p> <p>To what Place this Custom of Gavelkind is. 121</p> <p>Whether the Brother shall inherit the Gavelkind Lands of the Brother executed for Felony. 121</p> <p>Whether the Wife shall forfeit her Dower of Gavelkind Lands. 121</p> <p>Whether the Custom of Gavelkind extends to Petit Treason. 121</p> <p>Custom of Gavelkind as to Piracy. 121</p> <p>To what Time the Forfeiture relates. 122</p> <p>When the Lands, &c. shall be vested in the King. 122</p> <p>Of seising Goods before Conviction. 122</p> <p>The Forfeiture at the King's Will upon Statute. 122</p> <p>Whether the Custom of Gavelkind extends to Felony by Statute. 122</p> <p>Of Felo de se. 123</p> <p>In Manslaughter. 123</p> <p>In Chance-medley and <i>se defendendo</i>. 123</p> <p>Upon Outlawry in Treason, Felony, &c. 123</p> <p>In Petit Larceny. 124</p> <p>Upon Flight. 124</p> <p>Upon Appeal of Death. 124</p> <p>Drawing a Weapon upon a Judge, or for striking in Westminster-Hall, &c. sitting the Courts. 124</p> <p>In <i>Præmanire</i>. 124</p> <p>For Challenging to fight for Money won at Play. 125</p> <p>By Papists. 125</p> <p>By Artificers for exercising or teaching their Trades in Foreign Parts. 125</p> <p>Of acquiring the Property in Personal Estates by Means of Forfeitures and Losses in Criminal Cases. 175</p> <p style="text-align: center;">Forgery.</p> <p>Of forged Deeds and Wills. 868</p> <p style="text-align: center;">Fraud.</p> <p>Where a Fine shall be avoided for Fraud. 641</p> <p>Of fraudulent Deeds and Wills. 868</p> <p>Of Deeds made or concealed by Fraud. 869</p> <p> To deceive Purchasers. 869</p> <p> To defraud Creditors. 871</p> <p>Of fraudulent Wills. 876</p> <hr/> <p style="text-align: center;">Gaming.</p> <p>Challenging to fight for Money won at Play incurs a Forfeiture of Personal Estate. 125</p> <p style="text-align: center;">Gavelkind.</p> <p>The Custom of Gavelkind. 29</p>
---	---

The T A B L E.

Gavelkind Land not forfeitable for Felony.	Page 83, 120
To what Places the Custom of Gavelkind extends.	121
Whether the Brother shall inherit the Gavelkind Lands of his Brother executed for Felony.	121
Where the Dower is forfeitable.	121
Whether the Custom of Gavelkind extends to Petit Treason.	121
Custom of Gavelkind as to Piracy.	121
Whether the Custom of Gavelkind extends to Felonies by Statute.	122

Gifts.

Of acquiring or conveying Personal Estates by Gift.	126
Gift what.	126
Gift how made.	126
Of Deeds of Gift.	713

Grants.

Grant what, and Grantor and Grantee who.	714
Kinds of Grants.	715
What Grants must (or may not) be by Writing.	715
Things necessary to every good Grant.	717
Who may be a Grantor.	717
Of naming the Grantor.	718
Who may be a Grantee.	719
Of naming the Grantee.	720
Of the Power of the Grantees, where the Grant is for the Benefit of others.	721
Of the Things granted.	721
Of the Estate, Property and Possession of the Grantor.	725
The Words of a Grant.	727
Of naming and describing the Things granted, and therein of <i>Election</i> .	727
Of the Commencement and Limitation of the Estate granted.	731
In the Commencement of the Estate granted.	731
In the Limitation of the Estate on the <i>Habendum</i> of the Grant.	732
What may or may not be granted by the same Deed.	732
Of several Grants of the same Thing.	732
Of Omissions of Ceremonies required in Grants.	733
What shall be said a good Grant in the Nature of a Release or Discharge, or not.	733
Of void Grants.	733
How Grants shall be construed.	733
Of Attornments.	734
Attornment what.	734
Kinds of Attornments.	734
The Effect of Attornment.	734
In what Cases the Attornment of Tenants is necessary or not, and void or not.	734

By whom an Attornment may and must be made, or not.	Page 735
To whom an Attornment may and must be made, or not.	736
At what Time an Attornment must be made.	736
How to make an Attornment, and what shall be said a good Attornment, or not.	736
Who shall be compelled to attorn, or not.	737
How an Attornment shall enure and be taken.	738
How an Attornment shall relate.	738
Where a Grant made by Tenant for Life or Years shall be deemed a Surrender.	813
Where it is made to him in Reversion or Remainder.	813
When it is made to him and a Stranger.	814
When it is done both with the Tenant and him in Reversion or Remainder.	814
When a Grant, &c. is made of the same Land, or a Thing out of the same Land.	814

Habendum.

THE <i>Habendum</i> in a Deed what.	263
The Office of the <i>Habendum</i> .	264
What the <i>Habendum</i> should contain, where placed in the Deed, and by what Words expressed.	264
How the <i>Habendum</i> shall be construed, and how different Estates are limited according to the Words of the <i>Habendum</i> .	265
Limitation of different Estates to different Persons.	272
Where the <i>Habendum</i> is repugnant and void, and where not, but shall control, divide or expound the Premises.	273

Heir-Looms.

Heir-Looms what, and who shall have them.	172
---	-----

Heriot.

Heriot what.	171
Heriot-Service.	171
Heriot-Custom.	171

Hotchpot.

Of bringing into Hotchpot according to the Statute of Distribution, and of Distribution where Provision has already been made for some of the Children of the Intestate.	160
--	-----

Ideots.

HAVE Capacity to purchase.	50
Whether an Ideot can give or grant.	190
Whether an Ideot can make a Feoffment.	534

The T A B L E.

Of a Recovery suffered by an Ideot.	Page 661
Of a Grant by an Ideot.	718
To an Ideot.	720
Whether an Ideot is capable of making a Will.	855
Whether an Ideot may avoid his own Grant, &c.	882

Indenture.

Indenture what.	520
What Conveyances must be by Indenture, and not by Deed Poll.	522

Infants.

An Infant has Capacity to purchase.	50
An Infant <i>in ventre sa mere</i> may be an Executor, but cannot act till he is seventeen Years of Age.	137
Grant, &c. by an Infant.	187
Where an Infant shall be bound by his Covenant.	415
Whether an Infant can make a Feoffment.	534
Of Livery of Seisin by an Infant.	565
Of a Fine by or to an Infant.	589, 590, 638
Of a Recovery suffered by an Infant.	659
By an Infant Trustee.	659
Whether an Infant may make a Grant.	718
Whether he may take by Grant.	720
Of a Lease by an Infant.	740
Whether an Infant is capable of making a Will.	855
Or Devise.	858
In what Cases an Infant may avoid his own Grant, &c. or not, and in what Time.	882

Interlineation.

Where a Deed may become void by interlining.	874
--	-----

Inrolment.

Of inrolling Deeds of Bargain and Sale.	708
In the Courts at <i>Westminster</i> , or before the <i>Custos Rotulorum</i> , &c.	708
What is paid for Inrolment.	709
Where the Inrolment is to be kept for Inspection.	709
How to inrol Deeds in the King's Bench.	709
Of inrolling Bargains and Sale in <i>Lancashire</i> , <i>Cheshire</i> and <i>Durham</i> .	710
In <i>Yorkshire</i> .	710
How and to what Purpose the Inrolment of a Deed shall relate.	711

Intruders.

A Fine levied by an Intruder upon the Thing is bad.	590
---	-----

Intrusion.

What it is.	118
-------------	-----

PART I.

Jointenants.

A Jointenant may lease his Moiety to commence after his own Death.	Page 187
Conveyance by a Jointenant.	191
Of a Feoffment made by a Jointenant.	536
Of a Fine levied by a Jointenant.	590
Of a Lease by a Jointenant.	740

Judgment and Execution.

Of acquiring Goods, &c. by Judgment and Execution.	171
--	-----

King.

Of a Feoffment made by or to the King.	536
Of a Fine by Tenant in Tail of the King's Gift.	589
Of a Recovery by Tenant in Tail of the King's Gift.	648
Of a Recovery suffered by the King.	661

Leases.

ARTICLES amounting to an immediate Lease.	399
Where a Proviso makes not a Lease, but only a Covenant.	398
What Words of Covenant or Agreement amount to a Grant, Lease, &c.	400, 404
Covenant to permit one to enjoy, &c. is no Lease.	400
Covenant and Grant that one shall enjoy the Lands, &c. amount to a Lease.	400
Mortgage and not a Lease.	400
Agreement between Strangers not to amount to a Lease.	400
<i>Concessit</i> makes a Lease.	400
Articles make an immediate Lease, though there is a Covenant therein that a Lease shall be made and executed.	401
A Lease what, and Lessor and Lessee who.	739
Kinds of Leases.	739
Things necessarily required in every good Lease.	739
What is a good Lease for Life or Years with Respect to the Lessor and Lessee, and the Thing leased, and the Estate, Property or Possession of the Lessor, &c. therein.	740
By special Power or Proviso to make Leases.	741
What Leases (or other Acts) may be made (or done) by a Tenant in Tail, and what Leases made by such a Tenant shall be good to bind the Issue or him in Remainder, or others after	10 Z

The T A B L E.

ter the Death of the Tenant in Tail; and how they shall bind.	Page 742
What Leases (or other Acts) may be made (or done) by the Husband with the Lands he has in Fee-Simple or Fee-Tail, in the Right of his Wife, or jointly with her; and what Leases made by him of such Lands are good or not, and how.	744
What Leases (or other Acts) Bishops or other Spiritual or Ecclesiastical Persons and Colleges, may make (or do) with the Lands they have in Right of their Churches or Houses, &c. and what Leases made by such Persons shall bind their Successors and others, or not.	745
Of the Manner of the Agreement in a Lease, and the Words whereby the same is set down; and what Words will make an Estate for Life or Years.	747
Of two Leases at one Time of the same Thing.	749
Of the Commencement, Continuance and End of the Term or Estate.	750
Of Forfeitures by Lessees.	752
Where a Lease for Life or Years shall be void <i>ipso facto</i> by the Death of the Lessor, or by other Means, or not, but voidable by Entry, &c. and how.	752
What shall be said a good Lease at Will, or not.	753
Of Repairs, &c. by Lessees.	753
Of Waste committed by Lessees.	753
Of Remedy by Recoverers in a Common Recovery against Lessees for Rents, Services, Waste, &c.	670
Where a Lease or other Act made or done by the Tenant for Life or Years shall be deemed a Surrender, or not.	813
Where it is made to him in Reversion or Remainder.	813
When it is done or made to him and a Stranger.	814
When it is done both with the Tenant and him in Reversion or Remainder.	814
When made of the same Land, or a Thing out of the same Land, &c.	814

Lease and Release.

A Conveyance by Lease and Release what.	773
Things requisite in a Lease or Bargain and Sale for a Year.	774
With Respect to the Consideration.	774
With Respect to the Estate and Possession.	774
With Respect to Inrolment.	774
Things requisite to the Release.	775
With Respect to the Consideration.	775
With Respect to the Estate and Possession.	775
With Respect to the Words in a Release.	775

With Respect to Recitals, the Uses, Conditions, Defeasances, Warranties and Covenants.	Page 775
Of setting aside a Lease and Release.	776

Legacies.

Of acquiring Goods, &c. by Legacy.	163
Legacy what, and Legatee who.	163, 852
Who may be a Legatee.	861
To whom Legacies are to be paid, or not.	163
Who are incapable of taking by Legacy, or being Legatees.	164
Difference between the Property and Use being bequeathed.	164
Where Legacies are recoverable, and of an Executor's Assent to a Legacy.	165
Assent where necessary, or not.	165
Assent express or implied.	165
At what Time Legacies are to be paid.	165
In what Order Legacies are to be paid.	166
Of abating Legacies.	166
What a Widow may discount out of Legacies to Children for their Maintenance.	167
Where the Legatee shall have Interest and Maintenance.	167
Ademption of a Legacy.	168
Where a Legacy is lost, or not, by the Death of the Legatee.	168
Of suing for Legacies.	171
The Office and Duty of an Executor as to Legacies.	151

Letters of Attorney.

To make Livery of Seisin.	489
Of making Livery of Seisin by Letter of Attorney.	560
Where Livery is void on Account of the Letter of Attorney being bad.	569
What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin.	570

Limitations.

The Nature of a Limitation.	281, 282
-----------------------------	----------

Livery of Seisin.

Letter of Attorney to make it.	489
Livery of Seisin how necessary.	494
To a Feoffment.	527
Livery of Seisin what.	541
The Antiquity and Origin of Livery of Seisin.	541
The Kinds of Livery of Seisin.	541
Livery in Deed what.	541
In Law what.	542
The Nature and Operation of Livery of Seisin.	542
The Effect and Operation of Livery of Seisin to pass a future Interest.	542

The

The T A B L E.

The Effect of Livery of Seisin with Respect to the Prefence or Possession of others.	Page 545
Livery of Seisin, in what Case it is requisite, or not.	548
By whom Livery of Seisin may be made.	550
To whom Livery of Seisin may be made.	551
When Livery of Seisin must be made.	553
At what Place Livery of Seisin must be made.	554
Of what Things Livery of Seisin must be made.	555
How Livery of Seisin is to be made.	555
Livery in Deed, how and to whom to be made, and when it is good.	559
Livery in Law or within View, how and to whom to be made, and when it is good.	560
What shall be said an Execution of the Livery.	563
In what Cases several Parcels will pass by one Livery, or where several Parties may take by a Livery to one.	563
Of making Livery of Seisin by Letter of Attorney in general.	564
By whom and to whom Livery may be made by Letter of Attorney.	564
Who may make Livery of Seisin by Attorney.	565
Who may be Attorney to make Livery of Seisin.	565
Livery to be by Deed.	566
When Livery must be made.	566
In what Place Livery by Attorney may be made.	567
How Livery must be made.	567
Livery to one in the Absence of the other Feoffee, or to more Persons than is requisite.	568
Delivery of Seisin of Part in the Name of the whole, or of more than the Authority extends to.	569
Where Livery is void on Account of the Letter of Attorney being bad.	569
What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin.	570
How Livery of Seisin shall enure, and be taken and construed.	570
What must be done after Livery of Seisin.	573
Where Livery is presumed at Law or supplied in Equity.	573
Whether Livery is necessary in a Bargain and Sale of Land.	708
To a Lease for Life.	747

Lunatics.

Have Capacity to purchase.	50
Whether a Lunatic can give or grant.	190
Of a Feoffment made by or to a Lunatic.	534
Of Livery of Seisin by Letter of Attorney of a Lunatic.	565
Of a Recovery suffered by a Lunatic.	661
Of a Grant by a Lunatic.	718
To a Lunatic.	720

Whether a Lunatic is capable of making a Will.	Page 855
Whether a Lunatic may avoid his own Grant.	882

Marriage.

Of acquiring or conveying Personal Estates by Marriage.	135
Covenants concerning Marriages.	479

Menaces.

Of Deeds obtained by Menace.	868
------------------------------	-----

Mortgages.

Mortgage what.	787
How a Mortgage is made.	788
What shall be a good Mortgage.	788
Of usurious Mortgages.	788
What shall be taken as a new Mortgage.	789
What shall affect a second Mortgage, or not.	789
Of buying in old Incumbrances to protect Mortgages.	789
In what Order Mortgages, Judgments, &c. are to be paid.	790
How Mortgagee must be satisfied where the Premises fall short.	790
Where Mortgage Money is presumed to be satisfied.	790
To whom the Mortgage Money shall be paid on the Death of the Mortgagee, and to whom Mortgages shall descend.	790
What shall be accounted Principal, and what Interest, and what shall carry Interest, and what the Mortgagee is accountable for.	791
Who may redeem a Mortgage.	791
Of what a Bill in Equity may or may not be to redeem.	792
Where one of two Things mortgaged, or Mortgage and Bond cannot be redeemed without the other.	792
Where a new Term is subject to the old Redemption.	792
What a Mortgagor, &c. is liable to pay on Redemption.	792
In what Time Redemption must be made.	793
Where a Mortgagor concealing a former Incumbrance shall lose his Equity of Redemption.	794
Where a Court at Law may relieve the Mortgagor (Ejectment for the Lands, Action on the Bond for the Mortgage Money, Bill of Foreclosure, &c. being brought) on Payment of Principal, Interest and Costs.	795
Where a Court of Equity may make a Decree on a Bill of Foreclosure before the Suit shall be brought to a regular Hearing.	796
Of	

The T A B L E.

Of re-conveying a Mortgage on Payment of the Money. Page 796
Of a Recovery suffered by a Mortgagor or Mortgagee. 658

Mortmain.

Of Forfeiture by Alienation in Mortmain. 96
Mortmain, Derivation and Signification of the Word. 96
What is a Mortmain. 96
The Statutes of Mortmain and their Expositions, and what Evasions have been made out of them. 96

Mortuary.

Mortuary what, and when due. 172

Name.

WHAT a good Name of Purchase. 51
Of the Name and Description of the Party contracting, as the Grantor, Donor, &c. 218
What is a sufficient Name for the Donee, Grantee, or other Person, to whom a Contract may be made. 228
The Parties Names and Additions or Description. 255
How a Feoffor ought to be named. 537
How a Feoffee ought to be named. 537
By what Name a Thing may pass by Feoffment. 538
By what Names Cognifors and Cognisees may give and take in a Fine. 590
By what Names Things must be expressed in Fines. 593
Of naming the Places where the Things lie. 595
Of naming a Grantor. 718
Of naming a Grantee. 720
Of naming Things devised. 861
Mistake or Error in naming the Thing. 861
Incertainly in naming the Thing. 861
Of naming the Devisee or Legatee. 862
Of misnaming the Devisee. 863
Of naming the Executor. 863

Non-claim.

Where by Non-claim a Fine shall be a Bar. 629

Notice.

Where Notice is necessary before Performance or Breach of a Condition. 306, 311, 318, 339
Where Notice is necessary, or not, for the Performance of a Covenant. 424
Where Notice to repair must be given. 461

Runcupative Wills.

What. 852, 867

Obligations or Bonds.

AN Obligation what. Page 828
Kinds of Obligation. 828
What is a good Obligation, or not, as to its original Creation, and where an Accident or Fraud in the writing of it has been relieved in Equity. 829
As to the Manner and Form of making it. 829
On what to be written. 829
In what Person. 829
Words. 829
Language. 830
As to the Matter and Substance of an Obligation. 831
What is a good Condition of an Obligation, or not. 831
As to the Manner and Form of making it. 831
As to the Matter and Substance of the Condition of an Obligation. 832
Against Law. 832
Impossible. 832
Insensible and incertain. 833
Repugnant. 833
Not triable. 833
What Bonds or Obligations are void by the Statute Law. 833
When void, not being made to the Sheriff. 833
How a single Obligation shall be construed. 835
How an Obligation with a Condition, or the Condition of an Obligation shall be construed, and how it must and ought to be performed. 836
With Respect to the Persons that are to do the Thing. 836
With Respect to the Time of doing the Thing. 836
With Respect to the Place where the Thing is to be done. 837
In Respect of the Thing itself to be done. 838
To perform Covenants. 838
To make a Feoffment, Lease, &c. 838
To make a Release or other Assurance. 838
To pay Money or Rent. 838
To warrant Land, and for quiet Enjoyment. 838
To prove a Thing. 838
To suffer a Wife to make a Will. 838
In Respect of the Manner and Order of doing the Thing, &c. 839
Conditions impossible. 840
When the Condition of an Obligation shall be said to be performed, and the Obligation saved or satisfied, or not. 840
To make a Feoffment. 840
To make an Estate. 841
To make further Assurance. 841
To save harmless. 841
To grant a Rent or to procure it to be granted. 841
Tender

The T A B L E.

Tender and Refusal.	Page 842		
To pay Money.	842		
Acceptance of another Thing.	843		
To stand to an Award.	843		
To shew a Release.	843		
For quiet enjoying.	843		
To appear.	843		
To make a Bond.	843		
To marry a Woman.	843		
To quit Possession.	843		
When a single Bond shall be said to be broken and forfeited, or not.	844		
When the Condition of an Obligation shall be said to be broken, and the Obligation forfeited, or not.	844		
To make a Feoffment.	844		
To make a Lease.	844		
To make an Estate.	844		
To make further Assurance.	845		
To save harmless.	845		
To pay Money.	845		
To pay Rent.	845		
For quiet Enjoyment.	845		
To stand to an Award.	846		
To give a Licence.	846		
To appear.	846		
Not to alien.	846		
To marry a Woman.	846		
To perform Covenants.	846		
To keep Prisoners.	846		
In what Cases an Obligation, although good in its original Creation, is void or discharged by Matter <i>ex post facto</i> , or not.	846		
Where a Bond is extinguished at Law, and where after Extinguishment at Law it is good in Equity.	848		
What shall be recovered on a Bond in Law or Equity.	849		
In what Cases Obligees have Remedy in Equity where Bonds are lost or clandestinely taken away.	849		
Occupancy.			
Occupancy what.	1, 17		
Occupant who.	17		
Upon what Law Occupancy is founded.	17		
What Occupancy is to supply.	17		
The Subject and Object of the Occupant.	18		
Of what Estate there may be an Occupant.	18		
No Occupancy of a Copyhold <i>sans</i> special Custom.	18		
Nor of Things which lie in Grant.	19		
Against whom there shall not be an Occupant.	19		
Who shall be an Occupant.	19		
A special Occupant.	20		
What Actions will lie against an Occupant.	20		
What an Occupant ought to plead.	20		
Relief in Equity in Cases of Occupancy.	20		
How to prevent Occupancy.	21		
Laws relating to Title by Occupancy altered, by Statutes.	21		
PART I.			
		Outlawry.	
		For Treason or Felony creates a Forfeiture of Lands, &c.	Page 82, 83
		An Outlaw cannot make an Executor.	136
		But may be an Executor.	137
		Whether he may give, grant, &c.	190
		Whether an Outlaw can make a Feoffment.	535
		Of a Fine by a Person outlawed.	589
		Of a Grant by a Person outlawed.	717
		Of a Grant to a Person outlawed.	720
		Whether an Outlaw may make a Will.	856
		Papists.	
		HOW far Papists are disabled from purchasing or conveying Estates.	53 to 60
		Indemnity of Protestants Purchasers of Papists Estates.	60
		Papist not taking the Oaths, &c. forfeit Lands, &c.	125
		Papish Recusant Convict cannot be an Executor or Administrator.	137
		Paraphernalia.	
		Paraphernalia what.	146
		Where the Wife shall have her Paraphernalia.	146
		Parties.	
		How barred by a Fine.	618
		Pawns.	
		Statute relating to Pawnbrokers.	134
		Personal Estates.	
		Of acquiring or conveying Personal Estates.	125 to 175
		Pious Uses.	
		Of pious Uses.	690
		Power.	
		Where a Power to revoke Uses of Land shall be good, and how they shall be taken; and what Revocation by Virtue of such Power shall be good, and what not.	697
		Of Leases by special Power or Proviso to make Leases.	741
		Release of a Power of Revocation.	764
		II A	What

The T A B L E.

What is an Extinguishment of a Power of Re-
vocation, or not. Page 819

Premises.

The Premises of a Deed what.	254
The Office of the Premises.	254
The Contents of the Premises.	255
The Date.	255
The Parties Names and Addition or Description.	255
The Recital.	256
What.	256
Where placed.	256
Where Misrecital will hurt a Deed.	256
The Consideration.	257
The Receipt.	257
The Gift and Grant.	257
The Things granted or conveyed.	258
The Exception.	260
Of what it may be.	260
Of what it must be.	261
How it must be made.	262
In which Part of the Deed.	263
By what Words.	263

Prescription.

Of claiming Title to Estates by Prescription.	76
Prescription what.	76
In what Names made, and who may be by Prescription.	77
In Grant.	77
Of what Things.	77
How laid.	78
When a Title by Prescription may be lost.	78
The Difference between Prescription, Custom and Usage.	78
Copyholds.	78
Local, and when in no Person.	78
Usage.	78
The Incidents inseparable to Prescription and Custom.	78

Privies.

How barred by a Fine.	619
-----------------------	-----

Proviso.

Where a Proviso shall not make a Covenant.	398
Where a Proviso makes not a Lease, but only a Covenant.	398
Where a Proviso can have no Effect as a Condition, but is by Way of Agreement.	398
Where a Proviso makes a Covenant and a Condition also.	399
Provided also, and it is covenanted, granted and agreed; where it is a Covenant and where it is a Condition.	399
Where a Proviso is a bare Covenant, and why.	399
Proviso abridging a Covenant.	399

Purchase.

Of acquiring Real Estates by Purchase.	Page 49
Purchase what.	49
Derivation.	49
Definition.	49
Description.	49
Who are capable or incapable of purchasing or conveying Lands, &c. and what are good Names of Purchase.	49
Persons natural.	49
Persons incorporate.	49, 50
King.	49
Aliens.	49
Alien-Merchants.	50
Felons.	50
Infants.	50
Ideots and Lunatics.	50
Hermaphrodites.	50
Feme Coverst.	50
Queen Consort.	50
Parishioners.	51
Inhabitants.	51
Churchwardens.	51
Lords and Commoners.	51
Name and Surname.	51
Title.	51
Earl, &c.	51
Dean and Chapter.	51
Name changed.	51
Known Name or Description of the Person.	51
Persons deformed, Ideots, &c. Minors and other reasonable Creatures.	52
Persons disabled in some particular Things.	52
Offices.	52
Persons capable of certain Things to special Purposes.	53
Who cannot purchase nor retain any Thing.	53
How Papists are disabled from purchasing or conveying Estates.	53
Indemnity of Protestant Purchasers of Papists Estates.	60
Persons naturalized or made Denizens, when incapable to take by Grants.	60
Where Artificers going beyond Sea are incapable of taking by Purchase.	60
Who are deemed Purchasers, or not.	61
In what Cases Purchasers are favoured.	62
As to Incumbrances.	63
By Allowance.	67
After Length of Time.	68
In what Cases Purchasers are affected.	69
By Incumbrances.	69
By Misapplication of Money.	73
By presumptive Notice, and where there is a Settlement.	74
Of Disputes between Purchasers.	75

Pur:

The T A B L E.

<p>Purpresture.</p> <p>What it is. Page 119</p>	<p>Where a Man shall have a Re-entent or new Execution, or not. Page 825</p>
<p>Queen.</p> <p>QUEEN Confort may purchase, &c. as a Feme Sole. 50</p> <p>May make Executors. 136</p> <p>Of a Grant by a Queen Confort. 717</p> <p style="text-align: center;">See Feme Covert.</p>	<p>Where the Conusor or his Heir, or an Alienee or Purchaser, shall have Contribution upon a Statute or Recognizance, or not. 827</p> <p>Where and by what Means a Recognizance, and the Execution thereof, shall be discharged, suspended or avoided in all, or in Part, and where not. 827</p> <p>Recoveries. See Common Recoveries.</p> <p style="text-align: center;">Reddendum.</p>
<p>Rasure.</p> <p>WHERE a Deed may become void by Rasure. 874</p>	<p>Reddendum what, and how it differs from an Exception. 276</p> <p>Where the Reddendum is necessary, or not. 276</p> <p>Of what the Reddendum must be. 276</p> <p>Out of what a Reddendum must be. 277</p> <p>To whom a Reddendum may be made. 277</p> <p>How and by what Deed a Reddendum must be made. 278</p> <p>Where the Reddendum is placed in the Deed, and by what Words it is expressed. 278</p> <p>How the Reservation shall be construed. 279</p>
<p>Real Estates.</p> <p>Of acquiring or conveying Real Estates and claiming Titles thereto. 1 to 125</p>	<p style="text-align: center;">Registering Deeds and Wills.</p>
<p>Recitals.</p> <p>Recital what. 256</p> <p>Where placed. 256</p> <p>Where needful or not. 256</p> <p>Where Misrecital will hurt a Deed. 256</p> <p>Where a Recital amounts to a Covenant. 379</p> <p>Recital that it is agreed. 379</p> <p>A Covenant, that doth not consist with the Recital that leads and occasions it, shall not oblige. 380</p> <p>Recital being considered with the rest of the Deed is material. 380</p> <p>Where a Recital amounts to an Agreement. 381</p>	<p>In <i>Middlesex</i>. 507</p> <p>In the North Riding of <i>York</i>. 511</p> <p>East Riding. 500</p> <p>West Riding. 495</p> <p style="text-align: center;">Releases.</p> <p>A Release what, and Releasor and Releasee who. 754</p> <p>Kinds of Releases. 754</p> <p>Acquittance what. 754</p> <p>Where a Man is not bound to pay Money without an Acquittance. 754</p> <p>What shall be said a Release in Law, or not, and how. 755</p> <p>The Nature and Operation of a Release in general. 755</p> <p>Where a Will shall not operate as a Release. 755</p> <p>How and after what Manner Things shall be released. 756</p> <p>What Things may be released, or not. 756</p> <p>Things requisite in Releases of Lands and Tenements in general. 757</p> <p>Things requisite in Releases that enure by Way of enlarging Estates. 757</p> <p>In Respect of the Estate of the Releasor. 757</p> <p>In Respect of the Estate of him to whom the Release is made. 758</p> <p>In Respect of Privy. 759</p> <p>In Respect of Words whereby it is made. 759</p>
<p>Recognizances.</p> <p>A Recognizance what. 820</p> <p>What shall be said a good Recognizance, and what not. 821</p> <p>In Respect of the Persons before whom it is acknowledged. 821</p> <p>In Respect of the Manner of making, acknowledging and registering of it. 821</p> <p>All the Proceedings upon a Recognizance, and the Manner and Order of Execution thereupon. 821</p> <p>What Things are subject and liable to Execution upon a Recognizance. 824</p> <p>In Respect to the Name and Quality of the Things themselves. 824</p> <p>In Respect of the Estate, Property and Possession of the Conusor in the Things. 824</p> <p>In Respect of the Quantity. 825</p>	<p>Things</p>

The T A B L E.

Things requisite in Releases of Lands and Tenements, that only give, discharge or extinguish any Right or Title of Lands. *Page* 760
In Respect of the Estate of the Releasor. 760

In Respect of the Estate of him to whom the Release is made. 761
In Respect of Privy. 762
In Respect of the words whereby it is made. 763

Of Releases of other Things than Lands or Tenements, as Seignories, Rents, Commons, Debts, &c. 763

Of a Seignior, Rent-Service, Common, or the like. 763

Of an Advowson. 764

Of a Condition. 764

Of a Power of Revocation. 764

Of a Warranty. 764

Of Debts. 764

In Respect of Persons. 764

In Respect of Time. 765

In Respect to Words. 765

The Force and Virtue of a Release, and how it shall enure and be construed. 765

In Respect of the Persons; and where a Release made by one shall bind another, and where not; and where a Release made to one shall enure to others, or not. 765

In Respect of the Things released. 767

Actions, Right, Title, Entry, or Right of Entry. 767, 768

Debts, Duties, Suits, Debates, Quarrels, Controversies, Covenants, Statutes. 768, 769

Errors, Warranties, Legacies, Rent, Promises, Judgments, Executions, Appeals, &c. 770

To one good for all, or of one Thing good for another. 771

In Respect of the Time or Place. 771

Where Releases shall be void and set aside. 773

Where a Fine enures as a Release. 627

What shall be said to be a good Grant in the Nature of a Release. 733

Remitter.

Where a Fine works by Way of Remitter. 625

Rent.

Things to be observed in demanding Rent. 13

Of Remedy by Recoverers in a Common Recovery against Lessees for Rents, Services, Waste, &c. 670

How far a Grantor or Grantee, Lessee or his Assigns are chargeable before or after an Assignment made, with the Rent, &c. 786

Repairs.

Of Repairs by Lessees.

Page 753

Request.

Where necessary to the Performance of a Condition. 313, 317, 318

Where Request is necessary, or not, for the Performance of a Covenant. 425

Revocation.

What Act or Thing is a Revocation of a Letter of Attorney to make Livery of Seisin. 570

Where a Power to revoke Uses of Lands shall be good, and how they shall be taken; and what Revocation by Reason of such Power shall be good. 697

Revocations and new Declarations.

What a Revocation and new Declaration is. 816

The Effect of a Revocation. 816

Who may revoke. 816

What may be revoked. 817

Revocation how made, and when defective may be helped. 817

In what Cases a Person may make a Revocation and a new Declaration both, or only one of them. 817

What Act, Deed or Will, is a Revocation. 817

How Revocations are interpreted. 819

What is an Extinguishment of a Power of Revocation, or not. 819

Where a Power to revoke Uses of Land shall be good, and how they shall be taken, and what Revocation by Reason of such Power shall be good, and what not. 697

Release of a Power of Revocation. 764

Of Revocations of Wills and Testaments. 863, 877

Sale.

Of acquiring or conveying Personal Estates by Sale. 129

Sale what. 129

Who may sell. 129

What is a good Sale, or not. 129

How a Sale in a Market overt of Goods, &c. though stolen, &c. shall bar the Owner. 130

Who are excepted or not. 130

The Days and Places of Market overt. 131

Statutes relating to Sales in Fairs and Markets overt. 131

As to Horses. 131

Toll-taker to have before him the Parties and the Horse, &c. 131

And make an Entry in the Book. 131

Six

The T A B L E.

Six Points to save the Property in the right Owner.	Page 132	Proclamation.	Page 173
As to Pawns.	134	Of straying again within the Year.	173
		Of the Owners claiming and seising the Cattle.	173
Sealing.		Superstitious Uses.	
Of sealing Deeds.	248	Of superstitious Uses.	690
Where a Deed may become void by breaking or defacing the Seal.	875		
Seisin.		Surrenders.	
Letter of Attorney to make Livery of Seisin.	489	Surrender what.	803
Livery of Seisin how necessary.	494	Kinds of Surrenders.	806
See Livery of Seisin.		The Nature and Effect of a Surrender.	806
		What shall be said a Surrender in Law of Lands, and by what Means an Estate shall be surrendered in Law, or not.	807
Servants.		Where Copyhold Lands shall pass without Surrender.	808
Covenants concerning Servants.	484	Things requisite in a good Surrender of Lands.	808
Spiritual Persons. See Ecclesiastical Persons.		Of the Parties between whom a Surrender is made, and their Estate and Possession.	808
		Of the Place where the Surrender is made.	810
Statutes.		Of the Things surrendered.	811
A Statute what.	819	How a Surrender is made, and by what Words.	811
Kinds of Statutes.	820	Of the Agreement of the Surrenderee to the Surrender.	812
What shall be said a good Statute or Recognizance, and what not.	821	Where a Surrender in Pursuance of a Bond shall be compelled in Equity.	813
With Respect of the Person before whom it is acknowledged.	821	Where a Feoffment, Lease, Grant, or other Act made or done by the Tenant for Life or Years, shall be deemed a Surrender, or not.	813
In Respect of the Manner of making, acknowledging and registering of it.	821	Where it is made to him in Reversion or Remainder.	813
All the Proceedings upon a Statute or Recognizance, and the Manner and Order of Execution thereupon.	821	Where it is done or made to him and a Stranger.	814
What Things are subject and liable to Execution upon a Statute or Recognizance.	824	When it is done both with the Tenant and him in Reversion or Remainder.	814
In Respect to the Nature and Quality of the Things themselves.	824	When a Grant, &c. is made of the same Land, or a Thing out of the same Land, &c.	814
In Respect of the Estate, Property and Possession of the Conusor in the Things.	824	In what Cases a defective Surrender, or the Want of Surrender may be supplied, or not.	815
In Respect of the Quantity.	825	How a Surrender shall be construed and taken.	815
Where a Man shall have a Re-extent or new Execution, or not.	825		
Where the Conusor or his Heirs, or an Alienee or Purchaser, shall have Contribution upon a Statute or Recognizance, or not.	827	Tall. See Tenant in Tall.	
Where and by what Means a Statute or Recognizance, and the Execution thereof, shall be discharged, suspended or avoided in all or in Part, and where not.	827	Tenants in Common.	
Strangers.		Of a Feoffment made by a Tenant in Common.	536
How Strangers shall be barred by a Fine.	619	Of a Fine levied by a Tenant in Common.	599
Strays.		Of a Lease by a Tenant in Common.	740
An Estray what.	173		
PART I.		II B	Tenant

The T A B L E.

Tenant by the Curtesy.

Where a Fine levied by him extinguishes his Right. Page 626

Tenant in Dower.

Of a Lease made by Tenant in Dower. 741

Tenant for Life.

Of Deeds by Tenant for Life. 178
 Of a Fine levied by Tenant for Life. 590
 Where a Feoffment, Lease, Grant, or other Act made or done by the Tenant for Life or Years, shall be deemed a Surrender, or not. 609, 813.
 When it is made to him in Reversion or Remainder. 813
 When it is done or made to him and a Stranger. 814
 When it is done both with the Tenant and him in Reversion or Remainder. 814
 When a Grant, &c. is made of the same Land, or a Thing out of the same Land, &c. 814

Tenant in Tail.

Of Deeds by Tenant in Tail. 178, 196, 209, 213
 Of a Fine by Tenant in Tail of the King's Gift. 589
 Of a Fine by Tenant in Tail after Possibility of Issue extinct. 590
 Of a Fine levied by Tenant in Tail. 609
 Of a Recovery suffered by Tenant in Tail. 658
 What Leases (or other Acts) may be made (or done) by a Tenant in Tail, and what Leases made by such a Tenant shall be good to bind the Issue, or to him in Remainder, or others after the Death of the Tenant in Tail, and how they shall bind. 742
 Of a Tenant in Tail's avoiding his own Grant. 882
 What Lease a Tenant in Tail can make. 178

Tender.

Where a Tender is necessary. 315, 324, 326
 Where a Tender is necessary, or not, for the Performance of a Covenant. 425
 Tender and Refusal, when it shall save a Condition. 842

Tenendum.

The Tenendum in a Deed what. 275
 The Office of the Tenendum. 275
 Where the Tenendum shall be placed, and by what Words expressed. 276

Testaments.

A Testament what. Page 852
 Kinds of Testaments. 852
 The Parts of a Testament. 852
 Of the Manner of making Testaments and Revocations of them. 863

See Wills.

Treasure trove.

Treasure trove what, and to whom due. 172

Trusts.

Trust and Confidence what. 675
 Of the Difference between Uses and Trusts. 675
 Of Trusts and Confidences of Lands and Chattels, Real and Personal; the Nature of such Trusts, the Duty of them that are trusted, and the Remedy to be had against them for Breach of their Trust. 698

Usage.

THE Difference between Prescription, Custom and Usage. 78

Uses.

Of Covenants to stand seised to Uses. 452
 The Difference between a Feoffment and a Covenant to stand seised to Uses. 531
 In what Cases Uses are vested or changed by a Feoffment. 531
 Of Feoffments to the Uses of others. 532
 Of Deeds declaring or leading the Uses of Feoffments, Fines and Recoveries. 675
 Use what. 675
 Trust or Confidence what. 675
 The Difference between a Use and a Trust. 675
Cestuy que Use who. 676
 Of the different Kinds of Uses. 676
 Of the Nature of Uses. 676
 Of Incidents to Uses. 677
 Of the Original and Antiquity of Uses. 677
 Why Uses were invented. 678
 Cause of making the Statute 27 H. 8. c. 10. 679
 What shall be said a good Use of Land, or not; and when and where such a Use shall be raised, altered or created, or not. 681
 In Respect of the Manner of raising it, and the several Ways whereby Uses may be raised. 681
 In Respect of the Persons trusted, and what Persons may not be seised to the Use of another. 682
In

The T A B L E.

In Respect of the Person for whom the Trust is, or the <i>Cestui que Use</i> . Page 683	683
In Respect of the Estate and Possession of him that creates the Use.	683
In Respect of the Estate and Possession of him that takes by the Conveyance.	683
In Respect of the Cause or Consideration of an Use, and what shall be a sufficient Consideration to raise or alter a Use, or not.	684
In Respect of the Manner and Frame of the Words used in raising of Uses, and what Manner of Uses may be raised, or not.	687
In Respect of the Nature and Quality of the Use.	689
Charitable Uses.	689
Pious Uses.	690
Superstitious Uses.	690
Of Deeds declaring (or leading) the Uses of Feoffments, Fines or Recoveries.	690
On what Assurances Uses may be declared.	690
Of declaring the Use according to the Estate the Party has in the Land.	691
By what Deed Uses may be declared.	691
When a Declaration of Uses may be made.	692
Of a precedent Agreement for the Limitation of Uses.	692
Of the Certainty of the Declaration of Uses.	693
Of Averment of Uses, or the Proof of Uses by Witnesses.	694
To what Use an Assurance of Land shall be by Construction of Law, and how the Limitation of the Uses of Land by a Deed shall be construed.	694
Where and how Uses of Land may be extinguish'd and destroyed or suspended, or not; and where the antient Use shall be revived by the Entry of the Feoffees, or not.	696
Where a Power to revoke Uses of Land shall be good, and how they shall be taken; and what Revocation by Reason of such Power shall be good, and what not.	697
Other Trusts and Confidences of Lands and Chattels, Real and Personal, the Nature of such Trusts, the Duty of them that are trusted, and the Remedy to be had against them for Breach of their Trust.	698
What Uses require no Execution by the Statute of Uses.	700
Remedy at Law as to Uses, and Questions as to them how decided.	701

See **Covenants to stand seised to Uses.**

Usurpation.

What it is.	118
Usury.	
Of an usurious Mortgage.	788
Of usurious Contracts.	772

Waifs.

WAIF what.	Page 172, 173
To whom forfeited.	173
Restitution in what Cases made.	173
Why the Forfeiture is.	173
Who may seize Waifs.	173

Warranty.

Warranty what, and Warrantor and Warrantee who.	361
Kinds of Warranties.	361
General or particular.	361
In Deed.	361
In Law.	361
Lineal.	361
Collateral.	361
By Disseisin or Wrong.	361
What Words and Clauses in a Deed will make a Warranty.	361
What shall be said a good Warranty in a Deed, or not, and how it shall bar and bind.	362
What shall be a good Warranty in Law, and how it shall bar and bind.	365
What shall be said a Lineal Warranty, and how such Warranty shall bar.	365
What shall be said a Collateral Warranty, and how such a Warranty shall bar.	367
What shall be said a Warranty that begins by Disseisin, Abatement or Intrusion, and what is the Effect thereof.	368
To what Things a Warranty may be annexed and extended, and to what not, and how.	369
The Fruit and Effect of a Warranty in Deed, and what Use may be made of it.	370
Who may take Advantage of a Warranty, and how and against whom it may be taken.	372
When a Warranty shall be said to be defeated, determined or avoided, and how, or not.	374
How a Warranty shall be expounded.	376
How a Covenant differs from a Warranty.	378
Release of a Warranty.	784

Waste.

Of Forfeiture by Waste.	98
Waste what.	98
Search if Waste committed.	98
Kinds of Waste.	98
Voluntary and permissive.	98
Active and passive.	98
Waste in Houses.	98
In pulling them down.	98
Waste in Gardens and Orchards.	99
Waste in Dove-houses, Parks, &c.	99
Waste in Land.	99
Waste in digging Mines for Gravel, &c.	100
Waste in Trees and Woods.	100
Dilapidations or Waste of Ecclesiastical Places.	101
Of	Of

The T A B L E.

<p>Of staying Waste. Page 101</p> <p>The Forfeiture, Judgment and Recovery in Waste. 101</p> <p>Of Remedy by Recoverers in a Common Recovery against Lessees for Waste, &c. 670</p> <p>Of Waste committed by Lessees. 753</p> <p style="text-align: center;">Wills and Testaments.</p> <p>Of the Difference between Deeds, Wills and Testaments. 520</p> <p>Of a Feoffment to the Use of a Will. 532</p> <p>Where a Will shall not operate as a Release. 755</p> <p>Wills, Testaments and Devises what. 852</p> <p>Kinds of Wills and Testaments. 852</p> <p>The Parts of a Will or Testament. 852</p> <p>A Devise or Legacy what, and a Devisor and Devisee, or Legatee, who. 852</p> <p>Kinds of Devises or Bequests. 853</p> <p>Executor and Administrator who. 853</p> <p>Kinds of Executors and Administrators. 853</p> <p>The Nature or Effect of a Will or Testament, and of a Codicil. 854</p> <p>Things requisite in making a good Will. 854</p> <p>Who are capable of making Wills. 854</p> <p>Of the Testator's Resolution to make a Will. 856</p> <p>Of the Occasion or Motive to make a Will. 856</p> <p>Things requisite in a good Devise. 857</p> <p>Who may make a good Devise, or not. 858</p> <p>What Things may be devised or bequeathed. 858</p> <p style="padding-left: 20px;">By Common Law, Custom or Statute Law. 858</p> <p>Of naming Things devised. 861</p> <p style="padding-left: 20px;">Mistake or Error in naming the Thing. 861</p> <p style="padding-left: 20px;">Incertainty in naming the Thing. 861</p> <p>Who may be a Devisee or Legatee. 861</p> <p>Of naming the Devisee or Legatee. 862</p> <p>Of the Devisee's Capacity to take by the Name whereby he is described. 862</p>	<p>Of misnaming the Devisee. Page 863</p> <p>Of the Words of a Devise. 863</p> <p>Of the Intent of making a Devise. 863</p> <p>Of the Manner and Form of making Wills and Testaments, and of Revocations of them. 863, 817</p> <p>Of naming an Executor. 863</p> <p>Where it must be in Writing. 864</p> <p>On what and in what Hand and Language a Will may be written. 865</p> <p>Of the Testator's sealing and subscribing his Name. 865</p> <p>Of Interruption in the making a Will. 865</p> <p>Of the Proof of a Will. 865</p> <p>Lord Coke's Advice concerning the Disposition of Lands and making Wills. 866</p> <p>Of Nuncupative Wills. 867</p> <p>What Will is a Revocation of Uses. 817</p> <p>Of fraudulent, forged, void and voidable Wills. 868</p> <p>Of fraudulent and void Wills in general. 876</p> <p>Where a Will or Testament good in its Creation and Beginning may become void by Matter <i>ex post facto</i>, or not. 877</p> <p style="padding-left: 20px;">By Countermand or Revocation. 877</p> <p style="padding-left: 20px;">By cancelling it. 878</p> <p style="padding-left: 20px;">By Alteration of the Estate of the Testator. 878</p> <p style="padding-left: 20px;">By Intention to alter it. 878</p> <p style="padding-left: 20px;">In making another of the same Date. 879</p> <p style="padding-left: 20px;">By the Declaration of the Testator. 879</p> <p>Where a Will void or voidable in its Inception may become good by some Matter or Accident <i>ex post facto</i>, or not. 880</p> <p>General Rules for the Exposition of Wills. 884</p> <p style="text-align: center;">Wrecks.</p> <p>Wreck what. 174</p> <p style="padding-left: 20px;">What not. 174</p> <p>To whom a Wreck belongs. 174</p> <p>Flotsam, Jetsam and Lagan, what. 174</p>
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F I N I S.